



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

## Information Notice

### Pricing of Eircom's Civil Engineering Infrastructure

Publication and notification to the European Commission (EC), the Body of European Regulators for Electronic Communications (BEREC), and Member State National Regulatory Authorities (NRAs) of draft measures under Article 32 of Directive 2018/1972

#### Information Notice

**Reference:** ComReg 21/108

**Version:** FINAL

**Date:** 22/10/2021

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

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1. This Information Notice relates to the Commission for Communications Regulation's ('**ComReg**') publication and parallel notification to the relevant European authorities of its draft decision ('**Draft Decision**') on the pricing of Eircom Limited ('**Eircom**') civil engineering infrastructure ('**CEI**'). A non-confidential version of the Draft Decision is attached at Annex 1 of this Information Notice. Separately, the Consultants' reports and the non-confidential respondents' submissions are published alongside this document.<sup>1</sup>
2. In accordance with the requirements, at that time, of Article 6 of the Framework Directive (now replaced with Article 23 of the European Electronic Communications Code ('**EECC**')<sup>2</sup>) ComReg carried out a national public consultation ('**CEI Consultation**')<sup>3</sup> on its pricing proposals for access to Eircom's CEI during the period from 9 September 2020 to 18 November 2020.
3. Prior to the adoption of a final decision, Article 32(3) of the EECC now requires ComReg to publish and, at the same time, make draft measures accessible to the European Commission ('**EC**'), the Body of European Regulators for Electronic Communications ('**BEREC**') and National Regulatory Authorities ('**NRAs**') in other Member States (the '**Article 32 Notification**').
4. The Article 32 Notification has today been made by ComReg on the basis of the draft measures set out in the Draft Decision.
5. Please note that this Information Notice, including the Draft Decision in Annex 1, does not constitute a national public consultation and should therefore not be construed as an invitation to make submissions to ComReg.
6. Having completed the Article 32 Notification, ComReg will take utmost account of any views expressed by the EC, BEREC and NRAs in other Member States before adopting its final decision.

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<sup>1</sup> ComReg Document 21/108a (Dot Econ Report), ComReg Document 21/108b (Europe Economics Report) and ComReg Document 21/108c (Non-Confidential Respondents' Submissions).

<sup>2</sup> Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the 'EECC').

<sup>3</sup> Consultation and Draft Decision: Pricing of Eircom's Civil Engineering Infrastructure ('CEI'), CEI access in the context of the National Broadband Plan ('NBP'), dated 9 September 2020. [Pricing of Eircom's Civil Engineering Infrastructure \(CEI\): Consultation and Draft Decision | Commission for Communications Regulation \(comreg.ie\)](#)

# Annex 1: CEI Pricing Draft Measures

A 1.1 A copy of ComReg's Draft Decision is attached below.



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# Pricing of Eircom's Civil Engineering Infrastructure

Response to Consultation Document 20/81 and Final Decision

**NOTE: THIS IS A DRAFT DECISION**

ComReg Decision [Dxx]/21

Reference: ComReg 21/[XX]

Version: [Draft]

Date: 22/10/2021

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

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## Redacted Information

Please note that this is a non-confidential version of the Response to Consultation and Decision. Certain information within this document has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol &lt; and the symbol [ is used to indicate the start of confidential information and the symbol ] indicates where that confidential information ends.

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# 1 Introduction

- 1 ComReg is the national regulatory authority ('**NRA**') for the electronic communications sector in Ireland. As the NRA, ComReg is tasked under the European regulatory framework for electronic communications with reviewing electronic communications markets and where ComReg finds that relevant markets are not competitive, with imposing obligations on operators found to have significant market power ('**SMP**'). Obligations which ComReg may impose include price controls including obligations to charge cost-oriented prices. ComReg's objectives in line with Section 12 of the Communications Regulations Act 2002 (as amended 2011)<sup>1</sup> and Regulation 16 of the Framework Regulations<sup>2</sup>, are to promote competition, to encourage efficient investment and innovation, contribute to the development of the internal market and to promote the interests of users by encouraging access to the internet at a reasonable cost to end-users.
- 2 This response to consultation and decision document (the '**Decision**') is concerned with Eircom's pricing obligation for Civil Engineering Access ('**CEI**') (i.e., access to Eircom's poles and ducts) as set out in ComReg Decision D10/18<sup>3</sup> (the '**2018 WLA / WCA Market Review Decision**') which designated Eircom Limited ('**Eircom**') with SMP in the market for wholesale local access at a fixed location (the '**WLA Market**').
- 3 The 2018 WLA / WCA Market Review Decision maintained the costing methodology and the associated maximum prices for Eircom's CEI access services which ComReg had determined previously in ComReg Decision D03/16<sup>4</sup> (the '**2016 Access Pricing Decision**').
- 4 Since publication of the 2018 WLA / WCA Market Review Decision the Department of the Environment, Climate and Communications ('**DECC**')<sup>5</sup> has concluded a contract with National Broadband Ireland ('**NBI**') for the purpose of progressing the Irish Government's National Broadband Plan ('**NBP**'). NBI has been contracted to deliver high speed fibre broadband services to the non-commercial areas of the country where no commercial operators plan to invest (without state funding). These non-commercial areas are referred to as the NBP Intervention Area (the

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<sup>1</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (the 'Act').

<sup>2</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the 'Framework Regulations').

<sup>3</sup> ComReg Document No. 18/94, Decision D10/18, Market Review: Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products. Response to Consultation and Decision; dated 19 November 2018.

<sup>4</sup> ComReg Document No. 16/39, Decision D03/16, Pricing of Eir's Wholesale Fixed Access Services: Response to Consultation Document 15/67 and Final Decision, dated 18 May 2016.

<sup>5</sup> This was previously known as the Department of Communications, Climate Action and the Environment (DCCA), in the CEI Consultation.

'**NBP IA**'), representing circa 537,000 premises (delivery points). NBI's contract<sup>6</sup> with the Irish State for the deployment and operation of the network in the NBP IA with the benefit of a State subsidy is for an initial 25-year period. In order for NBI to deliver on the NBP, it will require significant access to Eircom's CEI over a period of at least 25 years. ComReg refers to NBI's broadband network rollout using Eircom's CEI for the purposes of the NBP as NBI's Major Infrastructure Programme ('**NBI's MIP**') throughout this document.

- 5 In this Decision ComReg is further specifying, pursuant to Regulation 18 of the Access Regulations, the existing cost orientation price control obligation for CEI, as set out in the 2018 WLA / WCA Market Review Decision pursuant in particular to Regulation 13 of the Access Regulations. The further specification of Eircom's obligation of cost-orientation for CEI Access includes making provision for a differentiated CEI pricing measure for, on the one hand, generic access to CEI and, on the other hand, NBI's MIP access to Eircom's CEI.
- 6 For the avoidance of doubt, involvement by an access seeker in a major infrastructure rollout programme is not sufficient to trigger a requirement or justification for the application of a differentiated price control. It is the unique circumstances of NBI's access to Eircom's CEI as the national broadband plan provider and the terms and conditions of its NBP contract with the Minister for Environment, Climate and Communications which has led ComReg to set a differentiated price control (and prices) as regards Eircom's provision of CEI Access to NBI in this Decision. Hence, with the exception of NBI, all other CEI access seekers will be subject to the CEI price control for generic access users, as specified in Section 5 and Section 6 of this Decision.
- 7 In this Decision ComReg has also set revised maximum pole and duct / sub-duct access prices that Eircom can charge to the relevant access seekers referred to above, derived from the Pole Access Model (the '**PAM**') and the Duct Access Model (the '**DAM**'). The PAM and DAM are the cost models used to implement the various costing methodologies, including various assumptions and costing data, in order to derive the CEI access charges. Cartesian Consultants assisted ComReg in this regard. The PAM and DAM are discussed in more detail in Section 5.11.
- 8 This Decision follows on from Consultation Document 20/81<sup>7</sup> (the '**CEI Consultation**'). The CEI Consultation, accompanied by a Report prepared by ComReg's consultants Dot Econ Limited ('**Dot Econ**') on "*Pricing and costing principles for access to civil engineering infrastructure and the NBP*" (the '**Dot Econ Draft Report**') as well as a report prepared by Europe Economics Research Limited

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<sup>6</sup> The contract concluded between the Minister for Communications, Climate Action and the Environment and NBI dated 19 November 2019. A non-confidential version of the NBP contract can be found at <https://www.gov.ie/en/publication/16717-national-broadband-plan-contract/>

<sup>7</sup> Consultation and Draft Decision: Pricing of Eircom's Civil Engineering Infrastructure ('CEI'), CEI access in the context of the National Broadband Plan ('NBP'), dated 9 September 2020.

(**'Europe Economics'**) on the "*Cost of Capital for Poles and Ducts Access*" (the **'Europe Economics Draft Report'**) was opened on 9 September 2020 and following an extension, closed on 18 November 2020.

- 9 During the consultation process ComReg also made access available to the non-confidential models (i.e., the PAM and DAM), as well as associated documentation, to those interested parties likely to be affected by the decision that ComReg may take as a result of this CEI Consultation, upon request to ComReg.<sup>8</sup> This has allowed for further transparency regarding the modelling work undertaken by ComReg and it also means that other operators have access to similar information to the information available to Eircom and/or NBI (albeit that some information is randomised due to the confidentiality of data obtained from Eircom and NBI). **[Non-confidential versions of the final PAM and DAM will be available to those interested parties referred to above at the time of the Decision.]**
- 10 Responses to the CEI Consultation were received from eight interested parties as follows:
- i. Alternative Operators in the Telecommunications Market (**'ALTO'**);
  - ii. BT Communications Ireland Limited (**'BT'**);
  - iii. Eircom Limited (**'Eircom'**), including a report from its advisors Berkeley Research Group (**'BRG'**);
  - iv. National Broadband Ireland Limited (**'NBI'**), including a report from its advisors, Frontier Economics;
  - v. Siro Limited (**'Siro'**);
  - vi. Sky Ireland Limited (**'Sky'**);
  - vii. Virgin Media Ireland Limited (**'Virgin Media'**); and
  - viii. Vodafone Ireland Limited (**'Vodafone'**).
- 11 The undertakings listed at paragraph 10 are collectively referred to as **'Respondents'** throughout the rest of the document and their submissions are collectively referred to as the **'Respondents' Submissions'**. A non-confidential version of the Respondent's Submissions listed at paragraph 10 are published in ComReg Document No. 21/[XX]S.
- 12 In reaching its final decision, ComReg has taken account of the Respondents' Submissions to the CEI Consultation. In discussing the Respondents' Submissions, below, ComReg has not outlined each and every point made in the Respondents'

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<sup>8</sup> Please see paragraph 5 of the CEI Consultation.

Submissions, but has set out the main points raised and, where appropriate, responded to these.

- 13 This Decision also benefitted from further input received from Dot Econ, set out in the Report entitled "Pricing and costing principles for access to civil engineering infrastructure and the NBP – Final Report" (the '**Dot Econ Final Report**'). Dot Econ's Final Report takes into consideration the views expressed by Respondents to the CEI Consultation, in relation to the appropriate costing/pricing methodology for CEI. In addition, further input was received from Europe Economics, set out in the Report entitled "The Cost of Capital for Poles and Ducts Access – Post-Consultation Analysis – Final Report" (the '**Europe Economics Final Report**'). Europe Economics' Final Report takes into consideration the views expressed by Respondents to the CEI Consultation in relation to the WACC that should apply to CEI costs in the context of the NBP.
- 14 In arriving at the conclusions set out in this Decision, ComReg has, in accordance with its relevant statutory obligations, under Article 32(3) of the European Electronic Communications Code ('**EECC**')<sup>9</sup>, notified the European Commission ('**EC**'), BEREC<sup>10</sup>, and other National Regulatory Authorities ('**NRAs**') regarding the measures which it proposes to take (the '**Notified Draft Measures**').<sup>11</sup> On [insert date] 2021 the EC issued its response to ComReg (the '**EC Comments Letter**'), in which it [insert details], as further set out in Annex: 6 below. In arriving at the position set out in this Decision, ComReg has taken utmost account of the EC Comments Letter. ComReg's consideration of the EC Comments Letter is set out in Annex: 7 and elsewhere throughout this Decision, as appropriate.
- 15 The remainder of this document is structured as follows:
  - (a) **Section 2**: provides a summary of the main conclusions;
  - (b) **Section 3**: provides a background on CEI and the objectives of this review;
  - (c) **Section 4**: sets out the factors considered in differentiating the price control remedy for CEI;
  - (d) **Section 5**: sets out the costing methodologies for CEI access services;
  - (e) **Section 6**: sets out the cost sharing / pricing methodologies for CEI access services;

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<sup>9</sup> Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ('**EECC**').

<sup>10</sup> Body of European Regulators for Electronic Communications ('**BEREC**') as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications and the Office.

<sup>11</sup> A non-confidential version of the Notified Draft Measures is available online at [insert].

- (f) **Section 7:** sets out the WACC that should apply to CEI access services in the context of the NBP;
- (g) **Section 8:** sets out ComReg's conclusions on other related / possible one-off CEI access costs;
- (h) **Section 9:** sets out the maximum CEI access prices based on the conclusions at Sections 5 - 8 of this Decision;
- (i) **Section 10:** sets out the process of the annual review as well as our views on the cost accounting and accounting separation obligations that should apply to Eircom in the context of CEI;
- (j) **Section 11:** sets out the regulatory impact assessment (the 'RIA');
- (k) **Section 12:** sets out Respondents' Submissions on the draft Decision Instrument in the CEI Consultation;
- (l) **Annex 1:** sets out the Decision Instrument relevant to the CEI access services in the WLA Market;
- (m) **Annex 2:** sets out the Dot Econ Final Report;
- (n) **Annex 3:** sets out the Europe Economics Final Report;
- (o) **Annex 4:** sets out the template for the Poles annual statement;
- (p) **Annex 5:** sets out the template for the Ducts annual statement;
- (q) **Annex 6:** sets out the European Commission's response to ComReg's notified draft measures;
- (r) **Annex 7:** sets out ComReg's consideration of European Commission's response to ComReg's notified draft measures.
- (s) **Annex 8:** sets out the Respondents' Submissions to the CEI Consultation.

## 2 Executive Summary

### 2.1 Overview

- 16 This Decision determines the costing methodology and the associated prices for access to Eircom's CEI (i.e., access to ducts and poles), for both generic access to CEI and for NBI's MIP access to CEI.
- 17 Eircom has SMP in the market for wholesale local access at a fixed location (the WLA Market) based on ComReg's 2018 WLA / WCA Market Review Decision. As a result, Eircom is obliged to comply with a number of regulatory obligations, including the obligation to provide access to its CEI and to comply with a price control obligation of cost orientation in relation to its CEI. The existing cost orientation price control for CEI access was imposed in ComReg's 2016 Access Pricing Decision and maintained as part of the 2018 WLA / WCA Market Review Decision.
- 18 In this Decision ComReg has drawn a distinction between, on the one hand, generic access to CEI, and on the other hand, NBI's MIP access to CEI for the purposes of the NBP, having regard to the significant differences between these two types of access.

#### Generic Access to CEI

- 19 Generic access to Eircom's CEI relates to access requested by or provided to an Undertaking to Eircom's CEI, excluding access to CEI for the purposes of the NBP (hereafter, '**Generic Access**'). In particular, no other operator is expected to seek access to Eircom's CEI to the extent envisaged for the NBP.

#### NBI's MIP access to CEI

- 20 Access to CEI sought by NBI's MIP for the purpose of the NBP has a unique set of circumstances unlikely to be replicated; NBI's demand for CEI is expected to be of an unprecedented scale and duration<sup>12</sup> and to facilitate NBI's access to CEI, Eircom would need to make a significant investment in its infrastructure. Hence, NBI's demand for CEI only arises due to the NBP intervention. Eircom will likely become a significant CEI provider in the NBP IA and in turn NBI will eventually replace Eircom as the sole next generation access ('**NGA**') wholesale provider in this area.
- 21 The NBP seeks to ensure the delivery of high speed fibre broadband services to the non-commercial areas of the country where no commercial operators plan to invest (without state funding). These non-commercial areas are referred to as the NBP Intervention Area (hereafter, the '**NBP IA**'), representing circa 537,000

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<sup>12</sup> According to the Irish Government, NBI will require access to over 1.5 million poles and over 15,000 kilometres of underground duct, over a period of at least 25 years.

premises (delivery points). NBI does not have its own network and will depend on the incumbents CEI network to deliver its fibre services in the NBP IA. NBI's contract<sup>13</sup> with the Irish State for the deployment and operation of the network in the NBP IA with the benefit of a State subsidy is for an initial 25-year period. ComReg refers to NBI's broadband network rollout using Eircom's CEI for the purposes of the NBP as "**NBI's MIP**" throughout this Decision.

- 22 As noted above, for the purposes of its network rollout, NBI is expected to seek access to a significant volume of Eircom's CEI, a large part of which will be in the NBP IA.<sup>14</sup> In addition, NBI is likely to seek access to Eircom's CEI in order to "transit" between the NBP IA and NBI's interconnection points outside the NBP IA (hereafter, the '**Commercial Areas**' as described at Section 3), so as to serve customers in the NBP IA. An important restriction in the contract between the State and NBI is that the subsidies provided to NBI may only be used in relation to the network for the provision of certain wholesale services in the NBP IA in accordance with the contract, and that NBI may not use the subsidies to provide electronic communications services and networks outside the NBP IA. NBI will not be able to use its subsidised network outside the NBP IA for any purposes other than "transiting" between its interconnection points located in the Commercial Areas and those in the NBP IA in order to provide services in the NBP IA. NBI may not rely on that part of its network that transits the Commercial Areas built and operated using the State subsidy to provide services in direct competition with Eircom or other operators in the Commercial Areas.
- 23 It is those unique circumstances of NBI's access to Eircom's CEI as the NBP provider and the terms and conditions of its NBP contract with the Minister for Environment, Climate and Communications which that has led ComReg to set a differentiated price control (and prices) as regards Eircom's provision of CEI Access to NBI in this Decision.

### ComReg's objectives

- 24 The differences between Generic Access to CEI and NBI's MIP access to CEI means that different approaches are warranted in order to achieve ComReg's statutory objectives under Section 12 of the Communications Regulation Act of promoting competition and encouraging efficient investment. This includes, further to Regulation 16 of the Framework Regulations, promoting where appropriate infrastructure-based competition, while promoting regulatory predictability and taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State.

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<sup>13</sup> The contract concluded between the Minister for Communications, Climate Action and the Environment and NBI dated 19 November 2019. A non-confidential version of the NBP contract can be found at <https://www.gov.ie/en/publication/16717-national-broadband-plan-contract/>

<sup>14</sup> Please see Section 3 for further details.



- 25 Consistent with the European Commission's 2013 Recommendation on non-discrimination and costing methodologies<sup>15</sup> (hereafter, the '**2013 EC Recommendation**'), ComReg recognises that the reuse of existing CEI is an essential aspect of encouraging efficient investment. This means that CEI access services should be priced in such a way so as to encourage efficient entry by avoiding inefficient duplication of CEI while maintaining the investment incentives of the CEI's owner by allowing it to recover its efficiently incurred costs plus a reasonable rate of return on its capital employed.
- 26 While as noted above, consistent with the CEI Consultation, ComReg adopts a differentiated price control between, on the one hand Generic Access to CEI, and on the other, NBI's MIP access to CEI, following responses to the CEI Consultation received by ComReg and further advice from ComReg's advisors (Dot Econ, Europe Economics and Cartesian), ComReg has made some modifications to its initial proposals in particular as regards to the cost allocation and cost recovery rules.

## 2.2 Costing approach for Generic Access to CEI

- 27 The price for Generic Access to Eircom's CEI is set at a level that encourages entry in those parts of the network where sufficient economies of scale and scope exist, thereby allowing a number of network operators to enter and compete with Eircom, in turn fostering competition in downstream markets. As Generic Access to CEI is generally sought by operators deploying networks to compete directly with Eircom in downstream markets, it is appropriate that all relevant CEI costs (fixed, variable, shared and common costs) continue to be recovered by Eircom. In order to promote efficient investment while preventing excessive prices, ComReg considers that a mix of the bottom-up long run average incremental cost plus a contribution towards common corporate costs ('**BU-LRAIC+**') approach and the top down historic cost accounting ('**TD HCA**') approach is appropriate, which is the same methodology that is currently used.
- 28 The BU-LRAIC+ methodology continues to apply to those ducts and poles that cannot be reused and which need to be replaced, which is in line with the 2013 EC Recommendation.<sup>16</sup> The BU-LRAIC+ methodology values the operator's assets at the current market value and allows for changes in asset prices. The access price as a result is, in principle, similar to what the access seeker might pay to build its own network and thus this promotes efficient infrastructure investment by other operators. The TD HCA methodology applies to those ducts and poles that can be reused for the provision of NGA services, in line with the 2013 EC

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<sup>15</sup> European Commission's Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU).

<sup>16</sup> Paragraph 33 of the 2013 EC Recommendation.

Recommendation. It is based on the SMP operator's (Eircom's) accounting data, adjusted for efficiencies; it can also include a forecast for future expenditure over the price control period similarly adjusted for efficiencies. The accounting net book value of each asset is taken as the basis for capital costs and this value is depreciated over the remaining lifetime of each asset. Operating expenditure is also estimated from historic accounting information and common corporate costs are allocated to different services using allocation keys.<sup>17</sup>

- 29 The national prices for Generic Access to poles and for Generic Access to ducts / sub-ducts are based on the costs associated with access in the Urban Commercial Area, as that is the area where the demand for the Generic Access to CEI is most likely to occur. This represents a change from the position set out in the CEI Consultation where ComReg proposed to use the costs across the entire Commercial Area i.e., Urban Commercial Area<sup>18</sup> and Rural Commercial Area<sup>19</sup>. Please see Section 5.5 for further details.
- 30 In relation to Generic Access to CEI, ComReg has decided to continue to apportion, or share, those costs between access seekers using the same methodology as currently used. For poles, this means that costs are shared among Generic Access users based on the number of Generic Access users on the pole (i.e., that have cables on the pole), including Eircom itself. The pole access price will accordingly vary depending on the number of Generic Access users on the pole. For example, if Eircom and one other operator have cables on a pole then all of the pole costs are split 50:50 between Eircom and the other operator. Please see Section 6.3 for further details.
- 31 For duct / sub-duct, the costs continue to be shared among Generic Access users (including Eircom) based on the average capacity derived as a price per metre of duct / sub-duct i.e., the per metre cost of the duct network divided by the total number of cables (copper and fibre) on average using the Eircom network (in this case using the Urban Commercial Area network). Please see Section 6.7 for further details.

### 2.3 Costing approach for NBI's MIP access to CEI

- 32 Insofar as access to Eircom's CEI by NBI for the purposes of the NBP is concerned, it is necessary to distinguish between (i) CEI access in the NBP IA and (ii) CEI

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<sup>17</sup> See Section 5 of this document.

<sup>18</sup> Urban Commercial Area is the footprint where commercial operators are delivering or have indicated plans to deliver high speed broadband services. It is also the footprint where Eircom has deployed FTTC. This footprint covers approximately 1.5m premises. Please see Section 3.3.2.

<sup>19</sup> Rural Commercial Area is the footprint comprised of the premises passed by Eircom (or to be passed by Eircom) as result of Eircom's commitment to deliver high speed broadband on a commercial basis under its 2017 Agreement with the Minister in relation to NBP – commercial deployment commitment. Please see Section 3.3.2.

access outside of the NBP IA for the purposes of serving the NBP IA.

- 33 In the **NBP IA**, ComReg expects that customers will ultimately migrate from Eircom's copper network onto NBI's fibre network and that all the premises in this area will ultimately be served by NBI's fibre network service. As a result, it is likely that Eircom will decommission its copper network and the only wholesale revenue available to recover Eircom's investments in its CEI network in the NBP IA will be through the CEI access prices levied on NBI. NBI accordingly may emerge as the only user of a significant proportion of Eircom's poles and ducts in the NBP IA.
- 34 In the light of this, the objectives pursued by the price control are to ensure both that Eircom may recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets for the purposes of sharing of those assets with NBI, while also discouraging inefficient duplication of CEI by NBI, and to ensure that Eircom faces the right incentives in terms of customer migration from its copper network to NBI's fibre network.
- 35 To achieve these objectives, ComReg has decided that the costing methodology for NBI's MIP access in the NBP IA should include a contribution towards the shared network costs of CEI as well as the incremental costs (or BU-LRAIC) associated with the investment in those non-reusable assets while also taking into account the TD HCA costs for reusable assets.<sup>20</sup> Consistent with ComReg's view set out in ComReg Decision D11/18<sup>21</sup>, no contribution to Eircom's common corporate costs is included in the price to be charged by Eircom to NBI in the NBP IA since these costs are already recovered from services sold by Eircom in the Commercial Areas. However, since the CEI Consultation and taking into account Respondents' Submissions, ComReg has reassessed the common corporate cost categories and in some cases costs that were previously considered as common have been respecified as incremental (or scalable) to Eircom's provision of CEI access to NBI's MIP in the NBP IA. This is discussed in Section 5.7.2 of this Decision.
- 36 As regards cost allocation, NBI and Eircom will pay the incremental costs they cause in the NBP IA. In addition, the shared network costs for poles are allocated between Eircom and NBI on a "per operator plus approach" whereby these costs are allocated equally among the number of poles access users present on the pole (i.e., have cables present on the pole).<sup>22</sup> For ducts, the shared network costs are allocated between Eircom and NBI on a "per metre" of duct / subduct length accessed. This represents a change from the "per customer approach" cost sharing approach that ComReg had proposed for poles and ducts in the CEI Consultation, which was deemed impracticable given the difficulties raised by Eircom in obtaining

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<sup>20</sup> Please see Section 5 of this document.

<sup>21</sup> ComReg Document No.18/95: Response to Consultation Document 17/26 and Final Decision, "Pricing of wholesale broadband services, Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets", dated 19 November 2018.

<sup>22</sup> Please see Section 6 of this document.

the customer line/location information to implement such an approach. This is discussed further in Section 6, subsections 6.5.2 and 6.9.2 of this Decision.

- 37 CEI access by NBI's MIP **outside the NBP IA (in the Commercial Areas) for the purpose of the NBP** gives rise to different considerations. Outside the NBP IA, NBI is expected to seek access to Eircom's CEI solely to support NBI's fibre broadband services in the NBP IA and not, by contrast to other CEI access seekers in the Commercial Areas, to compete with Eircom in downstream markets. This means that providing NBI with CEI access in the Commercial Areas will not entail any loss of wholesale or retail revenues or market share for Eircom which instead, unless the price control is amended, will benefit it with significant additional revenues which were not contemplated when setting the current price control. There is a risk that these additional revenues (also referred to as "windfall gains") could lead to competitive distortions. Hence, ComReg has decided to allow Eircom to only recover the long run incremental cost (hereafter, '**LRIC**') that is caused by NBI's MIP access to Eircom's CEI in the Commercial Areas. The LRIC methodology ensures that Eircom recovers its efficiently incurred costs caused by NBI's shared access to its CEI while at the same time promoting efficient use of existing reusable CEI assets, although it does not include any shared network costs or common corporate costs. Please see Section 5.6 for further details.
- 38 Table 1 below summarises ComReg's decision on the costing methodology and cost sharing (or pricing) approaches that are used to set the wholesale CEI access prices for Generic Access to CEI and NBI's MIP access to CEI in the various geographic footprints.

**Table 1: Costing methodologies and cost sharing approaches for CEI Access**

	<b>Generic Access to CEI</b>	<b>NBI's MIP Access to CEI</b>	
<b>Geographic Footprint</b>	<i>National</i>	<i>Commercial Areas</i>	<i>NBP IA</i>
<b>Costing methodology</b>	LRAIC+ (with TD HCA)	LRIC	LR(A)IC (with TD HCA)

<p><b>Cost sharing approach</b></p> <p><b>(for shared network costs and common corporate costs)</b></p>	<p>Per operator for poles i.e., based on no. of users present on the pole (with cables on the pole).</p> <p>Per metre of duct / sub-duct length.</p>	<p>N/A</p>	<p>For <b>poles</b>, a 'per operator plus' i.e., NBI and Eircom pay their incremental costs and shared network costs are split 50:50 between Eircom and NBI. For <b>ducts</b>, NBI and Eircom pay their incremental costs and shared network costs are split on per metre of duct / sub-duct length.</p>
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## 2.4 Weighted Average Cost of Capital (WACC) for CEI access

39 Insofar as the appropriate rate of return to be allowed as part of the price control is concerned, for NBI's MIP access to CEI, some of the WACC parameters i.e., cost of debt, asset beta and gearing, have been amended from those parameters used to set the generic fixed line telecoms WACC so as to reflect the specific conditions and effect of NBI's access under the NBP contract with the Irish State. As a result, Eircom recovers a WACC of no more than 3.76% for NBI's MIP access to CEI in the NBP IA and for NBI's transit access in the Commercial Areas. Generic Access users of CEI pay the fixed line telecoms WACC rate of 5.56%, updated as of 1 July 2021<sup>23</sup> and which is based on the parameters determined in ComReg Decision D10/20 (the '**2020 WACC Decision**').<sup>24</sup> The CEI prices set out in Section 9 of this Decision reflect these WACC rates. Please see Section 7 of this Decision for further details on the changes to the WACC parameters specifically related to CEI access by NBI's MIP.

## 2.5 Other one-off CEI costs

40 The CEI annual access prices set in this Decision are calculated on the basis that these charge(s) recover all relevant costs associated with an operator obtaining access to Eircom's ducts and poles.

41 However, ComReg has identified two CEI related activities, i.e., replacing a pole with pole furniture and tree trimming activities, which may result in additional costs that Eircom may need to recoup separately through a one-off charge, where Eircom

<sup>23</sup> Information Notice 21/68, 'Weighted Average Cost of Capital – first annual update', dated 29 June 2021 <https://www.comreg.ie/publication/weighted-average-cost-of-capital-first-annual-update>.

<sup>24</sup> ComReg Document No 20/96: Review of Weighted Average Cost of Capital (WACC) – Response to Consultation and Final Decision; Mobile Telecommunications, Fixed line Telecommunications, Broadcasting Transmission; dated 14 October 2020.

can demonstrate that the relevant costs associated with these activities are not already recovered as part of the annual CEI access charges.

- 42 Eircom may recover any additional costs associated with replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced.
- 43 In addition, tree trimming costs to prepare aerial cable routes in advance of cable deployment are considered incremental costs outside the normal business as usual activities and so these costs should be incremental to that operator. Hence, Eircom can recover these incremental tree trimming costs from operators as a one-off charge on an as-needs basis or indeed any other agreed request from operators to tree trim specific pole routes outside of Eircom's preventative maintenance programme. On the other hand, tree trimming costs associated with normal business as usual pole replacement is recovered as part of the pole access charge.
- 44 Such one-off charges are subject to Eircom's transparency obligations including pre-notification to ComReg, which are further specified in the Decision Instrument at Annex 1. This is discussed further in Section 8.

## 2.6 CEI access prices

- 45 ComReg has determined the maximum annual prices for access to Eircom's CEI services in Table 2 - Table 7 below, for both Generic Access to CEI and for NBI's MIP access.

### Prices for Generic Access to CEI

- 46 For Generic Access users of CEI, the annual access prices set out in this Decision (at Table 2, Table 3 and Table 4) are calculated on the basis that these charge(s) recover all costs associated with an operator obtaining access to Eircom's poles and ducts, including process related costs and ongoing wholesale costs such as product management, billing and account management.
- 47 The Generic Access CEI prices include a rate of return based on the current fixed line telecoms WACC of 5.56%, as set out in Information Notice 21/68.
- 48 For the avoidance of doubt, no other charges (other than those set out in Table 2, Table 3 and Table 4) may be levied by Eircom to recover the costs that the prices derived by the PAM and DAM are designed to recover, except for the one-off charges discussed in Section 8, which require Eircom to demonstrate in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the cost orientation of its CEI prices and which are subject to Eircom's transparency obligations (i.e., pre-notification and publication requirements).

- 49 For **Generic Access users of poles**, when the pole is shared with another Generic Access user then the cost should be shared based on the number of Generic Access users on the pole (i.e., that have cables on the pole), including Eircom itself (i.e., applying the per operator approach).

**Table 2: Maximum annual prices for Generic Access to poles**

Generic access	1 [month] 2022 – 30 June 2022	1 July 2022 – 30 June 2023	1 July 2023 – 30 June 2024	1 July 2024 – 30 June 2025	1 July 2025 – 30 June 2026
	€	€	€	€	€
<b>National pole price*</b>	20.39	21.47	22.71	22.94	23.13

\*This is the total price of a pole and so the annual price will vary depending on the number of Generic Access users seeking access to the pole

- 50 In the particular case of **Generic Access to duct** ComReg has set the prices for the following access products:

- Duct Access / Direct Duct Access in Table 3;
- Sub-Duct Access in Table 4.

- 51 While the CEI Consultation only provided the annual proposed prices for the provision of Sub-Duct Access (which was referred to more generally as “duct access” in the CEI Consultation), there has been developments since then regarding Eircom’s sub-duct self-install product, which is discussed in ComReg Document 21/60.<sup>25</sup>

- 52 The DAM model consulted on already includes all of the costs related to each of the duct access products listed above and so ComReg considers that it is appropriate to provide clarity and transparency to the industry in this Decision on the different variants of duct access and their related prices, which is also consistent with the duct access products specified in the 2018 WLA/WCA Market Review Decision.<sup>26</sup>

- 53 **Duct Access** is access to Eircom’s duct, without sub-duct access. The prices set in Table 3 include all of the costs associated with accessing the duct i.e., including a contribution to the costs of trenches, ducts and chambers and clearing duct blockages but excluding the cost associated with sub-duct (namely, the costs of rod, rope and test and sub duct deployment). The maximum annual Duct Access

<sup>25</sup> [ComReg2160.pdf](#)

<sup>26</sup> Section 7.2 of the Decision Instrument at Appendix 20 of the 2018 WLA/WCA Market Review Decision.

prices (in Table 3) are based on a per metre of duct.

- 54 **Direct Duct Access** is direct access to Eircom's ducts for the installation of cables without the use of sub-duct. Direct duct access is costed in the same manner as duct access and so the prices in Table 3 apply. The prices include all of the costs associated with accessing the duct i.e., includes a contribution to the costs of trenches, ducts and chambers and clearing duct blockages, excluding the cost associated with sub-duct. The maximum annual Duct Access prices (in Table 3) are based on a per metre of duct.
- 55 **Sub-Duct Access** is access to Eircom's sub duct, which means the tube or tubes inserted in a duct through which a cable is installed. The sub duct annual prices at Table 4 includes a contribution to the costs of trenches, ducts and chambers and clearing duct blockages, and all of the costs associated with installing sub duct i.e., the cost of rod, rope and test. The maximum annual Sub-Duct Access prices (in Table 4) are based on a per metre of sub duct.
- 56 For the avoidance of doubt, in the various duct related prices set out below, the cost modelling associated with any duct remediation activities such as clearing duct blockages is assumed to be carried out by Eircom and recovered by Eircom in the annual recurring charges.
- 57 In later sections of this Decision and in particular in determining the appropriate costing methodology (Section 5), the cost sharing approach (Section 6) and the appropriate WACC (Section 7) for duct related access, ComReg uses the generic term 'duct access' which covers all of the products listed at paragraph 50.

**Table 3: Maximum annual prices for Generic Access users of Duct Access / Direct Duct Access by surface type**

Generic Access Per metre of duct	1 [month] 2022 – 30 June 2022	1 July 2022 – 30 June 2023	1 July 2023 – 30 June 2024	1 July 2024 – 30 June 2025	1 July 2025 – 30 June 2026
	€	€	€	€	€
National duct access price for Carriageway	0.82	0.72	0.66	0.66	0.70
National duct access price for Footway	0.67	0.59	0.54	0.54	0.58
National duct access price for Verge	0.49	0.43	0.40	0.40	0.42



**Table 4: Maximum annual prices for Generic Access users of Sub-Duct Access by surface type**

Generic Access Per metre of sub duct	1 [month] 2022 – 30 June 2022 €	1 July 2022 – 30 June 2023 €	1 July 2023 – 30 June 2024 €	1 July 2024 – 30 June 2025 €	1 July 2025 – 30 June 2026 €
National sub-duct price for Carriageway	0.89	0.79	0.73	0.73	0.77
National sub-duct price for Footway	0.74	0.66	0.61	0.62	0.65
National sub-duct price for Verge	0.56	0.50	0.47	0.47	0.49

#### Prices for NBI's MIP access to CEI

- 58 For NBI's MIP access to CEI, the prices set out in this Decision (at Table 5, Table 6 and Table 7) are calculated based on all of the assumed relevant costs associated with providing CEI access in the NBP IA and the Commercial Areas, from the PAM and DAM models, over the next 5 years.
- 59 The annual CEI access charges for NBI's MIP (at Table 5, Table 6 and Table 7) do not include process related cost<sup>27</sup>, which are charged as one-off payments. There are also one-off costs associated with tree trimming activities and the cost of replacing a pole with pole furniture, which Eircom may recoup outside of the annual CEI access charges for NBI's MIP described above, which is discussed at Section 8.
- 60 The CEI annual prices for NBI's MIP in the NBP IA and in the Commercial Areas includes a rate of return based on the WACC for CEI of 3.76% (as set out in Section 7).
- 61 For the avoidance of doubt, and with the exception of process charges (which are charged upfront) as well as the one-off charges discussed in Section 8 and where Eircom and NBI may agree to an alternative arrangement as provided for at Section 9.4, Eircom shall charge NBI no other prices other than the prices determined in Table 5, Table 6 and Table 7 for the period from 1 [month] 2022 to 31 December

<sup>27</sup> Costs of Eircom's staff that are engaged in planning, processing / ordering and managing the provision of CEI access i.e., process costs.

2023. The prices thereafter, from 1 January 2024, shall be determined by the annual review process described briefly below and in more detail at Section 10 of this Decision.

- 62 The **annual pole access charges for NBI's MIP in the NBP IA** (at Table 5) includes the incremental capital costs of accelerated pole replacement during the FTTH rollout. In addition, the pole access charges for NBI's MIP in the NBP IA includes a contribution (as discussed in Section 6) towards the shared pole network costs, as well as the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.
- 63 The **annual pole access charges for NBI's MIP in the Commercial Areas** (at Table 5), includes the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management only. ComReg has not identified any capital costs for poles that would be considered incremental to NBI's transit access in the Commercial Areas and which should be recovered in the annual pole access charge.

**Table 5: Maximum annual prices for pole access by NBI**

<b>NBI Pole Access</b>	<b>1 [month] 2022 – 31 December 2022</b>	<b>1 January 2023 – 31 December 2023</b>	<b>1 January 2024 – 31 December 2024</b>	<b>1 January 2025 – 31 December 2025</b>	<b>1 January 2026 – 31 December 2026</b>
	€	€	€	€	€
<b>NBP IA</b>	8.96	9.37	9.73	10.26	10.88
<b>Commercial Areas</b>	0.07	0.07	0.07	0.07	0.07

- 64 The **annual Sub-Duct Access charges for NBI's MIP in the NBP IA** (at Table 6) includes the capital costs relating to the deployment of sub-duct and its installation<sup>28</sup>, the cost of clearing duct blockages<sup>29</sup> and the remaining costs of duct remediation during the FTTH rollout. In addition, the duct charges for NBI's MIP in the NBP IA includes a contribution (as discussed in Section 6) towards the shared

<sup>28</sup> This includes the costs of rod, rope & test of sub-duct.

<sup>29</sup> A significant part of the sub-contractor labour costs incurred with duct blockage clearances are charged as 'differences from estimate' ("DFE"), based on the actual volumes of duct blockages encountered when laying sub-duct. Since the CEI Consultation ComReg updated the costs associated with the sub-duct to reflect the mix of sub-ducts deployed by Eircom for its own consumption in the IFN and updated the per metre cost for sub-duct installation (including rod, rope and test) labour costs to exclude the estimated element of one duct blockage clearance. Accordingly, ComReg increased the number of DFE duct blockage clearances from two duct clearances per kilometre of underground route in the DAM to three duct clearances in the final DAM in all three footprints.

duct network costs, as well as the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.

- 65 The **annual Sub-Duct Access charges for NBI's MIP in the Commercial Areas** (at Table 6) includes the cost of sub-duct and its installation as the only capital cost that is incremental to NBI's MIP and in addition the price includes the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.
- 66 The prices presented in Table 6 are based on the total annual costs of a metre of duct (trench), calculated in the DAM cost model taking into account the forecasted mix of metres of duct (trench) consumed by NBI's MIP, as a shared duct user and as a single duct user in the relevant period.

**Table 6: Maximum annual prices for Sub-Duct Access by NBI**

NBI Per metre of sub-duct	1 [month] 2022 – 31 December 2022	1 January 2023 – 31 December 2023	1 January 2024 – 31 December 2024	1 January 2025 – 31 December 2025	1 January 2026 – 31 December 2026
	€	€	€	€	€
<b>NBP IA</b>	0.63	0.63	0.62	0.62	0.62
<b>Commercial Areas</b>	0.09	0.09	0.09	0.09	0.09

- 67 Consistent with the approach for Generic Access, ComReg has provided in Table 7 the equivalent Duct Access / Direct Duct Access prices that would apply should NBI decide to install its own sub-duct. However, ComReg may need to consider any variations to the prices depending on the type of sub-duct self-install product that NBI may request. <sup>30</sup>

<sup>30</sup> The approach described here would also apply if Eircom and NBI decide to opt for upfront payment of incremental costs, as discussed at Section 9.4.

**Table 7: Maximum annual prices for Duct Access / Direct Duct Access by NBI**

NBI Per metre of duct	1 [month] 2022 – 31 December 2022	1 January 2023 – 31 December 2023	1 January 2024 – 31 December 2024	1 January 2025 – 31 December 2025	1 January 2022 – 31 December 2026
	€	€	€	€	€
<b>NBP IA</b>	0.56	0.56	0.55	0.55	0.55
<b>Commercial Areas</b>	0.02	0.02	0.02	0.02	0.02

68 Please see Section 9 of this Decision for further details on the prices.

## 2.7 Implementation and Annual Review

69 In the absence of any anticipated significant changes to CEI costs for Generic Access, the Generic Access prices calculated on the basis of the PAM and DAM in this Decision are fixed per year for a period of five years, subject to Eircom's obligation of cost orientation continuing for that period. If there are any significant changes to CEI costs and/or to the WACC during that time resulting in a material impact on costs, ComReg may rely on Regulation 13(4) or Regulation 18 of the Access Regulations to assess adjustments required or further specifications and issue directions to Eircom as and if required. On the expiry of the five year period, again subject to Eircom's obligation of cost orientation continuing, Eircom will continue to be required (unless otherwise specified by ComReg) to derive cost oriented prices on the basis of the PAM and DAM.

70 Insofar as CEI access by NBI's MIP is concerned, this Decision sets the prices from 1 [third month from date of decision] 2022 until 31 December 2023, as produced by the PAM and DAM at the date of this decision. However, ComReg considers that given the significant investments required, the associated uncertainties and the fact the prices are based on a number of key assumptions, Eircom is required to carry out an annual review of the PAM and DAM. From 1 January 2024, the applicable prices will be the prices derived from the forecasted information in the PAM and DAM reconciled and adjusted accordingly to account for any discrepancies between forecasts and actual costs (from Eircom's accounts and underlying financial and other internal systems) year on year. For ease of implementation of the annual review process, any future price changes associated with NBI's CEI access will coincide with Eircom's new accounting financial period i.e., from 1 January each year for the duration of the price control. Please see Section 10 of this Decision.

## 3 Background

71 In this section of the document ComReg provides a summary of the background to the CEI review, including the current regulatory obligations for CEI and the importance of CEI access in the context of the NBP. In addition, this section also considers the regulatory objectives pursued by ComReg in determining the appropriate costing/pricing methodology for CEI access, including the views of Respondents and ComReg's final position.

72 This section is structured under the following headings:

- (a) What CEI services are;
- (b) The WLA Market and applicable regulatory obligations;
- (c) NBP and the importance of CEI access;
- (d) ComReg's regulatory objectives; and
- (e) Other regulatory considerations.

### 3.1 What CEI services are

73 CEI means the physical access path facilities deployed by Eircom to host cables such as copper wires, optical fibre and co-axial cables. It includes, but is not limited to, subterranean or above-ground assets such as sub-ducts, ducts, chambers and poles. Ducts are Eircom's underground pipes or conduits that carry or are capable of carrying cables that are in turn used to deliver electronic communication services to end-users. Poles are Eircom poles which can be used to support copper or fibre cables in order to provide electronic communications services. CEI is also known as passive infrastructure access.<sup>31</sup>

### 3.2 The WLA Market and regulatory obligations

74 In the 2018 WLA / WCA Market Review Decision, according to Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations, ComReg designated Eircom with SMP in the WLA Market, nationally and imposed a number of regulatory obligations on Eircom across the national WLA Market to address various competition problems. These obligations include the obligation to provide access to CEI and a price control obligation of cost orientation for CEI

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<sup>31</sup> Please note that CEI in this Decision does not include dark fibre which is optical fibre that is currently installed in the local access network but is not in use. In ComReg Decision D10/18 ComReg specified that Eircom provides Dark Fibre where access to Civil Engineering Infrastructure is not available, but where access to Dark Fibre is reasonably available.

access services.

- 75 Paragraph 6.110 of the 2018 WLA / WCA Market Review Decision summarises the competition problems in the WLA Market as follows:

*“...absent regulation in the Relevant WLA Market, ComReg considers that Eircom would have the ability and incentive to influence competition through effects on prices, innovation, output and the variety or quality of goods and services provided. A number of competition problems may arise whereby Eircom could:*

- (a) Exploit customers or End Users by virtue of its SMP position;*
- (b) Leverage its market power into adjacent vertically or horizontally-related markets with a view to foreclosing or excluding competitors in downstream and/or upstream markets; and*
- (c) Delay or deter investment and market entry into the Relevant WLA Market and, ultimately, downstream markets.”*

- 76 In particular, ComReg found Eircom had the ability and incentive to engage in anti-competitive behaviours and problems which ComReg had outlined in Section 7 of Consultation Document 16/96 preceding the 2018 WLA / WCA Market Review Decision.<sup>32</sup> These problems arose, insofar as CEI is concerned, from the fact that CEI was a bottleneck asset without access to which access seekers are unlikely to build network infrastructure. As a vertically integrated undertaking with SMP in the WLA Market, Eircom has the ability and incentive to refuse to provide access to these CEI inputs, in circumstances where access to Eircom's CEI is necessary to ensure the development of sustainable and effective downstream competition and to minimise foreclosure concerns that could arise, absent regulation. CEI access is key to promoting sustainable competition through network rollout by removing unnecessary network build costs. No other access obligation has the ability to reduce access network build costs, thereby creating the conditions necessary to promote sustainable competition.<sup>33</sup>
- 77 ComReg further found that a cost orientation price control would ensure that Eircom is prevented from charging excessive prices for wholesale inputs and, at the same time, should promote efficient infrastructure investment and encourage service providers to climb the ladder of investment. A cost orientation price control also ensures that Eircom can recover the efficiently incurred costs which are relevant to the provision of WLA products, services and facilities. This should, in turn lead to efficient price and investment signals being provided to all market participants. In the 2018 WLA / WCA Market Review Decision ComReg found that the price control

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<sup>32</sup> ComReg Document No 16/96 'Market Reviews, Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products', dated 11 November 2016.

<sup>33</sup> Paragraphs 8.188 to 8.192 of ComReg Consultation Document 16/96.

it had imposed in ComReg Decision D03/16<sup>34</sup> (the '**2016 Access Pricing Decision**') for CEI, among other things, remained appropriate.<sup>35</sup>

- 78 In the 2016 Access Pricing Decision ComReg determined that the costs associated with duct and pole access should be based on a combination of a BU-LRAIC+ costing methodology for those assets that needed to be replaced (and could not be reused) for the provision of NGA and a TD HCA costing methodology for those assets that could be reused for the provision of NGA, as determined by the revised copper access model (the '**Revised CAM**'). The prices were differentiated by reference to the geographic footprint on the basis of justified cost differences between different areas. The maximum pole access rental prices were differentiated between Modified Larger Exchange Area (the '**Modified LEA**') and outside the Modified LEA on a price per pole basis, split equally amongst operators using the pole. The maximum Sub-Duct Access rental prices were differentiated by reference to surface type (footway, carriageway and verge) and by Dublin and Provincial areas, based on a price per metre of sub-duct. Further details are provided in Section 5, subsection 5.2 of this Decision.
- 79 As part of ComReg's notification to the European Commission of the draft measures contained in the 2018 WLA / WCA Market Review Decision under Regulation 13(3) of the Framework Regulations, the European Commission in its comments letter<sup>36</sup>, called on ComReg to revisit the access prices (which includes the prices for CEI) and to update the results of the Revised CAM with more recent data. Furthermore, the European Commission requested ComReg to notify the resulting prices without undue delay. In addition, in the European Commission comments letter on WACC<sup>37</sup>, as set out in Annex 5 of the 2020 WACC Decision, the European Commission requested ComReg to adjust all regulated prices [which include CEI] that are significantly affected by the WACC value, in line with the considerable decrease of the WACC (from 8.18% to 5.61% [as notified in the 2020 WACC Decision] for the fixed line market). The European Commission urged ComReg to update the relevant pricing decisions as soon as possible, to ensure that prices in the Irish wholesale markets reflect current market conditions.
- 80 In this Decision ComReg determines how to address the competition problems identified in the 2018 WLA / WCA Market Review Decision most effectively in respect of CEI access, having regard to changed expectations in respect of demand for CEI access following the awarding of the NBP contract. In particular, ComReg has amended the further specification of the obligation of cost-orientation imposed on Eircom so that the price control can address the risks that Eircom exploits CEI access seekers or end-users by virtue of its SMP position in the WLA Market and

<sup>34</sup> ComReg Document No. 16/39, ComReg Decision D03/16, Pricing of Eir's Wholesale Fixed Access Services: Response to Consultation Document 15/67 and Final Decision, dated 18 May 2016.

<sup>35</sup> Paragraph 8.614 of ComReg Consultation Document 16/96.

<sup>36</sup> Please see Appendix 2 of the 2018 WLA/WCA Market Review Decision.

<sup>37</sup> Commission Comments letter C(2020) 4837 adopted on 9.7.2020 in case IE-2020-2250.

delay or deter investment and market entry into the Relevant WLA Market through CEI access taking into account developments arising from the signing of the NBP contract.

- 81 This CEI pricing review also takes into account the principle adopted by ComReg in ComReg Decision D11/18<sup>38</sup> (the '**2018 Pricing Decision**'), that all common corporate costs of Eircom's access network should be recovered from services sold in Commercial Areas. However, based on the feedback from Respondents to the CEI Consultation, ComReg has revised its approach on the recovery of common corporate costs so that common corporate costs that are deemed to be incremental (or scalable) with respect to the CEI access service for NBI's MIP are allocated to NBI's MIP in the NBP IA. Please see further discussion in Section 5, subsection 5.7 below.

### 3.3 NBP and the importance of CEI access

#### 3.3.1 What is the NBP

- 82 The NBP is the Irish Government's plan to deliver high speed broadband services to all businesses, farms and households in Ireland, including in those geographic areas not served by commercial operators or where there are no concrete plans from operators to deliver NGA services. The NBP aims to ensure that all citizens across Ireland have access to high speed fibre broadband infrastructure capable of supporting download speeds of at least 30 Mbps by 2026. The NBP is the responsibility of the Department of the Environment, Climate and Communications ('**DECC**').<sup>39</sup>
- 83 The NBP is funded by a "gap-funding" model. As ComReg understands it, this model involves the State providing a subsidy to make it financially viable and thereby deliver the Government's broadband policy objectives. In this approach, the assets and the business are 100% owned and controlled by the private sector while the NBP provider builds, finances, operates and maintains the NBP assets. There are clawback and profit sharing mechanisms in place to ensure that the State's subsidy is only used to cover the upfront funding requirement of the project and that any future savings or profits made above those forecast will be shared with the State (this includes the clawback of any savings achieved by NBI with its subcontractors).

- 84 In November 2019, the European Commission, under EU state aid rules and having

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<sup>38</sup> ComReg Document No.18/95: Response to Consultation Document 17/26 and Final Decision, Pricing of wholesale broadband services, Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets, dated 19 November 2018.

<sup>39</sup> On 16 September 2016, ComReg published an Information Notice in ComReg Document No. 16/80 acknowledging "...that interested parties may wish to gain insight into the possible interaction between the NBP and regulation..." and setting a process whereby they could submit questions in writing to ComReg.



regard to its guidelines on the application of the State aid rules to broadband networks (the '**State Aid Guidelines**')<sup>40</sup>, approved support for the Irish NBP.<sup>41</sup>

85 ComReg as the NRA had no decision-making role in the design of the NBP or the award of any contracts under the NBP. These matters were solely the responsibility of DECC and the Minister. ComReg does however have an advisory role in the context of the State Aid Guidelines.<sup>42</sup>

### 3.3.2 Interactive broadband map

86 DECC developed an Interactive Map (the '**High Speed Broadband Map**') which identifies the locations and premises in the State as being either served by operators in the commercial sector or requiring State intervention under the NBP.

87 The current version of the High Speed Broadband Map published by DECC shows in amber colour the NBP IA, that is, the target areas for State intervention under the NBP, representing circa 537,000 premises (delivery points), and in blue, the areas where commercial providers are either currently delivering or have plans to deliver high speed broadband services.<sup>43</sup>

88 Eircom has rolled out FTTH passing over 300,000 premises based on its commitment agreement of April 2017 with DECC.<sup>44</sup> Furthermore, in 2018, Eircom announced plans to rollout FTTH to circa 1.4m urban addresses over the next five years<sup>45</sup> (an April 2021 update on that rollout indicated that 380,000 premises in 79 towns can now access FTTH<sup>46</sup>). The FTTH network has been overlaid on Eircom's existing network of duct and poles and it is anticipated that customers on copper-based services will migrate to fibre.

89 There are accordingly three distinct footprints which may be identified, as follows:

89.1 Urban Commercial, corresponding to the footprint where commercial operators are delivering or have indicated plans to deliver high speed broadband services. It is also the footprint where Eircom has deployed FTTC. This footprint covers

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<sup>40</sup> EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, 2013/C/25/01-  
[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0126\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0126(01)&from=EN)

<sup>41</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6291](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6291)

<sup>42</sup> The contract between NBI and the State also envisages a role for ComReg.

<sup>43</sup> The High Speed Broadband Map, published at <https://www.gov.ie/en/publication/5634d-national-broadband-plan-map/> is updated on a quarterly basis. The initial Map published in 2017 showed in addition to the Intervention Area in amber, two commercial areas: in light blue, those commercial areas where Eircom had committed to deliver high speed broadband (300k FTTH rollout) and in blue, other commercial areas where commercial operators are delivering or have indicated plans to deliver high speed broadband services.

<sup>44</sup> Agreement between the Minister for Communications, Climate Action and Environment and Eircom Limited in relation to National broadband plan – commercial deployment commitment.

<sup>45</sup> <https://www.eir.ie/pressroom/eir-announce-first-quarter-FY19-results-to-30-September-2018/>

approximately 1.5m premises (as at its inception in April 2017). This footprint is referred to throughout this document as the '**Urban Commercial Area**';

- 89.2 Rural Commercial, corresponding to the footprint comprised of the premises passed by Eircom (or to be passed by Eircom) as a result of Eircom's commitment to deliver high speed broadband on a commercial basis under its 2017 Agreement with the Minister in relation to National Broadband Plan – commercial deployment commitment.<sup>47</sup> This footprint is referred to throughout this document as the '**Rural Commercial Area**';
- 89.3 The NBP IA, also referred to by DECC as the non-commercial 'Intervention Area', where there is no existing or planned commercial high speed broadband services available and corresponding to the target areas for state intervention under the NBP, for the purpose of its contract with NBI.<sup>48</sup> This area includes circa 537,000 premises (delivery points). It is referred to throughout this Decision as the '**NBP IA**'.
- 90 The PAM and DAM reflect the distinction between the three geographic areas. Figure 1 below illustrates the three network footprints described above by way of concentric rings.

### 3.3.3 The NBP provider

- 91 In November 2019, the Minister signed a contract with NBI for the deployment and operation of the network in the NBP IA. A non-confidential version of the NBP contract was published by the State in August 2020.<sup>49</sup> In essence, the contract between DCCA (now DECC) and NBI means that NBI has been contracted to build, operate and maintain the broadband network in order to rollout high speed broadband services within the NBP IA, over a 25 year period (with a possibility to extend this by 10 years). NBI is expected to provide its own network infrastructure<sup>50</sup> but it will seek access to Eircom's CEI<sup>51</sup> in both the NBP IA and to transit through Commercial Areas in order to reach its own interconnection points. It is intended that NBI would complete its rollout of the fibre network in the NBP IA over the next

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<sup>47</sup> The PAM/DAM models reflect that Eircom rolled out high speed broadband to 340,000 premises rather than the 300,000 agreed to with DECC.

<sup>48</sup> In the EC State Aid Decision, the area requiring intervention is called the "white" NGA areas.

<sup>49</sup> <https://www.gov.ie/en/publication/16717-national-broadband-plan-contract/>

<sup>50</sup> This is mainly the fibre cables and the active equipment such as Optical Line Terminals (OLT).

<sup>51</sup> Although there is the potential for some use of infrastructure currently owned by the electricity network, ESB Networks.

seven years.<sup>52</sup> The European Commission approved its support for the Irish NBP in its Decision of 15 November 2019 (hereafter, the '**EC State Aid Decision**').<sup>53</sup>

92 NBI will be a wholesale operator in the NBP IA. As set out in Recital 28 of the EC State Aid Decision:

*"NBI will act mainly as a wholesale provider. NBI is allowed to provide retail services in the intervention area only under certain strict conditions as a retailer of last resort (RoLR) which is also subject to strict regulatory requirements. A RoLR may only arise where a consumer cannot get a retail service from the market. The Irish Authorities note that they consider it highly unlikely that NBI will engage in providing RoLR services in the intervention area during the lifetime of the contract."*<sup>54</sup>

93 Hence, NBI is expected to be the main, if not the only, provider of wholesale fibre broadband services in the NBP IA, after it completes the full deployment of its network. Customers on Eircom's existing legacy copper network are likely to transition to NBI's fibre network as it becomes available but in the interim, Eircom is likely to continue to supply copper-based services to customers in areas where NBI has yet to deploy and offer its fibre broadband services.

94 The prices that NBI charges for its wholesale services in the NBP IA are set by reference to the prices of comparable wholesale regulated broadband services.<sup>55</sup> As set out in Recital 64 of the EC State Aid Decision:

*"The NBP uses benchmarking as an important tool for ensuring that the aid granted will serve to replicate market conditions prevailing in competitive broadband markets. If a comparable regulated wholesale product exists, the wholesale access pricing will be comparable to the price of that regulated product."*

95 In order for NBI to provide its high-speed fibre broadband services and to serve customers in the NBP IA it needs access to CEI in both the NBP IA and also access for the purposes of transit through the areas outside the NBP IA.

96 ComReg understands that an important restriction in the contract between the State

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<sup>52</sup> In an article the then Minister for Communications Richard Bruton told the Dáil he had asked the company if the seven-year contract could be provided in five years:

<https://www.irishtimes.com/news/politics/oireachtas/broadband-plan-worth-3bn-might-be-delivered-in-five-years-instead-of-seven-d%C3%A1il-told-1.4264629>

<sup>53</sup> State Aid SA.54472 (2019/N)

[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6291](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6291)

<sup>54</sup> See also Clause 37.3 'Restrictions regarding the Retail Market in the Intervention Area and Excluded Area' and Clause 37.4 'No Circumvention of the Agreement' in the NBP contract.

<sup>55</sup> As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from end-users of the broadband service.

and NBI is that the subsidies provided to NBI must only be used to provide wholesale services in the NBP IA, in accordance with the contract, and that NBI may not use the subsidies to provide electronic communications services and networks outside the NBP IA. ComReg understands that NBI will not be able to use its subsidised network outside the NBP IA for any purposes other than “transiting” between its interconnection points located in the Commercial Areas and those in the NBP IA in order to provide services in the NBP IA. This means that NBI may not rely on its network that transits the Commercial Areas (built and operated using a State subsidy) to provide services in direct competition with Eircom or other operators in the Commercial Areas.

97 Recital 19 of the EC State Aid Decision states that:

*“The new network will consist of passive and active elements (including ducts, poles, dark fibre, exchanges, active equipment)... the proposed State aid scheme aims to support the roll-out of NGA networks. The scheme targets NGA white areas. The Irish authorities explain that while they encourage the reuse of existing infrastructure... limited backhaul deployment may be necessary to achieve the objectives of the scheme in certain situations. The Irish authorities clarify that such backhaul is exclusively ancillary to the deployment of the NGA network and therefore will be built and used only insofar as needed for the coverage of the target white NGA areas and not to support services provided outside the intervention area.”*

98 Footnote 18 (in Recital 19) of the EC State Aid Decision also specifies that:

*“Aid may thus be used to build limited backhaul in order to reach the intervention area where it is appropriate e.g. to traverse the eir 300,000 area (see recital (43)) and to get from small remote local exchanges back to the access network.”*

99 Hence, it is clear that NBI will seek access to CEI outside the NBP IA in order to serve those customers in the NBP IA. Furthermore, it is clear that NBI can only use its subsidy payments for the purpose of subsidising the network to provide certain wholesale products in the NBP IA and not to offer services outside the NBP IA (i.e., in the Urban Commercial Area or Rural Commercial Area), to serve and compete for customers in the Commercial Areas.<sup>56</sup>

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<sup>56</sup> See in particular Clause 37.2 ‘Use of the Subsidy Payments’ of the NBP contract. Under Clause 37.2.1 (using the defined terms therein), NBI acknowledges and agrees that the Subsidy Payments are provided for the purpose of subsidising only the Network for the provision of the Minimum Required Wholesale Products and Additional Required Wholesale Products (but not the Other Permitted Wholesale Products) to Premises in the Intervention Area in accordance with the Agreement and nothing else; under Clause 37.2.2, NBI acknowledges and agrees that the provision of electronic communications services and networks to the Excluded Areas is not within the permitted application of

100 Recital 34 of the EC State Aid Decision also emphasises this point stating that:

*“Aid cannot be used to support services provided outside the intervention area (i.e. the aid can only be used to support the connection of the NGA white areas).”*

101 Another condition of the NBP contractual agreement is the fact that the State (in this case DECC) can “step-in” in the event that NBI fails to comply with the agreed terms and conditions of the contract.<sup>57</sup> Recital 27 of the EC State Aid Decision states that:

*“Should the beneficiary fail to comply with the requirements set out in this agreement, the Irish Authorities reserve the right to step in and take back the funded assets and where necessary the foreseen wholesale business of the beneficiary.”*

102 As such, this condition reduces the risks involved for an operator such as Eircom who is likely to become a significant provider of CEI in the NBP IA. This is considered further in Section 7, as part of the discussion on the appropriate WACC for CEI in the context of the NBP.

103 NBI is expected to be the main provider of wholesale fibre broadband services in the NBP IA, after it completes the full deployment of its network. Customers on Eircom's existing legacy copper network are likely to transition to NBI's fibre network as it becomes available but in the interim, Eircom is likely to continue to supply copper-based services to customers in areas where NBI has yet to deploy and offer its fibre broadband services. The prices that NBI charges for its wholesale services in the NBP IA are set by reference to the prices of comparable wholesale regulated broadband services.<sup>58</sup>

### 3.3.4 NBI's MIP access to CEI

104 The reuse of existing infrastructure is strongly encouraged in the EC State Aid Decision and in the State Aid Guidelines<sup>59</sup> as sharing of existing CEI infrastructure

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the Subsidy Payments; and under Clause 37.2.3, NBI agrees that it shall not use or apply the Subsidy Payments except in accordance with the provisions of this Agreement for the purposes of subsidising the Network for the provision of the Minimum Required Wholesale Products and Additional Required Wholesale Products to Premises in the Intervention Area by NBI subject to, and in accordance with, the Agreement.

<sup>57</sup> As set out in Clause 73 'Step In Rights' of the NBP contract.

<sup>58</sup> As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from end-users of the broadband service.

<sup>59</sup> EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01), paragraph 78(f).

reduces costs (and hence the State subsidy required)<sup>60</sup>.

105 In November 2019, DCCAE (now DECC), in a press release published after the NBP contract had been signed with NBI, stated that:

*“...as much as possible of the network infrastructure will comprise the re-use of existing poles and ducts, which NBI will lease from existing infrastructure owners.”<sup>61</sup>*

106 As already outlined above, NBI's MIP in providing its wholesale services in the NBP IA will seek access to Eircom's CEI for two main purposes:

- (a) To provide high speed fibre broadband services within the NBP IA; and
- (b) To “transit” between the NBP IA and NBI's interconnection points outside the NBP IA (i.e., in the Commercial Areas). This means that NBI will likely require access to Eircom's CEI outside the NBP IA for transit purposes and to serve customers in the NBP IA.

107 There are a number of reasons why access to Eircom's CEI by NBI in the NBP IA (and for transit purposes outside of the NBP IA) is unique, compared to the more general CEI access sought by other operators (Generic Access seekers). Firstly, the situation in Ireland is highly unusual compared to other member states, as NBI is not the incumbent operator. Typically, incumbents have won broadband subsidies competitions. Secondly, NBI's demand for CEI only arises due to the NBP intervention. No other operator is expected to seek access to Eircom's CEI for the purpose of serving the Intervention Area and at the scale and durability of NBI's demand.

108 According to DECC, the NBI network will require access to over 1.5 million poles and over 15,000 kilometres of underground duct<sup>62</sup> to serve circa 537,000 premises<sup>63</sup>, against the background of a contract between NBI and DECC to last

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<sup>60</sup> While the level of the CEI access price(s) paid in NBI's MIP has no direct impact on the prices that NBI charges for its wholesale services (as these prices are set by way of comparable regulated broadband services), the level of the CEI access prices directly affects the amount of subsidy that NBI requires. In short, the price charged by Eircom to NBI for access to its CEI is used in the financial model to calculate the amount of State aid subsidy and so changes to the CEI price will impact on the level of State subsidy required. It should be noted, however, that the level of State subsidy is not relevant to ComReg's role (it is the responsibility of DECC) and it is not taken into account in ComReg's review of the costing methodologies for determining CEI prices.

<sup>61</sup> <https://www.gov.ie/en/publication/16717-national-broadband-plan-contract/>

<sup>62</sup> <https://www.gov.ie/en/publication/c1b0c9-national-broadband-plan/>

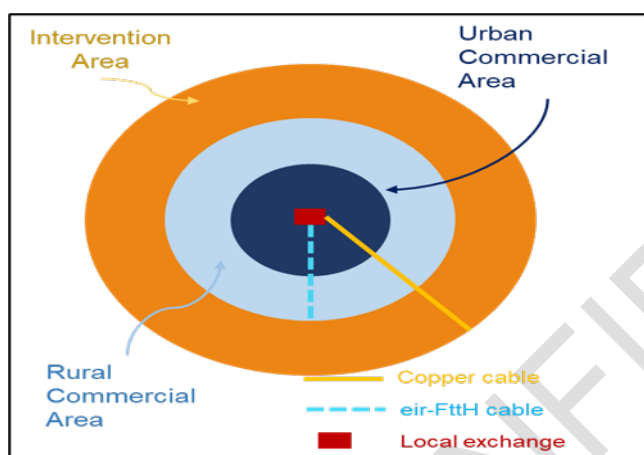
<sup>63</sup> DCCAE (now DECC) refer to circa **537,000** premises, which are in fact **delivery points**. In determining the CEI costs associated with the NBP IA, ComReg in its cost modelling exercise has used unique Eircodes (rather than delivery points), as our key objective is to establish the cost of serving each building with a fibre or copper cable i.e., premises passed. There are circa **452,000** unique **Eircodes** in the NBP IA, which equates to the circa 537,000 delivery points referred to by DCCAE. This difference arises for example when a farm or a B&B associated with a residential premise will have the same Eircode but are counted twice (as having two delivery points) by DCCAE.

for a minimum period of 25 years. This means that the NBP will cover over 20% of the premises in the country.<sup>64</sup>

109 Eircom will likely become a significant CEI provider in the NBP IA and in turn NBI will eventually replace Eircom as the sole NGA wholesale provider in this area.

110 Figure 1 illustrates the different network footprints associated with NBI's CEI access.

**Figure 1: Stylised view of network footprints**



111 The orange outer ring represents the NBP IA, where NBI will seek significant access to Eircom's CEI in the NBP IA, as described at paragraph 107. In the NBP IA (orange outer circle), it is expected that NBI will require access to almost all of Eircom's poles in the NBP IA, estimated to be nearly [3< ] poles (or nearly 70% of its total pole base estimated at [3< ] poles). NBI may only self-supply a CEI network in those limited situations where Eircom does not have a network.<sup>65</sup> There is no effective alternative to access to Eircom's CEI within the NBP IA for NBI.<sup>66</sup> Eircom will likely become a significant CEI provider in the NBP IA and in turn NBI will eventually replace Eircom as the sole NGA wholesale provider in that area.

112 The two inner concentric rings in Figure 1 i.e., light blue and dark blue areas, represent the Commercial Areas. The Commercial Area is divided into the Urban Commercial Area and the Rural Commercial Area, as defined at paragraphs 89.1-89.2.

113 NBI requires access to Eircom CEI in the Commercial Areas in order to interconnect or backhaul to its own Aggregation Nodes in the NBP IA, as NBI does not its own

<sup>64</sup> This is based on 544k premises as a percentage of estimated total premises in Ireland of 2.4m.

<sup>65</sup> NBI may in some cases request access to the ESB's network infrastructure. This would be under a separate commercial agreement between NBI and the ESB.

<sup>66</sup> NBI may in some cases request access to the ESB's network infrastructure. This would be under a separate commercial agreement between NBI and the ESB.

network. NBI's access in the Commercial Areas is likely to be predominantly in the Rural Commercial Areas, where we estimate that NBI will require access to an additional [340,000] poles from Eircom (or 20% of Eircom's total estimated pole base). The Rural Commercial Area represents nearly 15% of the total estimated premises in the Country.<sup>67</sup> The restrictions on NBI in the Commercial Areas were discussed earlier at subsection 3.3.3.

114 It is those unique circumstances of NBI's access to Eircom's CEI as the NBP provider and the terms and conditions of its NBP contract with the Minister for Environment, Climate and Communications which that has led ComReg to set a differentiated price control.

115 The points discussed above are discussed in more detail in Sections 4 - 7 of this Decision.

### 3.4 ComReg's regulatory objectives

#### 3.4.1 Position set out in the Consultation:

116 In the CEI Consultation ComReg explained that the regulatory objectives being pursued by it in determining the costing / pricing approach for Eircom's CEI access prices, are those set out in Section 12 of the Communications Regulation Act of 2002 (as amended) and Regulation 16 of the Framework Regulations, subject to the requirements set out in Regulation 6(1) of the Access Regulations<sup>68</sup>, Regulation 8(6) of the Access Regulations and Regulation 13 of the Access Regulations. The European Electronic Communications Code (the 'EECC') is dealt with separately at Section 3.5.

117 ComReg's regulatory objectives in line with Section 12 of the Communications Regulation Act 2002 (as amended) include to promote competition, to encourage efficient investment and innovation, to contribute to the development of the internal market and to promote the interests of users by encouraging access to the internet at a reasonable cost to end-users.

118 Regulation 16 of the Framework Regulations looks at the promotion of competition, the desirability of technological neutrality, development of the internal market and the application of objective, transparent, non-discriminatory and proportionate regulatory principles, including regulatory predictability, efficient investment, and taking due account of the variety of conditions relating to competition and consumers that exist in various geographic areas.

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<sup>67</sup> 340,000 premises as a percentage of total premises in the country of 2.4m.

<sup>68</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No 334 of 2011) (the "Access Regulations").



119 Regulation 6(1) of the Access Regulations provides that,

*“the Regulator shall, acting in pursuit of its objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and the interoperability of services in such a way as to –*

*(a) promote efficiency,*

*(b) promote sustainable competition,*

*(c) promote efficient investment and innovation; and*

*(d) give the maximum benefit to end-users.”*

120 ComReg is also required by Regulation 8(6) of the Access Regulations to ensure that the obligations it imposes are based on the nature of the problem identified, proportionate and justified and will only be imposed following a consultation process.

121 ComReg must also take into consideration the requirements of Regulation 13 of the Access Regulations, which sets out the considerations which ComReg must have regard to in imposing a price control obligation following a finding of SMP in a relevant market. In the context of this review of the CEI costing methodology, the requirements of Regulation 13(2) are particularly relevant as they specify that ComReg must take into account the investment made by the operator and allow the operator a reasonable rate of return on adequate capital employed. In this regard it is important to ensure when setting the appropriate CEI access prices that Eircom does not over or under recover its efficiently incurred costs associated in particular with its reusable CEI assets, as discussed in further detail in Section 5 below.

122 Section 11 (on the RIA) discusses how ComReg's statutory obligations specified at paragraphs 117-121 have been taken into account.

123 In particular, ComReg noted in the CEI Consultation that in pursuing these regulatory objectives and setting the regulated price for CEI access, it is appropriate and relevant to have regard to the varying conditions for competition across the WLA market, and the different purposes for which CEI access is sought. ComReg pointed out that at the time of publication of the 2018 WLA / WCA Market Review Decision, ComReg found that there remained too much uncertainty with respect to the Irish Government's NBP to draw any firm conclusions at that stage on the potential impact of the NBP on the Relevant WLA Market but noted its intention to keep this under review within the lifetime of this market review.

124 In the CEI Consultation, ComReg considered that following the signing of the NBI

contract, there is now sufficient clarity that its impact on CEI access at least may be assessed and reflected as and if appropriate in order to ensure that the costing / pricing methodology determined for CEI access remains adequate for the purpose of ComReg's statutory objectives. ComReg was of the view that the varying conditions for competition across the WLA market, and clarity as regards the different purposes for which CEI access is sought, mean its objective of promoting competition and efficient investment can only be served by a differentiated price control.

125 In the CEI Consultation<sup>69</sup> ComReg noted that a number of considerations were particularly relevant in this regard, including that it is highly unlikely that there will be competing wholesale NGA networks in the NBP IA (as defined) for the foreseeable future and within the current market review period. Eircom's own deployment of its rural Fibre to the Home ('FTTH') 300k network<sup>70</sup>, which is now complete, is likely to have removed any areas from the NBP IA that could be served commercially.

126 In the **NBP IA**, given that the likelihood of entry by another commercial operator is small — largely due to the less favourable cost and scale characteristics of the NBP IA, and hence the need for State intervention — ComReg's statutory objectives of promoting competition and encouraging efficient investment do not mean setting a price control in order to create sustainable and long term competition with Eircom, and facilitate new commercial entry, by either CEI providers or alternative wholesale broadband providers. In the CEI Consultation<sup>71</sup>, ComReg considered that promoting competition and encouraging efficient investment means allowing for a cost effective deployment of NBI's network and avoiding inefficient duplication of CEI assets in the NBP IA.

127 ComReg considered that promoting competition and encouraging efficient investment in the NBP IA means ensuring that the CEI access service being provided by Eircom to NBI's MIP and its fibre network will, when roll-out is completed, be available to all operators to seek wholesale access service to supply retail customers in the area. Hence, Eircom ought to be allowed to recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of those assets with NBI's MIP. It also means, taking into account that NBI's MIP is likely to eventually replace Eircom's copper-based services, as well as Eircom's plan as regards copper switch-off (and cable removal in the case of poles), avoiding inefficient investment through duplication of fixed costs and failure to achieve economies of scale and having duplicate (Eircom's and NBI's) networks running in parallel after the new fibre network is rolled out.<sup>72</sup>

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<sup>69</sup> Paragraph 106 of the CEI Consultation.

<sup>70</sup> Eircom's rollout is in fact be closer to 340,000 premises, rather than the initial plan of 300,000.

<sup>71</sup> Paragraph 107 of the CEI Consultation.

<sup>72</sup> Paragraph 108 of the CEI Consultation.

128 However, the timing of Eircom's copper switch-off (and removal of its copper cables from poles) remains uncertain.

129 ComReg noted that encouraging efficient investment means in the context of CEI access in the NBP IA setting the right incentives for the transition from copper to fibre services in the NBP IA. The issue of copper to fibre transition in the context of the NBP IA and the extent that different CEI cost sharing options (of per customer, primary/secondary user and per operator) might provide Eircom with suitable incentives to decommission its copper network are a key consideration by ComReg.

130 In the **Commercial Areas**, ComReg considered that different considerations apply<sup>73</sup>, and that it is also necessary to distinguish between Generic Access to CEI and NBI's MIP access to CEI for transit purposes. For Generic Access to CEI, ComReg considered that the existing price control for CEI should continue to apply. In particular the price for Generic Access to CEI should provide the correct investment incentives to promote competition by existing competing operators and facilitate commercial entry by alternative infrastructure providers, taking into account that by contrast to the NBP IA, Eircom is likely to continue to invest in CEI in these areas in order to continue to provide fixed line services to other operators, self-supply to its own retail arm and to end-users. Promoting competition and encouraging efficient investment mean sending the correct 'build-or-buy' signals to Eircom and other operators.

131 By contrast, NBI's MIP access to CEI in the Commercial Areas may not be used for the purpose of competing with other operators in the Commercial Areas, as part of the conditions to the subsidy from the State. NBI's MIP access to CEI in the Commercial Areas is limited to those situations where it requires access for the purposes of transit in order to provide its services in the NBP IA, using its subsidised network. ComReg noted that a key point for consideration in terms of NBI's MIP access to CEI in the Commercial Areas is the fact that Eircom has already replaced poles and cleared duct blockages in the Rural Commercial Area to facilitate the deployment of its own 300k FTTH Rural Network. Existing CEI assets in this context could be considered reusable for the provision of fibre broadband services by NBI in the Commercial Areas.

132 In the CEI Consultation ComReg invited views (in Question 1 of the CEI Consultation) on the matters considered in Section 3 of the CEI Consultation, in particular the regulatory objectives being pursued by ComReg.

### 3.4.2 Respondents' Views and ComReg's Response

133 ComReg received a direct response to Question 1 from seven Respondents, namely Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. While ComReg

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<sup>73</sup> Paragraphs 115-116 of the CEI Consultation.

received no direct reply from Sky to Question 1, ComReg has considered Sky's general response in its assessment of responses to Question 1.

134 NBI<sup>74</sup> and Siro<sup>75</sup> generally agreed with the points considered by ComReg on the regulatory objectives being pursued by ComReg. Eircom submitted that ComReg's approach on CEI was not in line with its regulatory duties and objectives.<sup>76</sup> Eircom claimed that a full market review of the WLA Market is required<sup>77</sup>, that ComReg is materially altering the level of the NBP subsidy<sup>78</sup> and that clarity is needed on the conditions for copper switch-off<sup>79</sup>. Vodafone submitted that in relation to copper switch-off ComReg should not overestimate the speed of migration to NBI's MIP and the subsequent loss of retail revenue by Eircom.<sup>80</sup>

135 Sky submitted that the proposed measures from ComReg are an effective "back door" universal service charge and that ComReg is straying into the area of public policy.<sup>81</sup> Sky also claimed that no objective reason was put forward why ComReg's CEI proposals did not take account of the impact of USO.<sup>82</sup> Virgin Media submitted that to permit a differentiated pricing remedy for one type of access for one company means that a similar differentiated approach may be needed for any other company that decides to undertake significant investment in the future. Virgin Media also claimed that if the CEI access price is lower for NBI (compared to Generic Access to CEI) then this lower price should be passed onto any access seekers of the NBP.<sup>83</sup> BT<sup>84</sup> and ALTO<sup>85</sup> submitted that there could be an incentive for Eircom to provide fibre services in the more attractive areas of the NBP IA and so they did not agree with the considerations made by ComReg in relation to the NBP IA footprint, which ComReg has considered at Section 5 (5.7.2).

136 ComReg's consideration of the points raised by Respondents and ComReg's position are set out below.

### Review of the WLA Market

137 Eircom suggested that ComReg must conduct a full review of the WLA Market and reanalyse the competitive conditions in the entire market to determine whether geographical differences warrant sub-national markets or sub-national remedies.<sup>86</sup> Eircom submitted that the effect of the NBP should be taken into account in a new

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<sup>74</sup> Pages 8-11 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>75</sup> Page 3 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>76</sup> Paragraphs 51-62 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>77</sup> Paragraphs 17-18 and 20-22 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>78</sup> Paragraphs 23-32 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>79</sup> Paragraphs 66-68 of Eircom's Non-Confidential Response dated 18 November 2020

<sup>80</sup> Page 5 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>81</sup> Paragraph 3 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>82</sup> Paragraphs 84-87 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>83</sup> Pages 2-3 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>84</sup> Paragraphs 4-5 of BT's Non-Confidential Response dated 18 November 2020.

<sup>85</sup> Pages 3-4 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>86</sup> Paragraphs 14 and 75 of Eircom's Non-Confidential Response dated 18 November 2020.

assessment of the relevant markets. Eircom also claimed that recent correspondence from ComReg suggests that it will wait the maximum 5-year period before reviewing the WLA Market, although the initial review in the 2018 WLA / WCA Market Review Decision (ComReg Decision D10/18) was conducted with a three year horizon in mind, which means that there is a period of 2 years where market conditions have not been fully considered in ComReg Decision D10/18.<sup>87</sup>

138 ComReg does not agree with Eircom. ComReg notes again, for the avoidance of doubt, that in this Decision, ComReg does not define markets (or sub-national markets). Firstly, ComReg is updating the existing CEI prices for Generic Access seekers based on the European Commission's comments to update prices (at paragraph 79) and in addition, ComReg is further specifying the cost orientation price control obligation for CEI to distinguish between, on the one hand, generic access to CEI, and on the other hand, NBI's MIP access to CEI for the purposes of the NBP, having regard to the significant differences between these two types of access. This should ensure that Eircom can recover its CEI costs that are efficiently incurred as well as an appropriate rate of return while also ensuring that the build/buy pricing signals are provided to alternative providers in the relevant geographic areas i.e., Commercial Areas, in line with ComReg's objective of encouraging investment. Please also see paragraph 80.

139 A consultation on the review of the Physical Infrastructure Access ('PIA') market is planned for Quarter 2 2022 and a separate consultation on the WLA Market is due in the second half of 2022.

#### **ComReg's regulatory objectives and a differentiated pricing remedy:**

140 Eircom considers that ComReg has failed to adequately justify how the specifics of NBP access necessitates a differentiated pricing approach and that ComReg's proposed approach is not in line with ComReg's regulatory duties and objectives.<sup>88</sup>

141 Eircom disagreed that NBI should be given "*favoured regulatory prices*" that are not available to any other operator in the market. According to Eircom "*These special discounted prices for NBI increase the risk of regulatory failure (i.e., that regulatory intervention leads to poor market outcomes for both industry and consumers).*" Eircom also noted that ComReg's proposed approach is "*...counter to the typically desired policy outcomes, in that it fails to reduce duct and pole access prices for other operators seeking similar access to NBI in "commercial areas" and in Eircom's view "...it goes directly against the principles of the Broadband Cost Reduction Directive and foregoes the opportunity to ensure greater infrastructure-based investment (consistent with its Regulatory Objectives) from other operators.*"<sup>89</sup>

142 In contrast, NBI considered that "*...a separate pricing regime is an appropriate*

<sup>87</sup> Paragraphs 20-22 and 69-81 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>88</sup> Paragraph 14 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>89</sup> Paragraph 2 of Eircom's Non-Confidential Response dated 18 November 2020.

*approach to consider, so that it is tailored to the unique set of circumstances under which NBI is rolling out the NBP network and making such large-scale and stable, long-term use of Eircom's pole and duct network.”<sup>90</sup> NBI's advisors, Frontier Economics, stated that the starting point for the assessment of the appropriate pricing approach for CEI access by NBI's MIP is to consider the position of Eircom in a “counterfactual scenario” where the NBP tender had not taken place.<sup>91</sup>*

- 143 Virgin Media considered that a similar differentiated pricing approach for CEI may be needed for any other company that decides to undertake a significant investment in CEI in the future.
- 144 ComReg remains of the view that there are objectively justified differences at play between CEI access provided in the context of the NBP and CEI access ordinarily sought by other operators i.e., Generic Access to CEI, to include operators undertaking a significant investment in CEI in future, to warrant a differentiated pricing remedy. It is the unique circumstances of NBI's access to Eircom's CEI, described at subsection 3.3.4, as the NBP provider and the terms and conditions of its NBP contract with the Minister for Environment, Climate and Communications which that has led ComReg to set a differentiated price control (and prices) as regards Eircom's provision of CEI Access to NBI in this Decision. Hence, with the exception of NBI, all other CEI access seekers will be subject to the CEI price control for generic access users.
- 145 ComReg continues to consider that different pricing approaches are warranted for CEI access in order to achieve ComReg's statutory objectives in Section 12 of the Communications Regulation Act 2002 (as amended) of promoting competition and further to Regulation 16 of the Framework Regulations encouraging efficient investment as well as promoting where appropriate infrastructure-based competition, while promoting regulatory predictability and taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State.
- 146 In the NBP IA, likelihood of entry by another commercial operator is small and ComReg's statutory objectives of promoting competition and encouraging efficient investment do not involve setting a price control in order to create sustainable and long term competition with Eircom, and facilitate new commercial entry, by either CEI providers or alternative wholesale broadband providers. Instead, the appropriate regulatory objectives in the NBP IA are to allow for a cost effective deployment of NBI's network, avoid inefficient duplication of CEI assets and ensure that Eircom is allowed to recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of

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<sup>90</sup> Page 9 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>91</sup> Page 14 of NBI's Non-Confidential Response dated 18 November 2020.

those assets with NBI.

- 147 In this regard, the pricing approach determined in this decision for NBI's MIP in the NBP IA takes into account that any incremental costs caused by NBI are paid by it. This ensures that Eircom can recoup the incremental CEI investments that it incurs in the NBP IA, where the CEI will ultimately be used solely by NBI, once Eircom decommissions its copper network. In addition, NBI's MIP price in the NBP IA reflects the fact that reuse of existing CEI infrastructure is appropriate in order to avoid inefficient investment through duplication of fixed costs and having duplicate (Eircom's and NBI's) networks running in parallel after the new fibre network is rolled out. Where CEI can be reused, use of Eircom's actual costs from its Historical Cost Accounts ('HCAs') ensures that there is no over or under recovery of costs by Eircom, consistent with the 2013 EC Recommendation on reuse of existing CEI.
- 148 Furthermore, encouraging efficient investment means in the context of CEI access in the NBP IA setting the right incentives for the transition from copper to fibre services in the NBP IA. NBI's fibre network will eventually replace Eircom's copper-based services, and so Eircom is expected to retire its copper network. In determining the appropriate pricing methodology for NBI's MIP access to CEI in the NBP IA ComReg has considered suitable incentives for Eircom to decommission its copper network. The decision to use the 'per operator plus' cost sharing approach for allocating the relevant share of pole costs between Eircom and NBI's MIP in the NBP IA means that NBI (and Eircom) will always pay the incremental costs they cause and in addition, Eircom and NBI will pay the remaining shared network costs on a 50:50 basis until such time that Eircom removes its copper cables from its poles at which point NBI's MIP will pay all (100%) of the pole costs. This is discussed further in Section 6.5.
- 149 In the Commercial Areas, different considerations apply and it is necessary to distinguish between Generic Access to CEI and NBI's MIP access to CEI for transit purposes. ComReg remains of the view that the considerations which led to the adoption of the existing price control for CEI continue to apply for Generic Access to CEI. In particular the price for Generic Access to CEI should provide the correct investment incentives to promote competition by existing competing operators and facilitate commercial entry by alternative infrastructure providers, as Eircom is likely to continue to invest in CEI in the Commercial Areas in order to continue to provide fixed line services to other operators, self-supply to its own retail arm and to end-users. Promoting competition and encouraging efficient investment mean sending the correct 'build-or-buy' signals to Eircom and other operators.
- 150 Hence, the costs to be recovered through facilitating Generic Access in the Commercial Areas should continue to include all costs i.e., incremental, shared network costs and common corporate costs. ComReg remains of the view that users should continue to pay a contribution to shared network costs in addition to common corporate costs, which recognises that Eircom should recover all of its

efficiently incurred costs when providing access to its CEI to other competing operators. The national prices for Generic Access to CEI are set based on the costs in the Urban Commercial Area, as Eircom submitted in its response to the CEI Consultation that that is the area where the demand for Generic Access is most likely to be. This is discussed in Section 5.5.2.

151 For NBI's transit access to Eircom's CEI in the Commercial Areas, different considerations again apply. NBI cannot use its subsidised network to compete with other operators in the Commercial Areas, as part of the condition of its subsidy from the state. Hence, a differentiated price for NBI's MIP access to CEI in the Commercial Areas is necessary to prevent the distortion of competition on infrastructure-based platforms caused by the State's intervention in the NBP IA. ComReg's decision to set a LRIC price for NBI's MIP access in the Commercial Areas reflects the fact that NBI will not compete for or serve customers in the Commercial Areas, and as such, does not distort competition with Eircom and other access seekers. As access to Eircom's CEI for NBI's MIP in the Commercial Areas is expected to be used solely to support NBI's fibre services in the NBP IA, rather than competing with Eircom to provide downstream services in the Commercial Areas, NBI's use of Eircom's CEI in the Commercial Areas will not impact on Eircom's downstream revenues from wholesale services sold to premises in the Commercial Areas. Hence, Eircom should not face any erosion of its market share as a result of facilitating the use of its CEI for NBI's MIP to transit the Commercial Areas. Furthermore, competition between Eircom and other access seekers remains undistorted.

152 The LRIC price for NBI's MIP access in the Commercial Areas also takes account of the fact that Eircom has already replaced poles and cleared duct blockages in the Rural Commercial Area to facilitate the deployment of its own 300k FTTH Rural Network and so existing CEI assets in this context could be considered reusable for the provision of fibre broadband services by NBI in the Commercial Areas. The efficient reuse of existing CEI is also consistent with the Broadband Cost Reduction Directive ('BCRD')<sup>92</sup>, despite Eircom's point at paragraph 141 that ComReg's approach to CEI pricing for NBI's MIP in the Commercial Areas "...goes directly against the principles of the Broadband Cost Reduction Directive ...". The LRIC approach for NBI's MIP charges in the Commercial Areas is discussed further in Section 5.6.

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<sup>92</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0061&from=EN>



### Retirement of Eircom's copper-based access network:

- 153 There were mixed views amongst Respondents on setting the right incentives for the transition from copper to fibre services in the NBP IA. Eircom claimed that the proposed approach completely fails to consider the difference between incentive and ability to switch off copper, and that it will only serve to worsen the issue of “artificially low copper prices”. Eircom submitted that as it is subject to existing regulatory remedies on legacy copper products in a number of markets (i.e., WLA / WCA markets, sub-set of the legacy FACO market) and given that USO obligations remain in place, ComReg has failed to give the matter detailed consideration. Eircom called on ComReg to consult on an overall copper switch-off policy that addresses all regulated markets.<sup>93</sup>
- 154 NBI submitted that encouraging migration from copper to fibre within the NBP IA makes sense but it “...*should not solely be dealt with from a policy perspective as a by-product of a pricing decision.*”<sup>94</sup>
- 155 BT<sup>95</sup>, ALTO<sup>96</sup> and Vodafone submitted that ComReg should consider the implications of copper continuing for many years to come and certainly beyond the period of this pricing review. In fact, Vodafone submitted that Eircom has the largest proportion of retail customers in the NBP footprint and will be well placed to retain a large proportion of customers migrating to the NBI service and so the timing of migration away from traditional voice services should not be overstated.<sup>97</sup>
- 156 Sky claimed that ComReg appears to have given no consideration to the actual levels of revenue earned by Eircom (retail and wholesale) on its copper network in the NBP IA today and that this is the most relevant metric that will inform Eircom's incentive if and when to switch off its copper network.<sup>98</sup>
- 157 ComReg has considered the Respondents' Submissions on the issue of setting the appropriate incentives for the transition of copper to fibre services in the NBP IA.
- 158 First, Article 81(1) of the EECR requires that:

*“Undertakings which have been designated as having significant market power in one or several relevant markets ... shall notify the national regulatory authority in advance and in a timely manner when they plan to decommission or replace with a new infrastructure parts of the network, including legacy infrastructure necessary to operate a copper network...”*

<sup>93</sup> Paragraphs 58-60 and 63-67 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>94</sup> Page 12/13 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>95</sup> Page 11 of BT's Non-Confidential Response dated 18 November 2020.

<sup>96</sup> Pages 11-12 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>97</sup> Page 5 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>98</sup> Paragraph 87 of Sky's Non-Confidential Response dated 18 November 2020.

159 In addition, Article 81(2) of the EECC provides that:

*“The national regulatory authority shall ensure that the decommissioning or replacement process includes a transparent timetable and conditions, including an appropriate notice period for transition, and establishes the availability of alternative products of at least comparable quality providing access to the upgraded network infrastructure substituting the replaced elements if necessary to safeguard competition and the rights of end-users.”*

160 Hence, the decommissioning (or migration) from legacy infrastructure is a decision for the SMP operator and the NRA's role is the oversight of its implementation.

161 Since publication of the CEI Consultation, in March 2021, Eircom submitted a white paper to ComReg on its intention to migrate services from copper-based to fibre-based networks, which Eircom subsequently published on its website.<sup>99</sup> In April 2021, ComReg published Eircom's paper and ComReg's correspondence with Eircom, in Information Notice 21/35.<sup>100</sup>

162 ComReg has been considering Eircom's whitepaper and examining what oversight is required by ComReg, in line with Article 81 of the EECC and other SMP regulatory obligations.

163 In May 2021, ComReg published Information Notice 21/43<sup>101</sup> outlining its approach to engaging with Eircom and other stakeholders on this matter. In August 2021 ComReg issued a Call for Inputs in ComReg Document 21/78.<sup>102</sup> The Call for Inputs sought interested parties' views on, inter alia, the principles, processes and notification procedures which ought to be followed by an SMP operator when seeking to implement a migration from legacy infrastructure initiative. With the benefit of the responses to the Call for Inputs, ComReg aims to issue a public consultation in late 2021, with more detailed proposals as to how the transition framework and process should be conducted. As indicated in ComReg Document 21/78, ComReg expects to issue its decision in 2022, but it does not rule out the possibility of a further consultation round in 2022.

164 Notwithstanding the above, ComReg considers that there is merit in providing incentives to Eircom for copper retirement and the removal of copper cables in the case of poles in the NBP IA by means of the prices set for NBI's MIP access. This has been considered by ComReg in determining the appropriate cost sharing approach that should apply for allocating shared network costs between Eircom and NBI in the NBP IA. For poles, ComReg considers that it is more efficient to remove

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<sup>99</sup> [https://www.openeir.ie/wp-content/uploads/2021/03/White-paper\\_Leaving-aLegacy.pdf](https://www.openeir.ie/wp-content/uploads/2021/03/White-paper_Leaving-aLegacy.pdf)

<sup>100</sup> <https://www.comreg.ie/publication/information-notice-copper-switch-off-correspondence>

<sup>101</sup> Consultation Process regarding the Transition from Regulated Copper Products and Services, Information Notice, ComReg 21/43, dated 4 May 2021

<sup>102</sup> <https://www.comreg.ie/media/2021/08/Call-for-Inputs-Migration-from-Legacy-Infrastructure-FINAL.pdf>

redundant cables from poles, as it helps to diminish the load on the pole, thereby helping to prolong its technical life. Hence, the cost sharing approach should help incentivise Eircom to remove redundant copper cables on poles in the NBP IA.

165 For duct, removing redundant copper cables can risk damaging other cables in the duct, so cables are not normally removed unless the perceived benefit outweighs that risk, e.g., freeing up capacity in the duct, or generation revenue from the sale of recovered copper cables. Therefore, ComReg considers that the cost sharing approach for duct access in the NBP IA does not need to further incentivise Eircom to remove redundant cables from ducts, given that duct capacity constraints are not likely to be a material concern in the NBP IA.

166 In this regard ComReg has considered Respondents' Submission on the appropriate cost sharing approach that should apply for poles and ducts in the NBP IA. ComReg has decided that despite the benefits of the 'per customer' approach in terms of incentivising migration from copper to fibre services in the NBP IA, it is impracticable given the absence of reliable active customer line information from Eircom. This is discussed in Section 6.5.

167 As a result, ComReg has decided that an alternative cost sharing approach i.e., a 'per operator plus' approach, should apply in the case of poles whereby NBI and Eircom would pay the incremental costs they cause in the NBP IA and the shared network costs would be split 50:50 between Eircom and NBI. The fact that under the 'per operator plus' Eircom will not be able to charge NBI's MIP 100% of the pole cost until it removes its copper cables from the poles should provide Eircom with additional incentives to remove its cables from its poles in a timely manner after copper switch-off. For the purpose of cost modelling, the average prices set by ComReg in this Decision for NBI's MIP in the NBP IA reflect that copper switch-off would be accompanied by physical removal of Eircom's copper cables. This incentive did not exist with the originally proposed per customer approach, where the charge to NBI would have been based on its share of active connections with the result that NBI's MIP could be paying 100% of the pole cost even if Eircom's copper cables remain on the poles.

168 ComReg expects the "switch-off" of the copper network will begin in the next five years. The CEI access prices set by ComReg in this Decision assume that there will be no copper retirement before 2025. In addition, the CEI models (PAM and DAM) assume that where an exchange has been fibre enabled, that it will be at least five years from then until copper retirement (post 2025). These assumptions will be monitored by ComReg and Eircom as part of the annual review process on the PAM and the DAM, which is discussed in Section 10.

### **NBP subsidy**

169 According to Eircom, ComReg would be altering the level of the NBP subsidy and hence retrospectively distorting the conditions associated with the NBP

procurement process post contract award. Eircom referred to paragraph 107 of the CEI Consultation and stated that ComReg has explicitly called out a change in its regulatory objectives with regard to the NBP IA, that promoting competition and encouraging efficient investment in this scenario now means "*allowing for a cost effective deployment of NBI's network*". For Eircom this means facilitating efficient re-use of existing CEI by NBI, and thus directly lowering the level of the subsidy.<sup>103</sup>

170 In addition, Eircom submitted that ComReg's proposals partially remove the incentive for NBI to minimise cost by mandating a lower regulated CEI access price specifically for NBI's purposes and given the design of the clawback mechanisms in the NBP Contract between NBI and DECC, the end result is a subsidy from Eircom to NBI and the State.<sup>104</sup> According to Eircom's understanding of the State Aid Guidelines they do not suggest that CEI access could be provided at prices other than those already prevailing in the market i.e., generic access regulated prices.<sup>105</sup>

171 Sky also claimed that ComReg's approach is highly favourable to NBI by reducing the scale of the subsidy it requires from the Irish state.<sup>106</sup> In addition, Sky stated that NBI's bid for the NBP tender assumed no special treatment on pricing (save for a marginal volume discount) and did not assume it would not have to make a contribution to Eircom's common costs for access to WLA products.<sup>107</sup>

172 On the other hand, NBI supported the position set out at paragraph 107 of the CEI Consultation stating that ComReg is correct that "*... in the context of the NBP, its regulatory obligation of promoting competition and encouraging efficient investment is best interpreted as an approach that allows for the cost-effective deployment of the NBP network while avoiding the inefficient duplication of CEI assets.*" NBI further noted that the Irish Government had identified a market failure in the NBP IA and that "*NBI's requirement for CEI access stems directly from the Government's approach to dealing with this market failure and so, absent any credible prospect of competitive NGA build within the IA over the medium-term, it is absolutely appropriate for ComReg to align its regulatory objectives to support this important Government initiative.*"<sup>108</sup>

173 To clarify, the level of the NBP subsidy and any associated "clawback" mechanisms provided for in the NBP contract between NBI and DECC is not relevant to ComReg's role but is the responsibility of DECC. Any impact on the level of the NBP and the associated clawback mechanism arising from the price control is not a relevant consideration for ComReg in determining Eircom's CEI access prices.

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<sup>103</sup> Paragraphs 43-46 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>104</sup> Paragraph 30 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>105</sup> Paragraph 23 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>106</sup> Paragraph 36 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>107</sup> Paragraphs 38-39 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>108</sup> Page 11 of NBI's Non-Confidential Response dated 18 November 2020.

Please also see paragraph 85.

174 ComReg also notes, as explained by Dot Econ in its note on recovery of common corporate costs at Annex 2 of the ANM Decision that “*A cross-subsidy arises where a service does not cover its incremental costs and a contribution is made through a margin earned through other services priced above their incremental cost.*” ComReg’s approach in this Decision means that NBI’s MIP charges always pay for the incremental costs associated with the CEI access service and the debate is more about the sharing of those non-incremental costs in the NBP IA. Hence, there is no cross subsidisation in ComReg’s approach to the NBI’s MIP charges in the NBP IA, contrary to Respondents’ suggestion.

175 ComReg notes further that in setting charges for NBI’s MIP access to CEI, ComReg’s role, amongst other things, is to ensure that Eircom can recover the investments that it incurs as a result of providing CEI access to NBI’s MIP (along with a reasonable rate of return). In the Commercial Areas, the CEI access price for NBI’s MIP must ensure that Eircom does not (over) recover additional revenues from NBI which could, as a result, undermine build/buy signals and distort competition. As NBI cannot use its subsidised network from the NBP IA in order to compete with Eircom in downstream markets in the Commercial Areas, unless the price control is amended to take into account, the additional revenue flow from NBI which is not currently accounted for, could lead to Eircom recovering significant additional revenues in the Commercial Areas in the form of a windfall gain. This in turn could lead to competitive distortions where Eircom may lower prices for end-user services and/or access services in the Commercial Areas, which could then lead to reduced incentives for full infrastructure competition in the Commercial Areas. Hence, intervention is required in order to ensure that revenues accruing to Eircom from NBI’s MIP’s access to CEI in Commercial Areas do not give Eircom an unfair competitive advantage or distort build/buy signals to the detriment of other alternative operators.

176 In the NBP IA, the objectives pursued by the CEI price control set by ComReg are to ensure both that Eircom may recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets for the purposes of sharing those assets with NBI’s MIP, while also discouraging unnecessary duplication of CEI by NBI, and to ensure that Eircom faces the right incentives in terms of customer migration from its copper network to NBI’s fibre network. In this regard, the CEI access price for NBI’s MIP in the NBP IA includes the incremental costs caused by NBI as well as a contribution towards the shared network costs of CEI in the NBP IA.

177 A contribution towards the shared network costs recognises the fact that the expected replacement of Eircom’s copper network with NBI’s fibre network means that NBI’s use of Eircom’s CEI in the NBP IA will ultimately impact on Eircom’s downstream revenues from the copper based wholesale services sold to premises

in the NBP IA. Therefore, Eircom's ability to fund / recover the cost of maintaining its CEI in the NBP IA from the revenues it receives from the wholesale customers on its copper network will be eroded over time, with the prospect that all CEI costs in the NBP IA may eventually have to be recovered from NBI's MIP. Since the CEI Consultation ComReg has reassessed the issue of NBI contributing towards common corporate costs and in some cases costs that were previously considered as common corporate costs have been respecified as being incremental (or scalable) to Eircom's provision of CEI access to NBI's MIP in the NBP IA and hence those incremental/scalable common corporate costs are recovered from NBI's MIP charges in the NBP IA. This is discussed in detail in Section 5.7.2.

178 Eircom also commented that ComReg is *"entirely altering the underlying assumptions that feed into standard regulated tariffs in an apparent attempt to produce the lowest possible price for the benefit of NBI specifically."*<sup>109</sup>

179 To clarify, the FTTC price in the 2018 Pricing Decision already assumes that all common corporate costs are recovered in the commercial area and this approach has been maintained in ComReg's recent decision on the Access Network Model ('ANM') in ComReg Decision [Dxx/21] (the 'ANM Decision'), but with some re-specification of costs previously recognised as common corporate costs to costs that are considered incremental (scalable) to services in the NBP IA. Please refer to Section 5 of the ANM Decision. In addition, it should be noted that the national price for Wholesale Line Rental ('WLR') set in the 2016 Access Pricing Decision required a degree of cross funding between lower cost lines and the longer more expensive lines in lower density areas that are typical of the NBP IA. Hence, the pricing approach for PSTN WLR already reflected the fact that the copper based services sold in the NBP IA would not be in a position to contribute to common cost recovery.

180 Having taken into account the Respondents' Submissions, and the advice from Dot Econ and Europe Economics, ComReg considers that the regulatory objectives discussed by ComReg in Section 3 of the CEI Consultation remain appropriate for the reasons outlined in Section 3.4.2 above and throughout the rest of this Decision.

## 3.5 Other regulatory considerations

### 3.5.1 Universal service obligations ('USO')

181 Eircom was designated as the Universal Service Provider (the 'USP'), to provide access at a fixed location to a public communications network, for the period 29 July 2016 – 30 June 2021, for the entire State, in line with ComReg Decision

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<sup>109</sup> Paragraph 43 of Eircom's Non-Confidential Response dated 18 November 2020.

D05/16<sup>110</sup> (the '2016 USO Decision').

182 On 27 May 2021 ComReg published its consultation and draft decision ('**Consultation 21/51**') on the Universal Services Requirements Provision of access at a fixed location ('**AFL USO**').<sup>111</sup> Subsequently, on 22 June 2021 ComReg also published an interim designation consultation on AFL USO ('**Consultation 21/66**').<sup>112</sup>

183 In summary, in Consultation 21/51, ComReg reached the preliminary view that there is a continued need for an AFL USO(s) for Ireland post 30 June 2021.

184 Consultation 21/51 includes consideration of the rollout of the NBP and commercial deployments. Paragraphs 27 & 28 of Consultation 21/51 states that:

*"The committed investment by commercial enterprises coupled with intervention by the State via the National Broadband Plan should, once the NBP Intervention is completed, ensure that high speed broadband and voice services are delivered to all premises in Ireland. At that time, the need for a Universal Service Obligation (USO) to provide adequate broadband connection and service will be assessed following transposition [of the EECC]. ComReg anticipates however that these commercial and State deployments will not be completed within the next 12 – 24 months"*

185 In paragraph 409 of Consultation 21/51 ComReg stated that it:

*"...is of the preliminary view that it cannot be assured that, absent an AFL USO, services would be delivered commercially (now and in the future) at an affordable price and appropriate quality, throughout the State. Accordingly, removing AFL USO (...) at this time would appear to be premature. ComReg is therefore of the preliminary view that there is a continued need for an AFL USO throughout the State, post 30 June 2021."*

186 On 30 June 2021 ComReg issued ComReg Decision D05/21<sup>113</sup>, maintaining the current AFL USO on Eircom until 30 October 2021 or until the date on which ComReg has made a final decision on the future need for a designation of a USP for AFL USO, whichever date is earlier.

187 In the context of this CEI review and in response to Q1 in the CEI Consultation, Sky questioned why ComReg's proposals on the costing/pricing methodologies for CEI

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<sup>110</sup> ComReg Document 16/65: Response to Consultation and Decision on "Universal Service Requirements – Provision of Access at a Fixed Location", dated 29 July 2016.

<sup>111</sup> <https://www.comreg.ie/publication/universal-service-requirements-provision-of-access-at-a-fixed-location-afl-uso>

<sup>112</sup> <https://www.comreg.ie/publication/universal-service-requirements-provision-of-access-at-a-fixed-location-afl-uso-interim-designation>

<sup>113</sup> ComReg Document 21/71 "Universal Service Requirements Provision of access at a fixed location (AFL USO): Interim Designation" <https://www.comreg.ie/media/2021/06/ComReg-2171.pdf>

did not take account of any actual or potential impacts arising from Eircom's USO obligations. Sky considered that the upshot of taking that approach means that ComReg lends "far too much weight" to assessing outcomes associated with Eircom's incentive to switch-off copper as part of the costing approach.<sup>114</sup>

188 As regards USO, the fact that an application for USO funding is based on the net cost incurred by the USP in providing the USO means that any common costs that are not incremental to the USO are excluded from the funding application. Therefore, Eircom's designation as the USP should not be relevant to the pricing of CEI. However, the fact that NBI will be contributing to the costs of the CEI it is sharing with Eircom in the NBP IA could affect the level of costs that are considered incremental to Eircom's USO, as, for example, the cost of poles in the IA, which were previously only used by Eircom to provide PSTN WLR services in the NBP IA, now become a joint/shared cost that can be shared between Eircom and NBI.

189 In the CEI Consultation ComReg put forward various cost sharing approaches for allocating the CEI shared network costs between Eircom and NBI in the NBP IA, so as to encourage the efficient migration from copper to fibre. This included the option of using a primary/secondary operator approach whereby Eircom would be the primary operator and absorb all shared network costs until it withdraws its copper cables while NBI would be the secondary user and only pay its incremental costs until it became the sole user of the CEI at which point it would pay the entire CEI costs. In addition, the other option of a 'per customer' approach meant that sharing of costs could be objectively informed by the relative number of the NBP IA premises actively connected either to Eircom's or NBI's networks.

190 However, taking into account Respondents' Submissions on the cost sharing approach for shared network costs in the NBP IA, ComReg has concluded that it will not adopt either of the approaches set out above but instead it will adopt the approach whereby NBI (and Eircom) will always pay the incremental costs incurred for duct and poles in the NBP IA and in the case of poles the shared network costs will be split 50:50 (on the basis that NBI and Eircom are only present on the pole) while the shared network costs for duct will be split according to the per metre of duct / sub-duct consumed. ComReg considers that splitting the shared costs in this way minimises any implications for USO funding as, for example, Eircom's copper access network will continue to make a fixed contribution to the cost of the pole until it removes its copper cables from the pole.

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<sup>114</sup> Paragraph 84 of Sky's Non-Confidential Response dated 18 November 2020.



### 3.5.2 2010 and 2013 EC Recommendations

191 The European Commission has published two recommendations in relation to Next Generation Access networks: a recommendation on access to NGA in 2010<sup>115</sup> (the '**2010 EC Recommendation**') and the European Commission's 2013 Recommendation on non-discrimination and costing methodologies<sup>116</sup> (the '**2013 EC Recommendation**').

192 The 2010 EC Recommendation looks at, amongst other things, common principles for the pricing of NGA services i.e., FTTC and FTTH, pricing of access to CEI, criteria for setting a risk premium (considering the investment risk associated with NGA services) while also assessing equivalence of access to CEI of the SMP operator for the purposes of rolling out NGA networks.

193 The 2013 EC Recommendation, amongst other things, looks at the way copper and NGA wholesale access prices should be set and where cost orientation is appropriate. In particular where cost orientation is the preferred approach (in order to address the competition problem(s) at hand), the 2013 EC Recommendation considers that the costing methodology for the calculation of wholesale NGA access products should be based on a BU LRIC+ approach. The 2013 EC Recommendation also advises that NRAs should value reusable legacy CEI assets e.g., ducts and poles and their corresponding regulatory asset base ('**RAB**') on the basis of the SMP operator's accounts.<sup>117</sup>

194 The 2013 EC Recommendation, at Paragraph 25, also highlights the need for stable and predictable wholesale copper access prices over time stating that:

*"...Such a costing methodology should ... avoid significant fluctuations and shocks, in order to provide a clear framework for investment and be capable of generating cost oriented wholesale copper access prices serving as an anchor for NGA services, and deal appropriately and consistently with the impact of declining volumes caused by the transition from copper to NGA networks, i.e. avoiding an artificial increase in wholesale copper access prices which would otherwise be observed as a result of customers migrating to the NGA network of the SMP operator."*

195 ComReg has considered these European Commission Recommendations as part of its assessment and determination of the appropriate costing / pricing methodology to adopt in relation to CEI access in this Decision.

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<sup>115</sup> European Commission's Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (2010/572/EU).

<sup>116</sup> European Commission's Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU).

<sup>117</sup> See paragraph 33-36 of the 2013 EC Recommendation.

### 3.5.3 European Electronic Communications Code

196 The EECC entered into force on 20 December 2018 and was required to be transposed into Irish national law by 21 December 2020.<sup>118</sup> The EECC amends and replaces the current EU regulatory framework for electronic communications.<sup>119</sup>

197 As the EECC has not yet been transposed into Irish law as at the date of this Decision, the legal basis for this CEI pricing review is the existing statutory regime, including the provisions set out in the Framework Regulations and the Access Regulations, read in light of the EECC. Whilst publication of this Decision occurs before the EECC has been transposed into Irish law, ComReg is satisfied that its conclusions, as contained in this Decision, are consistent with the provisions of the EECC.

198 Regulatory objectives for national regulatory authorities such as ComReg under the EECC are contained in Article 3 and are broadly consistent with those under the Irish regulatory framework (such as the promotion of competition and citizens' interests)<sup>120</sup>. The EECC includes the additional objective to promote connectivity and access to, and take up of, very high capacity networks<sup>121</sup> (including fixed, mobile, wireless networks) by all end-users. The objective to promote competition under Article 3 also includes an explicit reference to:

*"...promoting efficient infrastructure-based competition..."*<sup>122</sup>

199 Article 3 specifies that the promotion of citizens' interests includes:

*"...ensuring connectivity and the widespread availability and take-up of very high capacity networks..."*<sup>123</sup>

200 In addition, Article 81 of the EECC explicitly sets out the role of the NRA in facilitating migration from legacy copper networks to NGA networks by establishing conditions for an appropriate migration process which is in the interests of end-users.

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<sup>118</sup> Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

<sup>119</sup> Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, 7 March 2002 (as amended) (**Access Directive**); Directive 2002/20/EC on the authorisation of electronic communications networks and services, 7 March 2002 (as amended) (**Authorisation Directive**); Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 7 March 2002 (as amended) (**Framework Directive**); Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, 7 March 2002 (as amended) (**Universal Service Directive**).

<sup>120</sup> Article 8 of the Framework Directive.

<sup>121</sup> As defined in Article 2(2) and referred to in Recital 13 of the EECC.

<sup>122</sup> Article 3(2)(b) of the EECC

<sup>123</sup> Article 3(2)(d) of the EECC. See also Recital 24.

## 4 Differentiation of CEI price control

### 4.1 Overview

201 In this section of the document ComReg sets out the factors that it considered in establishing a differentiated price control for CEI for the two different types of CEI access seekers.

202 The rest of this section is discussed under the following headings:

- (a) Existing CEI price control and what has changed; and
- (b) Factors considered in differentiating CEI price control obligation.

### 4.2 Existing CEI price control and what has changed

203 The current price control for CEI access set in the 2016 Access Pricing Decision and re-imposed in the 2018 WLA / WCA Market Review Decision is in the form of an obligation of cost orientation where costs are calculated based on a combination of actual TD HCA costs for reusable assets and the BU-LRAIC+ (or replacement / current costs) for non-reusable assets.

204 Current CEI prices are differentiated by geographic footprint. For poles, different maximum annual prices apply in the Modified LEA and outside the Modified LEA. This differentiation between Modified LEA and outside the Modified LEA reflects the cost differences that were observed with regard to the average historic costs for poles taken from Eircom's fixed asset register as part of Eircom's historical cost accounts (the 'HCAs') at the time of the 2016 Access Pricing Decision, which in turn, would have been a consequence of the historical timing of pole investment by Eircom in different exchange areas.

205 For ducts, the existing maximum annual Sub-Duct Access prices are differentiated by surface type (carriageway, footway and verge) and by Dublin and Provincial. Sub-contractor rates (charged to Eircom) differed on the basis of the surface type in which the duct was deployed, and so, for consistency, different cost-oriented prices were set for Sub-Duct Access depending on surface type. In addition, Eircom also faced higher subcontractor rates to deploy duct in those exchanges that are in and around the Dublin area compared to areas outside of Dublin (i.e., Provincial areas). Consequently, in the 2016 Access Pricing Decision ComReg set the prices for duct differentiated by surface type and for 'Dublin' and 'Provincial' areas, to reflect the differences in costs.

206 Since 2016 however, the majority of pole investment by Eircom has focused on those rural areas where Eircom has passed premises with its FTTH network. As a

result, the average actual historic costs for poles in the Rural Commercial Area is now higher than in other areas of the country given the actual investments in poles (and ducts) recorded on Eircom's FAR in this area, based on Eircom's commitment (to DCCA) to rollout FTTH services in this area i.e., Eircom's 300k FTTH network in the Rural Commercial Area.

207 The rollout of NGA more generally requires some upgrading of Eircom's CEI, which will lead to additional costs. This has already happened in the Rural Commercial Area and the resulting CEI can be shared with various potential access users. In contrast in the NBP IA, this has yet to happen and in fact the investment in CEI in this area will be triggered by NBI's MIP. As a result, there are likely to be differences in unit costs for CEI between the Rural Commercial Area and the NBP IA.

208 In the future the level of pole replacement in the Rural Commercial Area should be much lower compared to the NBP IA and the Urban Commercial Areas, which is where the likely focus of pole replacement by Eircom will take place in the coming years. Consequently, the historic cost differential between the Modified LEA and outside the Modified LEA for pole access is less relevant. Any prospective cost differences are likely to be between the costs in the NBP IA and in the Commercial Areas. The same considerations apply to duct access costs, where any future investment (or replacement) by Eircom is likely to be focussed on the NBP IA and the Urban Commercial Area (rather than the existing Dublin and Provincial differentiation). This is considered further in Section 5 below.

209 The remainder of this section looks at the factors considered for differentiating the price control for NBI's MIP access to CEI and Generic Access to CEI, in both the NBP IA and in the Commercial Areas.

### 4.3 Factors considered in differentiating CEI price control obligation

210 Regulation 16 of the Framework Regulations provides that ComReg should take:

*"...due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State."*

211 ComReg Information Notice 17/94<sup>124</sup> identified a number of specific circumstances susceptible to justify a different treatment of CEI access requests (among others) for the purpose of the NBP including that:

- *"The products transit the 300k area only with no service provided in the 300k area permitted"*

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<sup>124</sup> <https://www.comreg.ie/publication/comregs-response-questions-nbp-process-regulatory-matters/>

- *The transit products have specific network design features and are specific to the rural fibre network*
- *25 year infeasible right of use (IRU) access and pricing terms are proposed*
- *There is a requirement to ensure no state aid distortion into the non-intervention area.”<sup>125</sup>*

212 ComReg further noted in Information Notice 17/94 that:

*“While ComReg cannot fetter its discretion with regard to either regulation or competition law, ComReg is of the view that the specific circumstances identified imply that Eir would not be required to automatically offer similar terms in other circumstances. While ComReg cannot pre judge the outcome of any future access request or, as noted above, fetter its discretion, it would have regard to these specific circumstances arising from the NBP in which access to these products was granted if it were called upon to adjudicate on such a request”.<sup>126</sup>*

213 In a subsequent information notice, Information Notice 18/51,<sup>127</sup> ComReg responded to questions raised by interested third parties regarding the NBP process, in particular with regard to CEI access. ComReg stated that:

*“It is ComReg’s view that there are objectively justified different circumstances at play in relation to the use of NBP Specific Product Process Enhancements for the purposes of the NBP such that these would not be equivalent to CEI access provided in other circumstances. There are substantial differences between these access requests for the NBPCo and those ordinarily sought by other authorised operators (“OAO”).”*

214 Therefore, ComReg recognises that there are “objectively justified” differences at play between CEI access provided in the context of the NBP and CEI access ordinarily sought by other operators (referred to as Generic Access to CEI in this document), where this relates to the use of NBP Specific Product Process Enhancements.

215 CEI access in the context of the NBP has a unique set of circumstances, as discussed at subsections 3.3.3 - 3.3.4 above. These are important factors in determining the appropriate pricing remedy for NBI’s MIP access.

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<sup>125</sup> Information Notice 17/94, page 7.

<sup>126</sup> Ibid.

<sup>127</sup> Information Notice 18/51 on ComReg’s response to Interested Parties Questions – relating to the NBP Process, dated 19 June 2018.

216 Consequently, ComReg considered the following factors in its assessment of whether a differentiated price control obligation for CEI was deemed justified and proportionate:

- (a) Possible impact on competition and investment incentives;
- (b) Scale and duration of access by the CEI access seeker;
- (c) Whether the costs of making CEI NGA-ready benefits multiple CEI users or instead is specific to one CEI user; and
- (d) Whether Eircom's ability to recover its efficiently incurred cost is eroded by providing access to its CEI, particularly where the CEI user is competing with Eircom for the same users.

217 Those factors at paragraph 216 are considered below as part of ComReg's assessment of the two types of CEI access sought from Eircom, going forward.

#### 4.2.1 CEI access sought in the Commercial Areas

218 Generic Access to CEI is generally sought by operators that are deploying networks to compete directly with Eircom in downstream markets in the Commercial Areas. These operators typically tend to avail of Generic Access services to expand their existing networks in order to target customers from other network providers including Eircom in the more densely populated areas. Therefore, Generic Access to CEI can facilitate entry by other operators in those parts of the network where sufficient economies of scale and scope exist to allow a number of network operators to enter and compete with Eircom, which fosters competition in downstream markets.

219 Generic Access to CEI by other operators means that these operators are gaining access to Eircom's CEI to deploy their own cables to offer their network services downstream. Generic Access to CEI in the Commercial Areas by a competing operator entails possible loss by Eircom of its market share in the downstream markets and associated revenues and margins.<sup>128</sup>

220 The existing costing methodology (of a combination of BU-LRAIC+ cost and TD HCA costs) for Generic Access to CEI ensures that a share of the full set of costs (fixed, variable, shared network costs and common corporate costs) are recovered by Eircom in the context of providing a competing operator with access to its CEI thereby ensuring that any loss of market share by Eircom as a result of providing access does not result in inadequate cost recovery by Eircom. ComReg considers

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<sup>128</sup> ComReg considers that Eircom's investment in CEI in the Commercial Areas in order to make its network 'NGA ready' benefits a number of competing operators and so the costs should be shared across all competitors.

that the existing CEI costing / pricing methodology (of BU-LRAIC+ and TD HCA) for Generic Access to CEI remains appropriate, subject to some refinements to the costing data being used which is discussed in Section 5.

- 221 The second form of CEI access is access to Eircom's CEI by NBI's MIP in the Commercial Areas for the purposes of enabling NBI to transit these areas in order to serve those customers in the NBP IA. NBI's MIP is expected to require access to a significant amount of Eircom's CEI in the Commercial Areas (in particular the Rural Commercial Area) in order to transit between the NBP IA and NBI's interconnection points outside the NBP IA (i.e., in Commercial Areas), so as to serve customers in the NBP IA.
- 222 Access requests by NBI's MIP in the Commercial Areas will be used solely to support NBI's fibre services in the NBP IA, rather than competing with Eircom to provide downstream service in the Commercial Areas. This is because NBI will not use its subsidised network outside the NBP IA to provide services / compete for customers in the Commercial Areas. One consequence of this restriction is that NBI's use of Eircom's CEI in the Commercial Areas, and by contrast with the position with Generic Access to CEI, should not impact on Eircom's business plans in downstream markets.
- 223 In light of this, ComReg considers that the existing costing / pricing methodology for Generic Access to CEI (which allows for the recovery of a share of the full set of costs as described at paragraph 220) which recognises the potential impact on margins and cost recovery ability for Eircom due to Eircom's possible loss of market share in the downstream markets is not appropriate for NBI's MIP access. In particular, pricing CEI access for NBI's transit access in the Commercial Areas on the same basis as for Generic Access to CEI would lead to excess cost recovery / excess revenues on the part of Eircom leading to competitive distortions in the Commercial Areas. Hence, ComReg considers that in order address this competitive distortion an alternative costing methodology (of LRIC) should be implemented for setting NBI's MIP charges in the Commercial Areas. This is discussed at Section 5.6 of this Decision.
- 224 Another factor considered in terms of NBI's MIP access to CEI in the Commercial Areas is the fact that Eircom has already replaced poles and cleared duct blockages in the Rural Commercial Area to facilitate the deployment of its own 300k FTTH Rural Network. As such, the existing CEI assets in this context are reusable for the provision of fibre broadband services by NBI's MIP in the Commercial Areas and so this should be reflected in the CEI access prices.
- 225 The factors discussed at paragraphs 218-224 are considered further in Sections 5 and 6 of this document.

## 4.2.2 CEI access in the NBP IA

226 As set out in Section 3, ComReg's regulatory objectives for the NBP IA is to ensure that Eircom can recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of those assets with NBI's MIP and avoid inefficient network duplication.

227 In the NBP IA, NBI's MIP is likely to require substantial and widespread access to Eircom's CEI to serve circa 537,000 premises (delivery points) for at least 25 years. ComReg understands that the large majority of these poles and ducts will be provided by Eircom. It is expected that premises will ultimately be served by NBI's fibre service with many currently served only from Eircom's copper network and ultimately migrating to receive fixed line services from NBI's fibre network.

228 As a result, Eircom's investments in CEI in order to make the network 'NGA ready' is solely due to NBI's access requirements. Hence, any investment by Eircom in CEI in the NBP IA is likely to be solely for the benefit of NBI's MIP (unlike the situation in the Commercial Areas where such investment benefits a number of competing operators). In fact, Eircom is likely to become a key supplier of CEI access services to NBI's MIP, rather than the main provider of fixed line telecommunication services in the NBP IA. In the NBP IA, ComReg expects that the migration of copper customers from Eircom's copper network onto NBI's fibre network will result ultimately in the decommissioning of Eircom's copper network and NBI's MIP may emerge as the only user of a significant proportion of Eircom's poles and ducts in the NBP IA. Hence, the costs recovered by Eircom for CEI access through NBI's MIP may be the only revenues that Eircom receives for the use of CEI in the NBP IA.

229 This also means that in a manner similar to the situation when a rival operator uses Generic Access to CEI in the Commercial Areas (in order to compete directly with Eircom), Eircom's ability to fund / recover the cost of maintaining its CEI in the NBP IA from the revenues it receives from the customers on its copper network may be eroded over time, with the prospect that all CEI costs in the NBP IA may eventually have to be recovered from NBI's MIP.

230 A key consideration in the context of the NBP IA is setting the right incentives for the transition from copper to fibre services in the NBP IA and the eventual withdrawal of Eircom's copper network. Section 6 of this document determines the appropriate cost sharing methodology which should provide Eircom with suitable incentives to decommission its copper network.

231 The factors discussed at paragraphs 226-230 are considered further in Sections 5 and 6 of this document.



## 5 Costing methodology for CEI access

### 5.1 Overview

232 In this section of the document ComReg determines the appropriate costing methodology and the cost modelling approach that should apply in relation to the following:

- (a) Generic Access to CEI;
- (b) NBI's MIP in the NBP IA; and
- (c) NBI's MIP for transit purposes outside the NBP IA.

233 In reaching ComReg's position below, ComReg has taken into account the recommendations from Dot Econ, which are set out in the Dot Econ Final Report at Annex: 2 of this Decision. In addition, ComReg has been assisted by Cartesian Consultants in respect of the CEI cost models (PAM and DAM) used to implement the costing methodologies and to derive the CEI charges.

### 5.2 Background on existing CEI access charges

234 The price control for CEI access (for duct and pole access) decided in the 2016 Access Pricing Decision and re-imposed in the 2018 WLA / WCA Market Review Decision was designed primarily with the view to facilitating Generic Access to CEI to compete directly with Eircom in a downstream market. The existing CEI access prices were set as follows:

- a) Duct access prices i.e., Sub-Duct Access, are determined based on a 95% reuse of Eircom's ducts (absent NGA rollout) using projected Top Down costs or Eircom's regulatory asset base ('RAB')<sup>129</sup> from its HCAs and an assumed 5% replacement of Eircom's ducts (due to NGA rollout) using a BU-LRAIC+ methodology (RAB based on current / replacement costs).
- b) Pole access prices are determined based on a 92% reuse of Eircom's poles (absent NGA rollout) using projected Top Down costs (or Eircom's RAB from its HCAs); and an assumed 8% replacement of Eircom's poles (due to NGA rollout) based on the BU-LRAIC+ methodology (RAB based on current / replacement costs).

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<sup>129</sup> The RAB as defined in the 2013 EC Recommendation means the total capital value of the assets used to calculate the costs of the regulated services. In the 2016 Access Pricing Decision Eircom's RAB was based on the net book value of the assets from Eircom's accounts and depreciated over the remaining lifetime of the asset by applying a tilted annuity formula which uses as a parameter the asset price index.

235 Furthermore, the existing maximum pole and Sub-Duct Access prices were calculated using the Revised CAM and differentiated by geographic footprint to take account of variances in costs in the different geographic areas, as described at paragraphs 204-205.

236 Since 2016 however, the majority of pole investment by Eircom has focused on those rural areas where Eircom has passed premises with its FTTH network. As a result, the average actual historic costs for poles in the Rural Commercial Area is now higher than in other areas of the country given the actual investments in poles (and ducts) recorded on Eircom's FAR in this area, following Eircom's 300k FTTH network rollout in the Rural Commercial Area.

237 The rollout of NGA, more generally, requires some upgrading of Eircom's CEI, which will lead to additional costs. This has already happened in the Rural Commercial Area and the resulting CEI can be shared with various potential access users. In contrast in the NBP IA, this is at an early stage and in fact the investment in CEI in this area will be triggered by specific requirements of NBI's MIP. As a result, there are likely to be differences in unit costs for CEI between the Rural Commercial Area and the NBP IA.

238 In the future the level of pole replacement in the Rural Commercial Area should be much lower compared to the NBP IA and the Urban Commercial Areas, which is where the likely focus of pole replacement by Eircom will take place in the coming years. Consequently, the historic cost differential between the "Modified LEA" and "outside the Modified LEA" for pole access is less relevant. This is because any prospective cost differences are likely to be between the costs in the NBP IA and in the Commercial Areas. The same considerations apply to duct access costs, where any future investment (or replacement) by Eircom is likely to be focussed on the NBP IA and the Urban Commercial Area (rather than the existing Dublin and Provincial differentiation).

239 In the remainder of this section of the document ComReg has summarised its preliminary position from the CEI Consultation, considered the Respondents' Submissions and, having regard to those submissions, set out its final position on the appropriate costing methodology and cost modelling approach for CEI access, under the following sub-headings:

- (a) General costing methodology;
- (b) Specific costing methodologies for CEI access;
- (c) Costing principles for Reusable and Non-Reusable CEI Assets;
- (d) Depreciation methodology for CEI access;
- (e) Asset lives for CEI assets;

(f) Determination of CEI unit costs.

## 5.3 General costing methodology

### 5.3.1 Position set out in the Consultation:

240 In Section 5 of the CEI Consultation, ComReg considered the general costing methodologies that should apply in the context of setting CEI access prices.

241 ComReg noted that certain assets and resources are dedicated to unique services and therefore these associated costs are considered as a direct cost and can be recovered solely from those services. However, in the case of assets and resources that can be used by many different services rules are needed to inform the allocation of the related costs to the particular services that the assets / resources support:

- **Joint costs:** these are costs incurred by some but not all services (e.g., a voice platform that is used by call transit, call origination, call termination, but not by broadband services or leased lines services);
- **Shared network costs:** these are costs used by all services e.g., network costs of ducts and trenching are consumed by all fixed line services and which ComReg referred to as '**shared network costs**' in this document; and
- **Common corporate (overhead) costs:** these are costs that cannot be allocated to services using a specific allocation method e.g., the costs of the Chief Executive's office which cannot be associated with one single service or a single set of services would be allocated to all services, and which ComReg referred to as '**common corporate costs**' in this document. <sup>130</sup> In the ANM Decision, ComReg refers to 'common corporate costs' as 'common costs'.

242 As a first step, ComReg considered the appropriate cost standard i.e., the means by which costs are allocated to services so that the operator (in this case Eircom) can recover all the efficiently incurred costs associated with its network, and assessed a number of regulatory options including:

- (a) Long run incremental cost ('**LRIC**');
- (b) Long run average incremental costs ('**LRAIC**');

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<sup>130</sup> Common corporate costs generally relate to general overheads which typically include general IT system costs, office accommodation and transport management as well as corporate costs such as finance, legal, HR and senior management.

- (c) LRAIC plus a mark-up for common corporate costs<sup>131</sup> ('**LRAIC+**'); and
- (d) Fully allocated costs ('**FAC**').

243 ComReg identified the key differences between the various costing options set out above.

244 LRIC includes the direct fixed and variable costs relevant to the increment of providing the service over the long-run (or often referred to as '**Pure LRIC**') but does not include recovery of shared network costs<sup>132</sup> or common corporate costs, from other divisions of the operator's business.

245 LRAIC typically includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run. The main difference between LRAIC and LRIC, is that the increment that is considered under LRAIC tends to cover a wider range of services compared to the LRIC approach. LRAIC+ includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run, plus a mark-up for common corporate costs. LRAIC+ is used where, given the significant proportion of fixed and joint costs in telecoms a contribution to common corporate costs is necessary to ensure the network operators can continue in the long-run. In general, LRAIC+ is the appropriate cost standard to encourage efficient investment decisions while ensuring that an operator is capable of recovering (but not over-recovering) all of its efficient costs. This approach should send the appropriate investment signals to alternative operators who may want to replicate the asset(s) in question.

246 An alternative to the various forms of LRIC is the FAC approach, which means that all of the costs efficiently incurred by the regulated operator, including sunk costs, are allocated to products typically following allocation rules based on the direct or indirect causality of costs with products. This approach includes all fixed, shared and common corporate costs. The FAC approach results in a price signal which has the advantage of being relatively consistent with the recorded investments incurred by the SMP operator but care should be taken to ensure that inefficiently incurred costs are excluded.

247 In the CEI Consultation ComReg considered that in general some form of LRIC (Pure LRIC / LRAIC / LRAIC+) is the appropriate cost standard, particularly for non-reusable assets in the case where the main objective is to encourage efficient

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<sup>131</sup> Common corporate costs generally relate to general overheads which typically include general IT system costs, office accommodation and transport management as well as corporate costs such as finance, legal, HR and senior management.

<sup>132</sup> These are shared (or common) network costs used by all services e.g., common network costs of ducts and trenching are consumed by all fixed line services and which are referred to as '**shared network costs**' in this document.

investment decisions in the access network.

248 As a second step, ComReg considered how costs should be assessed, and looked at two different cost bases;

(a) Current cost; or

(b) Historical cost.

249 The current cost approach (**'Current Cost Approach'**) values assets at the current market value and allows one to reflect the changes in asset prices. ComReg explained that the Current Cost Approach can be implemented either based on the SMP operator's accounting system or on a bottom-up (**'BU'**) model basis. This BU approach would allow ComReg to reflect the costs that a hypothetical entrant would incur when investing at any particular point in a modern equivalent asset (**'MEA'**). The economic rationale for the Current Cost Approach applied by means of a BU model is that by linking the value of the assets to a newly deployed network it promotes efficient investment incentives and ensures that the SMP operator recovers its future costs thereby encouraging it to make efficient infrastructure investment decisions. The Current Cost Approach is particularly relevant in the more competitive areas of the country if the BU-LRAIC+ approach is used to promote efficient infrastructure investment in the marketplace and encourage innovation in new and enhanced infrastructures by Eircom and other operators.

250 On the other hand the historic cost approach (**'Historic Cost Approach'** or **'HCA'**), uses the SMP operator's costs, which reduces the chance of over or under recovery of costs as the value is linked to the actual investment made in existing assets as opposed to the MEA approach, which assumes the investment is in new infrastructure. Some of the SMP operator's assets may be fully depreciated but still in use. The HCA approach should ensure that Eircom is not over recovering the costs of these assets.

251 ComReg also noted in Section 5 of the CEI Consultation that the European Commission's 2013 EC Recommendation at paragraph 31 provides that:

*"NRAs should adopt a BU LRIC+ costing methodology that estimates the current cost that a hypothetical efficient operator would incur to build a modern efficient network..."*

252 Furthermore, Paragraph 32 of the 2013 EC Recommendation provides that:

*"When modelling an NGA network... NRAs should include any existing civil engineering assets that are generally also capable of hosting an NGA network as well as civil engineering assets that will have to be newly constructed to host an NGA network. Therefore, when building the BU LRIC+ model, NRAs should*

*not assume the construction of an entirely new civil infrastructure network for deploying an NGA network.”*

253 Paragraph 33 of the 2013 EC Recommendation provides that:

*“NRAs should value all assets constituting the RAB of the modelled network on the basis of replacement costs, except for reusable legacy civil engineering assets.”*

254 Therefore, the 2013 EC Recommendation recognises that a key criterion in the valuation of the RAB<sup>133</sup> for civil infrastructure network is the extent that existing CEI assets can be reused in an NGA network and that the RAB for non-reusable assets should be based on current / replacement costs.

255 In the CEI Consultation ComReg considered that the Current Cost Approach is an appropriate cost base where the asset(s) concerned are non-reusable and where the objective is to encourage the deployment of alternative infrastructure as this is the appropriate means to send a build-or-buy signal to alternative operators who may want to replicate the downstream assets. On the other hand, the Historic Cost Approach (adjusted for efficiencies) should be applied where the asset(s) concerned is reusable and where the objective is to ensure that there is no over-or-under recovery of costs.

256 In the third and final step, ComReg considered what type of model to use in order to derive the costs, based on two different model types;

- (a) A top down (“**TD**”) model; or
- (b) A bottom up (“**BU**”) model.

257 A **TD cost model** relies on the SMP operator’s accounting information, which is better suited to achieve exact cost-recovery as it is linked to the actual investments made by the SMP operator and recognises the extent to which the relevant asset base has already been depreciated. The main disadvantages of this option are that the accounting information may include inefficient costs incurred by the SMP operator and it does not provide the appropriate build-or-buy signal i.e., no incentive for operators to replicate assets such as cables needed to deploy broadband networks.

258 The **BU model** reflects the choices of a hypothetical, forward-looking efficient operator from both a technical and an operational point of view, based on a data intensive process of dimensioning the network assets as if the network was being built (either as it stands, or with improvements to the topology). This approach is

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<sup>133</sup> Paragraph 6(q) of the 2013 EC Recommendation defines the RAB as “*the total capital value of the assets used to calculate the costs of the regulated services*”.

associated with models that are aimed at promoting efficient entry, since the cost model can consider how a network would be built today, rather than modelling the actual network built. The main economic reason to use a BU model is the need to send a build-or-buy signal to alternative operators who may want to replicate the asset and to send the right signal to Eircom when existing network infrastructure needs to be renewed. It is also more efficient to make forward-looking estimations based on expected levels of demand rather than relying on historical data.

259 ComReg also noted that as a BU model calculates the level of network costs on the basis of the quantity of equipment and infrastructure that an operator using efficient engineering rules would deploy to support an assumed level of demand. BU models tend to lend themselves to some form of the LRIC approach. The combination of LRIC(+) with a BU model is one of the most commonly encountered practices in cost models.

260 ComReg proposed that in general a BU model (in combination with some variant of the LR(A)IC(+) costing methodology) should be applied where the asset(s) concerned are non-reusable and where the objective is to encourage the deployment of alternative infrastructure as this is the appropriate means to send a build-or-buy signal to alternative operators who may want to replicate the downstream assets (i.e., broadband, leased lines).

261 On the other hand, ComReg proposed that the TD model (in combination with actual costs recorded in the HCAs but adjusted for efficiencies) should be applied where the asset(s) concerned are reusable and where the objective is to ensure that there is no over-or-under recovery of costs.

262 ComReg invited the views of respondents (in Question 2 of the CEI Consultation) on the general costing methodology principles.

### 5.3.2 Respondents' Views and ComReg's Response:

263 ComReg received a direct response to Question 2 from six Respondents, namely Eircom, NBI, BT, Vodafone, Siro and ALTO. Virgin Media stated that it had no comments.<sup>134</sup> Sky did not address the issues raised in Question 2 in their general response.

264 Eircom<sup>135</sup>, NBI<sup>136</sup>, BT<sup>137</sup> and Siro<sup>138</sup> agreed with the general costing methodologies, although Eircom made some comments around efficiency adjustments. In particular, Eircom submitted it was not appropriate to adjust costs in Eircom's HCA for efficiencies, as there is a danger that such an adjustment could lead to "hyper-

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<sup>134</sup> Page 3 of Virgin Media's Non- Confidential Response dated 18 November 2020.

<sup>135</sup> Paragraph 82 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>136</sup> Page 18 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>137</sup> Page 7 of BT's Non-Confidential Response dated 18 November 2020.

<sup>138</sup> Page 3 of Siro's Non- Confidential Response dated 18 November 2020.

efficiencies” resulting in under-recovery of properly incurred efficient costs.<sup>139</sup> Vodafone claimed that the NBP has already distorted the market as Eircom has invested in the ‘300k’ areas ahead of more populated areas and this has reduced the pool of potential locations where infrastructure investment could be made by a third party. Vodafone called on ComReg to recognise that the NBP has “*unintentionally distorted the market*”, that “*The potential pitfall to avoid in establishing costing models with an objective to encourage and maintain infrastructure investment is that they may only serve to prevent competition to Eircom in specific areas*” and to ensure that this is avoided.<sup>140</sup> ALTO disagreed with ComReg and stated that the proposed approach is discriminatory, particularly in relation to the recovery of common costs.<sup>141</sup> However, ALTO’s comment seems to be related to the proposed costing methodology approach for setting NBI’s MIP access charges, which is addressed in section 5.7.2 below.

265 First, ComReg would like to clarify that a BU model (in combination with some variant of the LR(A)IC+ costing methodology) is generally used when the objective is to encourage the deployment of alternative infrastructure as this is the appropriate means to send a build-or-buy signal to alternative operators who may want to replicate the downstream assets and compete with Eircom. Hence, this is the approach generally used by ComReg in more urban areas (or in this case Commercial Areas) where there is the potential for alternative infrastructure competition. However, in the case of NBI’s MIP, different considerations apply for the reasons discussed later in this section of the document. ComReg is satisfied accordingly that its choice of costing methodology is justified and will not serve to prevent competition to Eircom in specific areas as feared by Vodafone.

266 As regards efficiencies adjustments, ComReg notes that Regulation 13(3) of the Access Regulations provides the following (and similar wording is included in Article 74(2) of the EECC) that:

*“The Regulator shall ensure that any cost recovery mechanism or pricing methodology that ComReg imposes under this Regulation serves to promote efficiency...”* (emphasis added)

267 In terms of (productive) efficiency, ComReg believes that the sequential nature of investment decisions, when assessing whether the level of costs reported is efficiently incurred, needs to be considered in the pricing remedy. The BU approach already assumes a level of efficiency (as it is based on a brand new network) therefore no further adjustments are required but the TD HCA (or FAC) approach requires some assessment to ensure that any inefficient costs are excluded. In any event, the efficiency adjustments in the context of the TD HCA approach are

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<sup>139</sup> Paragraph 83 of Eircom’s Non-Confidential Response dated 18 November 2020

<sup>140</sup> Page 5 of Vodafone’s Non-Confidential Response dated 18 November 2020.

<sup>141</sup> Page 4 of ALTO’s Non-Confidential Response dated 18 November 2020.



generally not material and so cannot be described as “hyper-efficiencies”.

268 Eircom also submitted that when assessing legacy copper technologies (and duct and pole engineering) ComReg should consider that the associated labour costs are likely to increase over time as knowledge and expertise in the field continues to decline.<sup>142</sup> However, any efficiency adjustments are primarily applied to the copper cable network rather than duct or poles and are based on analysis previously provided by Eircom as part of the existing Revised CAM in the 2016 Access Pricing Decision, in the absence of more up-to-date information from Eircom as part of the current review. Please see further consideration of the point on efficiency adjustments in the ANM Decision at paragraphs 5.376 to 5.384.

269 Having considered the Respondents' Submissions, ComReg remains of the view that a BU model in combination with a variant of the LR(A)IC(+) costing methodology is an appropriate methodology where the asset(s) concerned are non-reusable and where the objective is to encourage the deployment of alternative infrastructure. The economic rationale for using the Current Cost Approach (or replacement costs) applied through a BU model is that this approach promotes efficient investment incentives and encourages innovation in new and enhanced infrastructures by Eircom and other operators who may wish to provide downstream services, while also ensuring that the SMP operator recovers its future costs thereby encouraging it to make efficient infrastructure investment decisions. On the other hand, a TD model in combination with actual costs recorded in Eircom's HCAs (or Separated Accounts) and adjusted for efficiencies is appropriate when the asset(s) concerned is reusable and where the objective is to ensure that there is no over-or-under recovery of costs. This TD approach can also be generally relevant in those more rural areas where the prospects of competition are extremely limited. The TD approach reflects the fact that the SMP operator's assets may be fully depreciated but still in use and so it ensures that Eircom is not over recovering the costs of these assets.

### 5.3.3 ComReg's Final Position

270 A BU model (in combination with a variant of the LR(A)IC(+) costing methodology) shall be applied where the asset(s) concerned are non-reusable and where the objective is to encourage the deployment of alternative infrastructure as this is the appropriate means to send a build-or-buy signal to alternative operators who may want to replicate the downstream services (i.e., broadband, leased lines).

271 The TD model (in combination with actual costs recorded in the HCAs but adjusted for efficiencies) shall be applied where the asset(s) concerned is reusable and where the objective is to ensure that there is no over-or-under recovery of costs.

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<sup>142</sup> Paragraph 84 of Eircom's Non-Confidential Response dated 18 November 2020.

## 5.4 Specific costing methodologies for CEI access

272 In Section 5.4 of the CEI Consultation ComReg considered whether the existing CEI costing / pricing methodology for Generic Access to CEI i.e., the base case, should remain in place, for both Generic Access to CEI and for NBI's MIP access to CEI or whether there are objectively justified reasons to differentiate the CEI costing methodology based on the nature of the CEI access sought in the different geographic footprints, having regard to ComReg's regulatory objectives in Section 3 and the factors set out in Section 4.

273 ComReg also recognised that the costs of CEI are such that CEI is unlikely to be replicated by other operators, nationally. Hence, the "build" option for CEI is not considered to be economically feasible. Instead ComReg was of the preliminary view that the CEI access service should be priced in such a way that it would encourage efficient entry by providing other operators with access to existing CEI while maintaining the investment incentives of the owner of that CEI by allowing it to recover its efficiently incurred costs plus a reasonable rate of return on its capital employed. Therefore, ComReg was of the preliminary view that the overall costing / pricing methodology should consider both the costs that arise as a result of another operator gaining access to existing CEI but also the costs that the CEI provider (Eircom) has incurred to deploy and maintain that CEI.

274 In the CEI Consultation ComReg assessed the costing methodologies for CEI in terms of the type of access being sought. ComReg invited the views of respondents (in Question 3 of the CEI Consultation) on the proposed costing methodologies in the case of Generic Access to CEI and for NBI's MIP access to CEI in the NBP IA and for NBI's transit access to CEI in the Commercial Areas.

275 ComReg received a direct response to Question 3 from six Respondents, namely NBI, Eircom, BT, Vodafone, Siro and ALTO. ComReg received no direct reply from Sky to Question 3, but ComReg has considered Sky's general response in its assessment of responses to Question 3. Virgin Media stated that it had no comments.

276 The rest of this sub-section is addressed under the following headings:

- (a) Generic Access to CEI;
- (b) NBI's MIP access to CEI in the Commercial Areas; and
- (c) NBI's MIP access to CEI in the NBP IA.

## 5.5 Generic Access to CEI

### 5.5.1 Position set out in the Consultation

277 For **Generic Access to CEI in the Commercial Areas** ComReg proposed to determine a national price for Generic Access to poles and for Generic Access to ducts, based on the costs associated with access in the Commercial Areas.

278 ComReg recognised that the existing pricing structure i.e., a price for pole access in the Modified LEA and a price outside the Modified LEA as well as a price for duct in Dublin and a separate price for duct in Provincial areas, should no longer apply. Since 2016, the historic cost differential between the Modified LEA and outside the Modified LEA for pole access has become less relevant. This is because any prospective cost differences in terms of investments in poles by Eircom are likely to be between the costs in the NBP IA (for the purposes of NBI's MIP) and in the Commercial Areas (for Generic Access to CEI and to support NBI's transit access).

279 In terms of Generic Access to CEI, demand for such access is more likely in the Commercial Areas over the next few years. CEI access in the NBP IA is likely to be solely from NBI (addressed separately below), with little demand expected from Generic Access users. Hence, ComReg proposed to determine a national price for Generic Access to poles and for Generic Access to ducts, based on the costs associated with access in the Commercial Areas.

280 In the Commercial Areas one of ComReg's objectives is to encourage competition through the promotion of network expansion by alternative infrastructure providers.<sup>143</sup> In this area, Generic Access users of Eircom's CEI are expected to continue to offer NGA services that compete with Eircom and so the CEI costing methodology should ensure that Eircom can continue to recover all of its efficiently incurred costs (plus a reasonable rate of return). ComReg proposed that in the Commercial Areas the costing methodology for CEI access should support access to existing CEI and promote efficient utilisation of those reusable CEI assets. Hence, ComReg reached the preliminary view that a combination of the TD HCA (for reusable CEI assets) and a BU-LRAIC+ approach (for non-reusable CEI assets), should apply for determining the costs appropriate to Generic Access to Eircom's CEI. This approach was also consistent with the costing methodology applied to the existing CEI prices, set in the 2016 Access Pricing Decision.

281 ComReg also considered that CEI comprises assets that can continue to provide a benefit to operators and services many years after the asset was first installed.

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<sup>143</sup> See paragraph 4.44 of ComReg's Electronic Communications Strategy Statement which states that *"It is therefore ComReg's goal that **competitive incentives facilitate efficient commercial investment in new and existing infrastructure and services to the widest extent possible.**"* [Strategy Statement \(comreg.ie\)](https://www.comreg.ie/Strategy-Statement)

Therefore, a cost is not necessarily incremental just because it is incurred at the time an order for CEI access is placed. Activities such as duct clearance and pole replacement can continue to be of benefit to network operators who need to access those ducts and poles to deploy new cables in the future. Therefore, ComReg considered that it is reasonable to treat the CEI investments needed to make the network 'NGA ready' as a shared network cost to be recovered from all operators that can potentially benefit from that investment in the long run. This ensures that the cost sharing benefits of CEI access are spread out indiscriminately across all competitors.

282 ComReg considered that the BU-LRAIC+ methodology for Generic Access to CEI, in including a contribution of shared network costs and common corporate costs, recognises that Eircom should recover all of its efficiently incurred costs, taking into account the likely decrease in Eircom's margins due to its loss of market share in the downstream markets as a result of a competing operator seeking Generic Access to Eircom's CEI. Therefore, Generic Access to CEI can facilitate entry by other operators in those parts of the network where sufficient economies of scale and scope exist to allow a number of network operators to enter and compete with Eircom, which fosters competition in downstream markets.

283 For **Generic Access to CEI in the NBP IA** ComReg proposed that as the demand for Generic Access to Eircom's CEI in the NBP IA was not likely to be material, the costing methodology approach put forward for Generic Access to CEI in the Commercial Areas would be justified for Generic Access to CEI in the NBP IA. Hence, the price for Generic Access to CEI in the NBP IA would be based on the national price for Generic Access to poles and for Generic Access to ducts, based on the costs associated with access in the Commercial Areas, as described above.

284 ComReg recognised that for Generic Access to CEI in the NBP IA applying the BU-LRAIC+ methodology to all Generic Access users of CEI would mean that the prices charged to any Generic Access users of CEI in the NBP IA would include a mark-up to recover common corporate costs, which would be inconsistent with the principle determined in the 2018 Pricing Decision that common corporate costs (e.g., general IT system costs, office accommodation, transport management and network rates as well as corporate costs such as finance, legal, HR and senior management) should only be recovered from services offered/sold in the Commercial Areas. However, as demand for the Generic Access to CEI in the NBP IA is not expected to be material, ComReg considered that this should have no material implications for cost recovery and ComReg would keep this under review should demand levels for Generic Access to Eircom's CEI in the NBP IA materialise.

285 ComReg proposed that the costing methodology for Generic Access to CEI should be based on a combination of BU-LRAIC+ approach (for non-reusable CEI assets) and TD HCA (for reusable CEI assets), and based on a national price, set by reference to the costs associated with the Commercial Areas.

## 5.5.2 Respondents' Views and ComReg's Response

286 NBI, Eircom, Siro, BT and ALTO commented on the proposed costing methodology for Generic Access to CEI.

287 NBI<sup>144</sup> and Siro<sup>145</sup> generally supported ComReg's approach. Eircom agreed but considered that the Generic Access prices, in particular for duct, should be based on the costs in the Urban Commercial Area.<sup>146</sup> Eircom also sought clarity on whether common corporate costs are included in the price for Generic Access to CEI in the NBP IA and whether Eircom is required to publish a different set of CEI prices for Generic Access in the NBP IA.<sup>147</sup> BT and ALTO disagreed with the proposed costing methodology for Generic Access to CEI, stating that the commercial area is cross subsidising NBI and Eircom in the NBP IA.<sup>148</sup>

### Generic access demand for CEI in Urban Commercial Area

288 ComReg notes Eircom's point that "...generic CEI access will only likely occur in Commercial Urban Areas..."<sup>149</sup> and in particular Eircom's view that the prices for Generic Access to duct should be based on the Urban Commercial Area as that is the area where the demand for Generic Access to ducts is most likely to be. Eircom submitted that as generic CEI access will only likely occur in Urban Commercial Areas and as the prices derived in the DAM are based on a blended cost of Urban Commercial Area and Rural Commercial Area it will result in an under-recovery of Eircom's efficiently incurred cost. Further, Eircom stated that as the cost of rural commercial duct is significantly lower than urban duct the derived national prices are on average 5-25% lower (depending on surface type) than the Urban Commercial Area costs and this will, if implemented, result in a material under recovery of Eircom's costs.<sup>150</sup>

289 ComReg has considered the issue raised by Eircom that the demand for duct access from Generic Access users is primarily expected to arise in the Urban Commercial Area and, therefore, the duct prices for Generic Access users should be based on the costs of the Urban Commercial Area. ComReg recognises that the economic case for Generic Access to CEI is stronger in the Urban Commercial Area footprint than in the Rural Commercial Area. The fact that Eircom has already deployed its 300k FTTH Network in the Rural Commercial Area and that NBI will transit this area with fibre cables, would seem to support the view that a third operator will not require CEI access to deploy its own fibre cables in the Rural Commercial Area given the lower economies of scale in the Rural Commercial Area

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<sup>144</sup> Page 20 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>145</sup> Page 3 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>146</sup> Paragraphs 102-103 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>147</sup> Paragraphs 93 & 95 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>148</sup> Page 7 of BT's Non-Confidential Response and Page 5 of ALTO's Non-Confidential Response.

<sup>149</sup> Paragraph 102 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>150</sup> Paragraphs 102-103 of Eircom's Non-Confidential Response dated 18 November 2020.

compared to the Urban Commercial Area. For these reasons, ComReg has modified its approach.

290 Instead of basing the national price for Generic Access to duct / sub-duct on the average costs across the Rural Commercial Area and Urban Commercial Area, ComReg has amended the approach so that the Generic Access duct prices (for Duct Access, Direct Duct Access and Sub-duct Access) now reflects the costs associated with the Urban Commercial Area only. The average cost of a metre of duct / sub-duct in the Urban Commercial Area is likely to be higher than in the Rural Commercial Area for a number of reasons.

291 A significant proportion of Urban Commercial Area duct is in the Dublin area and, in the past, Eircom faced a higher subcontractor rate for duct related activities in Dublin than outside Dublin. As a result, the historic cost of duct / sub-duct in the Urban Commercial Area is higher than in other areas. In addition, duct work in the Urban Commercial Area is more likely to require a greater level of traffic management than in Rural Commercial Areas and it is often the case that such work has to be undertaken outside of normal business hours to minimise traffic disruption in cities and towns. The additional costs associated with these requirements gives rise to higher costs for duct / sub-duct work in Urban Commercial Areas, compared to Rural Commercial Areas. It is also the case that duct charges reflect the average number of cables / sub-ducts in the trench and this tends to be different between ducts in Urban Commercial Areas and ducts in Rural Commercial Areas.

292 Hence, it is appropriate that the price for Generic Access to duct / sub-duct reflect the costs and cable deployments associated with the Urban Commercial Area only, where the demand for the service is most likely to occur. For the reasons set out at paragraph 289, ComReg does not expect that another network operator will seek any significant CEI access to deploy its own fibre network given the relatively low density of end users and given that Eircom and NBI are already present in that area.

293 As a result of the position taken above, ComReg is of the view that the approach for setting the prices for Generic Access to poles should also be modified to reflect the same footprint of costs i.e., the cost for pole access in the Urban Commercial Area. ComReg considers that there is merit in Eircom's argument that Generic Access is only likely in the Urban Commercial Area.

294 The majority of poles in the Urban Commercial Area are final drop poles to the customer premises, and ComReg anticipates that such poles could be required by other operators providing services to end users. In contrast, the majority of poles in Rural Commercial Areas are not final drop poles as they are used to support the main cable network. As Eircom has first-mover advantage for FTTH in the Rural Commercial Area, ComReg does not expect that another network operator will seek pole access to deploy its own fibre network given the relatively low density of end

users. While there could be situations where rival network operators need to transit the Rural Commercial Area to interconnect their main network nodes, ComReg expects that renting either dark fibre or a managed network solution from Eircom or NBI would be a more efficient alternative to renting pole access to facilitate fibre cable deployment. Siro's point that "*In general where there are poles in commercial areas these poles are fed underground with the service drops being fed overhead*"<sup>151</sup> also supports the position that the demand for pole access by Generic Access users may be confined to the Urban Commercial footprint, as most of the network routes and cable feeds in the Rural Commercial Area are overhead.

295 For these reasons, ComReg is of the view that the price for Generic Access to poles should be modified to reflect the costs of the Urban Commercial Area as this is where the demand for Generic Access to poles is expected to arise.

296 In summary, ComReg considers that reflecting the costs of the Urban Commercial Area, should ensure that the national prices set for Generic Access to CEI reflect Eircom's efficiently incurred costs in the area where CEI access is likely to take place while also providing alternative access seekers with the appropriate investment signals (build or buy) for NGA deployment. However, ComReg will keep this approach under review in order to ensure that the costs used to set the prices for Generic Access to CEI reflects the costs of the footprint(s) where Generic Access to CEI is taking place. If the demand for Generic Access to CEI moves materially beyond the Urban Commercial Area and into the Rural Commercial Area, then ComReg will give consideration to reviewing the cost basis underpinning the price control.

### **Recovery of common corporate costs from Generic Access charges**

297 There appeared to be a lack of clarity among BT, ALTO<sup>152</sup> and Eircom<sup>153</sup> on whether common corporate costs will be recovered from the revised prices for Generic Access to CEI, in particular for generic access to CEI in the NBP IA.

298 For the avoidance of doubt, the national prices set in this Decision for Generic Access to CEI in this Decision include a mark-up for common corporate costs.

299 As recognised at paragraph 284, applying the BU-LRAIC+ methodology to all Generic Access users of CEI means that the prices charged to any Generic Access users of CEI in the NBP IA would include a mark-up to recover common corporate costs. This would be inconsistent with the principle determined in the 2018 Pricing Decision that all common corporate costs should only be recovered from commercial downstream services sold in the Commercial Areas. However, as demand for the Generic Access to CEI in the NBP IA is not expected to be material, there should be no material impact. ComReg will keep this under review should

<sup>151</sup> Pages 3-4 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>152</sup> Page 7 of BT's Non-Confidential Response and Page 5 of ALTO's Non-Confidential Response.

<sup>153</sup> Paragraph 93 of Eircom's Non-Confidential Response dated 18 November 2020.

demand levels for Generic Access to Eircom's CEI in the NBP IA materialise. In addition, since the CEI Consultation ComReg has revised its approach to the recovery of common costs in the context of NBI's MIP access to CEI in the NBP IA which has led to a reduction in the level of common corporate costs to be recovered from the charges for Generic Access to CEI, which is reflected in the final prices set in Section 9. Any adverse consequences are, in ComReg's view, more than offset by the benefit of increased simplicity. The issue of recovery of common corporate costs is discussed later at subsection 5.7.2.

### Other issues

- 300 Vodafone disagreed that Generic Access users of CEI compete directly with Eircom, and therefore reduce the value of Eircom's existing service. According to Vodafone, in practice, an alternative operator would use an Eircom Bitstream type service if one was available to provide the level of service that the customer requires. In the case where generic access is requested the alternative operator is planning to provide a service that cannot be provided on existing infrastructure. Therefore, the case does not arise where the alternative operator is requesting CEI to build a competing copper loop and any new investment made by that operator would have to bear the same costs as NBI investment.<sup>154</sup>
- 301 However, ComReg is not suggesting that a Generic Access seeker is requesting CEI to build a competing copper loop. ComReg recognises that a Generic Access seeker may access Eircom's CEI access to deploy a service that is not a direct replica of an existing Eircom service. However, once Eircom's CEI is being accessed by another operator to provide a fixed access service in the same market(s) that Eircom is competing in, Eircom will likely suffer a loss of its margins arising from losing customers to the competing operator availing of Generic Access to CEI. This situation applies to all Generic Access seekers but not CEI access requested by NBI's MIP for transit purposes in the Commercial Areas, as NBI will not use that transit access to compete directly with Eircom in that area. Hence, a different costing approach is warranted in this case, which is discussed below at Section 5.6.
- 302 Eircom submitted that it was not clear whether it is required to publish a different set of CEI prices for Generic Access in the NBP IA.<sup>155</sup>
- 303 As discussed above, Eircom is not required to publish different CEI prices for Generic Access in the NBP IA. Rather, Eircom is required to publish the national price for Generic Access to poles and a separate national price for Generic Access to duct (differentiated by surface type), noting that the prices for Generic Access to CEI are no longer differentiated by footprint/region but instead are based on a national price for Generic Access to poles and a separate national price for Generic

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<sup>154</sup> Page 5 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>155</sup> Paragraph 95 of Eircom's Non-Confidential Response dated 18 November 2020.



Access to duct (which is also differentiated by surface type).

### 5.5.3 ComReg's Final Position

304 Having considered all of the Respondents' Submissions as well as the advice from Dot Econ, ComReg remains of the view that a combination of the TD HCA and BU-LRAIC+ methodology is appropriate for determining the CEI access charges for Generic Access to CEI for the reasons set out above and previously at Section 5.4 of the CEI Consultation.

305 Instead of using the average costs across the Commercial Areas to set the prices for Generic Access to CEI, ComReg has modified the approach to reflect the costs of the Urban Commercial Area only, in order to determine the national prices for Generic Access to poles and for Generic Access to ducts (including Duct Access, Direct Duct Access and Sub-duct Access). This is on the assumption that there is no material demand for Generic Access to CEI outside the Urban Commercial Area, a matter which ComReg will keep under review and may revisit in the context of the forthcoming market reviews of the WLA Market / PIA Market, as discussed at paragraph 139.

## 5.6 NBI's MIP access to CEI in the Commercial Areas

### 5.6.1 Position set out in the Consultation

306 For **NBI's MIP access to CEI in the Commercial Areas** ComReg noted that one of the key differences between Generic Access to CEI and NBI's expected use of Eircom's CEI is the fact that NBI will not use its subsidised network outside the NBP IA to serve customers and compete directly with Eircom in downstream wholesale markets<sup>156</sup> in these areas. NBI's MIP access to Eircom's CEI in the Commercial Areas is solely required so that NBI can transit the Commercial Areas in order to serve those customers in the NBP IA.

307 Unlike Generic Access to CEI, NBI's MIP is expected to require access to a significant amount of Eircom's CEI in the Commercial Areas (in particular in the Rural Commercial Area) in order to deploy its network to reach the premises (circa 537,000 delivery points) that are dispersed across the NBP IA. The fact that these premises are dispersed around towns and villages in a large proportion of Eircom's exchange areas means that NBI's MIP is likely to be deploying fibre cables on the same poles and ducts on which Eircom has already deployed fibre cables to serve the premises in Eircom's 300k FTTH network in the Rural Commercial Area. NBI is also likely to require access to sections of Eircom's ducts in the towns and villages

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<sup>156</sup> By downstream wholesale markets we mean where an access seeker uses a WLA input from Eircom in the WLA Market in order to provide (and compete) with Eircom in a variety of downstream wholesale (or retail) services in other markets e.g., Regional WCA Market.

where Eircom currently offer NGA services using FTTC and eVDSL and where Eircom is planning to deploy FTTH in the near future.

308 In the CEI Consultation, on the basis that NBI's MIP access to CEI in the Commercial Areas is expected to be used solely to support NBI's fibre services in the NBP IA, rather than competing with Eircom to provide downstream services in the Commercial Areas, ComReg considered that NBI's use of Eircom's CEI in the Commercial Areas should not impact on Eircom's revenues from downstream wholesale services sold to premises in the Commercial Areas. In this regard, Eircom should not face any erosion of its market share, as a result of facilitating the use of its CEI for NBI's MIP to transit the Commercial Areas. This is in contrast to the situation when a competing operator uses Generic Access to Eircom's CEI service in order to compete directly with Eircom.

309 ComReg also recognised that the majority of NBI's MIP demand (particularly for poles) in the Commercial Area is expected to be in the Rural Commercial Area, which comprise those parts of Eircom's 300k FTTH network passing over 300k premises that were originally considered part of the NBP IA. The existing CEI assets in this context should be reusable for the purpose of NBI's MIP as Eircom has already replaced poles and cleared duct blockages to facilitate the deployment of its own 300k FTTH Rural Network. ComReg therefore was of the view that Eircom ought to fund / recover this investment from the revenues it receives from all of the services (copper and fibre) it continues to sell to the customers on its network, but not NBI. ComReg noted that NBI's likely deployment of fibre cables on Eircom's poles or ducts alongside Eircom's own cables should not alter Eircom's ability to recover this investment as NBI cannot use its subsidised network outside the NBP IA to compete with Eircom or target those customers.

310 ComReg considered that if Eircom recovered from NBI the CEI access costs for facilitating NBI's transit access in the Commercial Areas based on the existing methodology for Generic Access to CEI (i.e., LRAIC+) this would allow Eircom to receive a contribution to the recovery of its shared network costs and common corporate costs. This would be in addition to the contribution Eircom already receives from the revenues of all its other wholesale services it continues to sell to service providers (including Eircom Retail) in the Commercial Areas. As a result, ComReg considered that there would be the potential for Eircom to over recover CEI costs (thereby benefitting from a windfall gain) associated with NBI's transit access in the Commercial Areas over and above the efficient costs incurred by Eircom in the supply of that CEI service.

311 ComReg also found that the use of the LRAIC+ option for NBI's MIP access to CEI for transit purposes in the Commercial Areas would mean that Eircom should have a lesser amount of costs to recover from other wholesale regulated services that use CEI e.g., current generation or copper based standalone broadband ('**CG SABB**') and WLR. This "waterbed" (or "see-saw" as referred to by Dot Econ) effect

would have to be addressed in order to avoid possible over recovery of costs by Eircom in accordance with the requirement for cost orientation of prices. However, given that not all services are cost oriented (e.g., the price control for FTTH rental services is in the form of an obligation not to cause a margin squeeze), addressing the issue of over recovery and how it impacts on other services could be difficult.

312 The Dot Econ Draft Report (in Section 5.3.2) of its report at Annex 2 of the CEI Consultation stated that:

*“...to the extent that Eircom earns additional margins from supplying NBI with CEI access within the commercial area, this has the potential to affect infrastructure-based competition between Eircom and third parties within that area. This is both because prices of Eircom’s wholesale services might fall and also because general CEI access prices might fall, affecting build-vs-buy incentives (what might be called “see-saw” effects caused by requiring cost-reflective CEI assets). Any such distortion would be an indirect consequence of the NBP intervention, as Eircom’s CEI, used by Eircom and parties other than NBI, would be cross-subsidised by NBI’s payments for CEI access.”*

313 Furthermore, ComReg believed that the option of LRAIC+ leads to a risk that any revenues that exceed incremental costs could distort competition for services in related competitive markets. If Eircom recovered in excess of its incremental cost (under the option of LRAIC+) this may lead to additional margins being earned by Eircom from those CEI assets sold to NBI (and who are not in a position to compete in the Commercial Areas) which may, in turn, result in Eircom obtaining an unfair competitive advantage and result in part funding of other services to the disadvantage of other alternative operators.

314 The Dot Econ Draft Report (in Section 5.3.2), at Annex 2 of the CEI Consultation stated that:

*“...there are two potential impacts affecting competitors to Eircom:*

- lowering the cost of wholesale services provided by Eircom such as VDSL VUA, particularly if prices are cost oriented; and*
- making the use of CEI access more attractive for other providers relative to building their own infrastructure.*

*Both impacts tend to suppress incentives for competitive infrastructure-based competition within the commercial area...”*

315 As a result, ComReg proposed that, for NBI’s MIP access to CEI for the purposes of transit in the Commercial Areas, an LRIC methodology may be an appropriate means to establish the relevant costs associated with NBI’s access to Eircom’s CEI in this area. ComReg noted that this approach to incremental costs is consistent

with the “sharer incremental cost” as recommended in the Dot Econ Draft Report, as:

*“...the costs avoided by just one sharer ceasing use, but the asset still being needed to meet the needs of other sharers”.*<sup>157</sup>

316 ComReg considered that the LRIC methodology ensures that Eircom recovers its efficiently incurred costs caused by NBI's shared access while promoting efficient use of existing reusable CEI assets and recognising that Eircom should suffer no loss of wholesale or retail revenues in this area as NBI cannot use its subsidised network outside the NBP IA to serve customers and compete in this area. Furthermore, the LRIC approach ensures against consequent potential competitive distortions. On balance ComReg reached the preliminary view that the LRIC option for NBI's MIP access to CEI for transit purposes in the Commercial Areas should achieve the correct balance between ensuring recovery of costs by Eircom while being consistent with ComReg's regulatory objectives, including promotion of competition and encouraging efficient investment.

317 Hence, ComReg proposed that the costing methodology that should apply for NBI's MIP access to CEI in the Commercial Areas is a BU-LRIC methodology, for non-reusable CEI assets, but with no contribution to the shared network costs or common corporate costs.

### 5.6.2 Respondents' Views and ComReg's Response

318 Eircom, NBI, BT, Vodafone, ALTO, Siro and Sky submitted views on the proposed LRIC methodology for NBI's MIP access to CEI in the Commercial Areas.

319 NBI<sup>158</sup> and Siro<sup>159</sup> generally supported ComReg's approach. Eircom disagreed for a number of reasons, including that the LRIC approach would increase the CEI access charges for others, thereby discouraging re-use of CEI and instead encourage duplication of physical infrastructure.<sup>160</sup> Eircom also claimed that it is constrained by a regulatory framework and the obligation of cost orientation and so any excess profits (through LRAIC+) would only likely occur for a short period.<sup>161</sup> In addition, Eircom submitted that there is no limitation (as far as Eircom is aware) of NBI offering services such as mobile backhaul or other services in the WHQA market once its infrastructure is in place.<sup>162</sup> A methodology that allocates no fixed or sunk costs to NBI's CEI prices in the Commercial Areas would be discriminatory

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<sup>157</sup> Section 5.3.2 of the Dot Econ Draft Report at Annex 2 of the CEI Consultation.

<sup>158</sup> Page 20 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>159</sup> Page 3 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>160</sup> Paragraphs 96-97 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>161</sup> Paragraph 98 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>162</sup> Paragraph 99 of Eircom's Non-Confidential Response dated 18 November 2020.

and result in distortion of competition as the type of "use" is not relevant.<sup>163</sup>

320 Vodafone claimed that some contribution [to shared network costs and common corporate costs] should be made for NBI's transit services.<sup>164</sup> Sky submitted that ComReg's costing methodology for NBI's access to CEI in the Commercial Areas is treating NBI in a "favourably discriminatory manner" and that NBI should be contributing to shared and common corporate costs in this area.<sup>165</sup> BT and ALTO submitted that a smaller fee maybe merited for NBI's access to CEI in the Commercial Areas if there are restrictions on the use of the CEI but that the level of any discount should be modest.<sup>166</sup>

### **LRIC methodology will impact prices for Generic Access users and discourage reuse of CEI and encourage duplication of infrastructure**

321 Eircom claimed that the LRIC approach for NBI's CEI access charges in the Commercial Areas would increase the CEI access charges for other Generic Access users, thereby discouraging re-use of CEI and instead encourage duplication of physical infrastructure.<sup>167</sup> BRG Consultants, in support of Eircom's submission, made similar arguments to Eircom<sup>168</sup> concluding that ComReg's proposal would lead to higher barriers to entry and expansion for potential competitors and may therefore result in less downstream competition, rather than more. Furthermore, ComReg's proposal would impose an unnecessary cost on consumers in the Commercial Areas. In contrast, if NBI's MIP contributed to Eircom's common network costs in these areas, it would potentially lead to lower costs for wholesale network services and ultimately lower prices.<sup>169</sup>

322 ComReg considers that the points raised above fail to address the fact that a differentiated costing methodology for NBI's MIP access to CEI in the Commercial Areas is necessary to prevent the distortion of competition on infrastructure-based platforms caused by the State's intervention in the NBP IA, as discussed by ComReg in Section 5.4 of the CEI Consultation.

323 In ComReg's Electronic Communications Strategy Statement for 2021-2023 ComReg stated that:

*"Where additional investment is required to achieve desired market outcomes, beyond what would be delivered in an effectively competitive market, such investment should be undertaken in a manner which creates minimal market*

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<sup>163</sup> Paragraph 101 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>164</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>165</sup> Paragraphs 95-96 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>166</sup> Page 7 of BT's Non-Confidential Response and Page 5 of ALTO's Non-Confidential Response.

<sup>167</sup> Paragraphs 96-97 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>168</sup> Paragraphs 122-123 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>169</sup> Paragraphs 125-126 of BRG Consultants Non-Confidential Report dated 18 November 2020.

*distortions and does not crowd out commercial investment.”<sup>170</sup>*

324 As set out by ComReg in Section 3 of this Decision, in the Commercial Areas ComReg's pricing approach for CEI needs to distinguish between Generic Access to CEI and NBI's MIP access to CEI for transit purposes, so as to meet ComReg's statutory objectives of promoting competition and encouraging efficient investment. NBI's MIP access to CEI in the Commercial Areas will not be used for the purpose of competing with other operators in the Commercial Areas, as NBI is not entitled to use its subsidised network outside the NBP IA for purposes other than "transiting" between interconnection points located in the Commercial Areas and those in the NBP IA according to the conditions of the subsidy from the State. Given that Eircom has already replaced poles and cleared duct blockages in the Rural Commercial Area to facilitate the deployment of its own 300k FTTH Rural Network, these existing CEI assets can be reused for the provision of fibre broadband services by NBI, as that is the likely area where NBI will seek transit access to Eircom's CEI. Hence, in the Commercial Areas it is justified that NBI's MIP would only pay the incremental costs that it causes, which would also ensure that Eircom recovers its costs.

325 In contrast, the prices for Generic Access to CEI in the Commercial Areas (which are discussed in subsection 5.5) should provide the correct investment incentives to promote competition by existing competing operators and facilitate commercial entry by alternative infrastructure providers, taking into account that Eircom is likely to continue to invest in CEI in these areas in order to continue to provide fixed line services to other operators, self-supply to its own retail arm and to end-users. Hence, in the context of Generic Access users in the Commercial Areas promoting competition and encouraging efficient investment mean sending the correct 'build-or-buy' signals to Eircom and other operators by means of a different costing approach.

326 While Eircom (and BRG Consultants) did not specify how ComReg's LRIC approach for NBI's MIP access to CEI in the Commercial Areas would lead to higher access charges for other CEI access seekers, ComReg understands Eircom's (and BRG's) main argument to be that if NBI pays less for CEI in the Commercial Areas then any Generic Access seeker sharing the CEI with NBI would have to pay more to rent that CEI from Eircom, and in turn, this could improve the business case for self-supply and lead to asset duplication. However, NBI's access to CEI for transit purposes will be predominantly in the Rural Commercial Area and Eircom makes the point (noted at paragraph 288 above) that the demand for Generic Access to CEI is most likely to be in the Urban Commercial Area. Hence, based on the evidence available to ComReg, NBI and Generic Access users of CEI will not be accessing the same CEI to any material degree and Generic Access seekers of CEI do not face additional costs that are not borne by NBI. By Eircom's own logic, the

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<sup>170</sup> Paragraph 4.49 of <https://www.comreg.ie/media/2021/06/ComReg-2170.pdf>

only operator that is likely to benefit from charging NBI a higher price to transit the Rural Commercial Area is Eircom itself, as Generic Access users of CEI in the Urban Commercial Areas would not benefit from NBI contributing more than LRIC.

327 Furthermore, ComReg considers, along with Dot Econ<sup>171</sup>, that if NBI pays the incremental cost associated with its access to Eircom's CEI in the Commercial Areas, but no more, then there should be no effect on the prices that other Generic Access users pay for access to Eircom's CEI within the Commercial Areas. The LRIC approach simply preserves the status quo and avoids distortionary knock-on effects arising from the NBP in the Commercial Areas. In contrast, if NBI pays more than the LRIC (or incremental costs) and Eircom enjoys a windfall gain on NBI's MIP access to CEI in the Commercial Area, this could eventually lead to lower prices (for end-user services and/or access services) in the Commercial Areas, which could lead to competitive distortions which consequently would likely reduce incentives for full infrastructure competition in the Commercial Areas as compared with the proposed LRIC approach.

328 In fact, ComReg considers that in the counterfactual where there is no NBP or access to CEI from NBI, Eircom would continue to recover its costs based on the existing charging regime for Generic Access to CEI as determined in the 2016 Access Pricing Decision, which reflects the fully loaded LRAIC+ costs. NBI's advisors, Frontier Economics, noted this point stating that "*Consider the counterfactual where the NBP contract was either not awarded at all or else awarded to an entity that used an alternative deployment solution, not involving Eircom's CEI assets. In this scenario Eircom would have no choice but to seek to fully recover its costs from its commercially derived revenue. Indeed, it is the case that Eircom's current price controls reflect this position as the basis for cost recovery.*"<sup>172</sup>

329 Hence, ComReg considers that Eircom's arguments above do not engage with the logic presented by ComReg in the CEI Consultation that the need for a differentiated CEI access price for NBI's MIP in the Commercial Areas is to prevent distortionary effects on infrastructure-based competition in the Commercial Areas.

### **NBI should contribute to shared & common costs in Commercial Areas**

330 Vodafone<sup>173</sup> and Sky submitted that NBI should contribute to shared and common corporate costs in the Commercial Areas. BT and ALTO submitted that a smaller fee may be merited for NBI's access to CEI in the Commercial Areas if there are restrictions on the use of the CEI but that the level of any discount should be modest.<sup>174</sup> Sky also made the point that end-users might get the benefit of lower prices in the Commercial Areas if NBI made a contribution to all costs incurred in

<sup>171</sup> See Section 9.1.3 of the Dot Econ Final Report at Annex 2.

<sup>172</sup> Pages 44-45 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>173</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>174</sup> Page 7 of BT's Non-Confidential Response and Page 5 of ALTO's Non-Confidential Response.

the Commercial Areas.<sup>175</sup> Sky submitted that for voice termination services, pure LRIC termination rates are largely reciprocal arrangements that give mutual benefits to all interconnected operators but in the case of NBI's MIP, pure LRIC results in no benefit to any other operator and in fact places an additional burden on other OAOs.<sup>176</sup>

331 In response, firstly, ComReg considers that the extent of any benefit from NBI contributing to shared network costs and common corporate costs (i.e., LRAIC+) is currently limited as NBI's use of Eircom's CEI in the Commercial Areas for transit access will be predominantly in the Rural Commercial Area, as noted at paragraph 326. Consequently, the main downstream services that share that CEI is the copper based WLR service, CG SABB and FTTH services. The WCA Market (associated with CG SABB) has been partly de-regulated in the 2018 WLA/WCA Market Review Decision and the price control obligation for FTTH rental services is not cost oriented (but based on the obligation not to cause a margin squeeze). For services that are primarily sold in the Urban Commercial Area, such as FTTC VUA, NBI's MIP will not be contributing to these costs (as NBI's CEI access is expected to be largely in the Rural Commercial Area) except for those costs that are common to all footprints.

332 Nonetheless, for the reasons already set out in Section 5.4 of the CEI Consultation and summarised above at paragraphs 306-317, ComReg considers that in the longer-term, allowing Eircom to recover costs above the LRIC risks creating a competitive distortion which can lead to disincentivising full infrastructure competition.

333 As noted in the Dot Econ Final Report, under the LRIC approach:

*"...Eir still recovers its efficiently incurred costs caused by NBI's shared use but does not gain any cost benefit itself from sharing CEI with NBI. If NBI were paid in excess of its sharer incremental cost, then Eir would enjoy benefits from CEI sharing with NBI. Other operators are not able to contest this new demand for CEI access from NBI within the commercial area, as if NBI is transiting to connect up the isolated components of the intervention area, then it will need CEI access primarily within the rural commercial area. Eir is present in the rural commercial area, having deployed a new NBA network, but it is unlikely that this area would sustain multiple networks."*<sup>177</sup>

334 Hence, allowing Eircom to just recover the LRIC associated with NBI's MIP access to CEI in the Commercial Areas allows it to be compensated for the costs that NBI causes in this area and so there is no risk to Eircom. This is consistent with Eircom's point that the costing methodology for NBI's "transit" access in Commercial Areas

<sup>175</sup> Paragraph 98 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>176</sup> Paragraph 103 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>177</sup> Section 7.2 of the Dot Econ Final Report at Annex 2.



must reflect the benefit that Eircom derives from investments already made by it, as well as the degree to which NBI will use its fibre network to compete with Eircom in other markets.<sup>178</sup> The LRIC methodology is intended to reflect the fact that the benefit for NBI is less than it is for the other user(s) of these assets as a result of NBI being prevented from competing in the Commercial Areas and the benefit Eircom will receive from its original investment is not eroded by NBI's access in the Commercial Areas.

335 However, while ComReg recognises that if NBI's MIP pays more than the incremental cost and Eircom enjoys a windfall gain on NBI's access services in the Commercial Areas, this eventually would lead to lower prices for end-user services and/or access services in the Commercial Areas, ComReg considers that the issue still remains that these lower prices can cause competitive distortions in downstream markets which can likely lead to reduced incentives for full infrastructure competition in the Commercial Areas, compared with the LRIC approach.

336 As noted in the Dot Econ Final Report if NBI pay above the LRIC:

*"...if Eir earned significant margins from CEI access supplied to NBI in the commercial area, then 'see-saw' effects lead to lower prices for other services. This could lead to a distortion of competition in various downstream services. This risk is our main concern as, unlike transient windfall gains for Eir, its effects could be persistent."*<sup>179</sup>

337 While ComReg recognises that the issue discussed at paragraph 334 can also occur in the context of the pricing for Generic Access to CEI, Generic Access seekers of CEI reduce Eircom's economies of scale so that compensation to Eircom (by recovering its LRAIC+ costs) is justified given that these access seekers are competing with Eircom in the Commercial Areas, unlike NBI's MIP.

338 Sky also considered that the fact that NBI is not competing for customers in the Commercial Areas is effectively a "red herring" when one considers the only reason it is transiting the Commercial Areas is to compete for vast amounts of Eircom's customers in the NBP-IA and there is a significant opportunity cost to Eircom in providing access to NBI in the Commercial Areas.<sup>180</sup>

339 However, Sky ignores that as NBI's advisors, Frontier Economics, note *"...it is reasonable to assume that, in such a counterfactual [where there is no NBP], Eircom's customers in the IA would not generate sufficient future margin even to cover the NBV and ongoing operation and maintenance of the CEI in the IA. As such, customers in the IA would not have made any contribution to the costs of the*

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<sup>178</sup> Paragraph 99 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>179</sup> Section 7.2 of the Dot Econ Final Report at Annex 2.

<sup>180</sup> Paragraphs 95 & 99 of Sky's Non-Confidential Response dated 18 November 2020.

*CEI in the commercial areas. In light of this there is no justification for NBI to make a contribution to the fixed and common costs in the commercial area to compensate for foregone contributions from these customers.”<sup>181</sup> This is consistent with ComReg’s reasoning.*

340 This argument is also consistent with ComReg’s position in the 2018 Pricing Decision, when it recognised that the incremental cost of serving a sub-set of copper access customers would exceed the nationally averaged price that was set for WLR under the existing 2016 Access Pricing Decision. As a result, the incremental cost of serving this sub-set of access lines may need to be part-funded from the margins being made on the less costly lines that are closer to the exchange.

341 Consequently, ComReg does not accept that there is an “opportunity cost” to Eircom in providing CEI access to NBI’s MIP in the Commercial Areas. NBI’s MIP can provide services to customers in the NBP IA, but the longer line lengths and lower line densities typical of the IA indicate that the average cost of providing those access services would be above the national average cost and would, therefore, have low or negative margins when prices have been set with reference to that national average cost. Furthermore, NBI will not compete for or serve customers in the Commercial Areas. As access to Eircom’s CEI for NBI’s MIP in the Commercial Areas will be used solely to support NBI’s fibre services in the NBP IA, rather than competing with Eircom to provide downstream services in the Commercial Areas, NBI’s use of Eircom’s CEI in the Commercial Areas will not impact on Eircom’s downstream revenues from wholesale services sold to premises in the Commercial Areas. Hence, Eircom should not face any erosion of its market share in the Commercial Areas as a result of facilitating the use of its CEI for NBI’s MIP to transit the Commercial Areas.

342 Sky disagreed with ComReg drawing similarities between the incremental costing principles that ComReg used to set the price of Line Share in ComReg Decision D04/09 and the LRIC approach for NBI’s access to CEI for transit purposes in the Commercial Areas. Sky claimed that the Line Share service is only available to operators who also purchase Eircom’s current generation Local Loop Unbundling (‘LLU’) service and so a contribution is made to common and shared network costs associated with the copper line but that this does not apply to NBI under ComReg’s proposals.<sup>182</sup>

343 However, this is not correct. An operator that purchases LLU will not require Line Share as it has already taken full control of the local loop. Line Share is only required where the OAO uses the broadband capacity of the line and it or another operator uses the same line to provide a narrowband voice service. Therefore, the

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<sup>181</sup> Pages 44-45 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>182</sup> Paragraph 103 of Sky’s Non-Confidential Response dated 18 November 2020.

Line Share service does not contribute to the "*common and shared network costs associated with the copper line*" as these costs are already recovered in the charges for the narrowband service i.e., WLR.

### **LRAIC+ methodology for NBI only gives rise to temporary distortion**

- 344 Eircom also submitted that even during short periods in which it might be able to generate more revenue from CEI [by way of a LRAIC+ approach] it is constrained by a regulatory framework that would prevent it from undertaking the kind of pricing behaviour highlighted by ComReg (and Dot Econ) and the fact that the prices for its regulated wholesale access services are set by cost-orientation means that there is no additional revenue that can be used to distort the market.<sup>183</sup> BRG Consultants supported Eircom's argument, and claimed that downstream prices would adjust either through competitive pressure or through regulatory decisions to remove any excess profits and so any potential distortion is therefore very limited. BRG Consultants claimed that if Eircom was able to earn profits on its CEI business above its WACC for a transitory period, this would have no bearing on its incentive or ability to set prices on other products in an anticompetitive way (e.g., through a margin-squeeze).<sup>184</sup>
- 345 Eircom's argument highlights the concern at the heart of ComReg's reason for proposing to derive the CEI charges for NBI's MIP in the Commercial Areas using a LRIC approach, which ComReg has summarised at paragraphs 332-336.
- 346 The ability of cost orientation to address any over recovery of costs is diluted because, as noted at paragraph 326, the most significant element of NBI's transit access is expected to occur in the Rural Commercial Area and many of the services that continue to be cost oriented, such as FTTC based services and Generic Access to CEI, are costed with reference to the costs in the Urban Commercial Area only. For example, NBI is expected to require transit access to circa 300k poles and all of these poles will be in the Rural Commercial Area, as poles in the Urban Commercial Area are primarily used as distribution points for final drops to serve premises outside the NBP IA, whereas the carrier poles that are used to support the feeder cables that require transit access to interconnect different parts of the NBP IA are located in the Rural Commercial Area. Therefore, the level of NBI's CEI access charges for transit in the Rural Commercial Area will not be affected by the cost orientation of FTTC based services that are confined to the Urban Commercial Area.
- 347 It is also unlikely that cost orientation will be a significant constraint on Eircom in the Rural Commercial Area. This is because, regulated legacy services such as CG SABB and WLR are either declining or deregulated (in the case of CG SABB in the Urban WCA Market) and FTTH rental services, which are emerging as the dominant

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<sup>183</sup> Paragraph 98 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>184</sup> Paragraphs 120-121 of BRG Consultants Non-Confidential Report dated 18 November 2020.

access service in those areas, are subject only to the obligation not to cause a margin squeeze (and not cost orientation).

348 Given this, it could be some time before regulation will be able to address any issues of over-recovery. Therefore, adopting a LRAIC+ methodology in order to set the price for NBI's MIP access to CEI for transit purposes in the Commercial Areas could result in a significant revenue windfall gain to Eircom. To illustrate the materiality of this issue, for example, if NBI was charged circa €10 per transit pole, this would give rise to an annual bill to NBI of circa €3 million (on the assumption that NBI require transit access to 300k poles in the Rural Commercial Area). This could provide sufficient revenue, over the lifetime of the contract, to fund all the investment in pole replacement that Eircom has undertaken in the Rural Commercial Area subsequent to its commitment in 2016 to deploy a rural FTTH network. Consequently, a significant element of Eircom's investment in its Rural FTTH network (in order to pass 300k premises that had been previously included as part of in the NBP IA) could ultimately be funded from the charges levied on the National Broadband Provider, NBI.

349 Eircom also argue that competition would ensure that any over recovery from CEI Access charges would be temporary but ComReg considers that any introduction of lower prices by Eircom in response to competitive threats from other network operators would mean that any distortion to competition is made permanent. Any reduction to Eircom's FTTH prices to offset the margins being made from transit CEI access charges would strengthen Eircom's first mover advantage for FTTH in the Rural Commercial Area and remove any remaining incentive for another network operator to deploy a rival FTTH network to compete with Eircom's FTTH network in the Rural Commercial Area. This is particularly the case if the investments that Eircom had incurred for the purpose of deploying its Rural FTTH network are not ultimately funded through the prices for Eircom's FTTH services but, instead, as noted at paragraph 348 are funded from the CEI access charges that Eircom levy on NBI, in a situation where NBI are prevented from using that CEI to compete with Eircom's Rural FTTH network.

350 Consequently, Eircom will be the only network operator to benefit from any payments for NBI's MIP access to CEI for transit purposes in the Rural Commercial Area that are above the incremental costs of providing that transit access service. The extent that the reduction to Eircom's FTTH prices applies nationally could also distort investment incentives by undermining the business case for alternative operators such as SIRO and Virgin Media to extend their existing FTTH networks in the Urban Commercial Area.

351 This highlights that Eircom has the ability to vary the investment (build/buy) signals in the Commercial Area and so could preclude prospective alternative network build in the Rural Commercial Area or/and to compete more aggressively in the Urban Commercial Area, where it faces greater exposure to competition from alternative

network providers, potentially limiting their expansion. The windfall gain, which is obtained from additional demand from a subsidised network, is in effect the equivalent of a scale economy, which in this case however is not reasonably available (or replicated) to alternative network providers and for this reason ComReg considers that it distorts competition and the build/buy signals for alternative investment.

352 As noted in the Dot Econ Final Report, Eircom's argument about the short-term impact of any excess revenues:

*"...misses the point that if Eir earns such gross margins from CEI access provided to NBP in the commercial area and they are passed through in lower prices in the commercial area due to the typical regular reviews of regulated prices, then this has implications for incentives for competition with the commercial area... This see-saw effect is the primary concern with setting CEI access prices for NBI at above LRIC in the commercial area. This pricing effect is not transitory, but permanent (unless there is a subsequent change in the basis of setting NBI's CEI access prices). Moreover, even if it takes some time for those price reductions to filter through, all operators can reason that they will eventually occur, so will factor this into forward-looking entry and investment decisions by Eir's potential competitors."<sup>185</sup> (emphasis added).*

353 For the reasons set out above, ComReg remains of the view that the LRAIC+ option for NBI's MIP access to CEI for transit purposes in the Commercial Areas could lead to competitive distortions, including the adverse effect of reducing incentives for competition from alternative infrastructure build in the Commercial Areas, which would be contrary to ComReg's regulatory objectives of promoting competition and encouraging investment.

#### **No limitation on NBI offering services in Commercial Areas:**

354 Eircom claimed that ComReg and Dot Econ failed to consider that, while the terms of the NBI contract limit NBI's offerings in the wholesale high speed broadband market to the premises in the NBP IA, there is no limitation as far as Eircom is aware on NBI offering services such as mobile backhaul or other services in the WHQA market once NBI's infrastructure is in place. Eircom considered that a costing methodology that allocates no fixed and sunk costs for the CEI associated with "transit" access to NBI's MIP charges in the Commercial Areas is clearly discriminatory and results in the distortion of competition for these backhaul services.<sup>186</sup>

355 ComReg remains of the understanding that the subsidies provided to NBI must only

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<sup>185</sup> Section 9.1.3 of the Dot Econ Final Report at Annex 2.

<sup>186</sup> Paragraph 99-101 of Eircom's Non-Confidential Response dated 18 November 2020.

be used to provide wholesale services in the NBP IA, in accordance with the NBP contract, and that NBI may not use the subsidies to provide electronic communications services and networks outside the NBP IA. ComReg understands that NBI is not able to use its subsidised network outside the NBP IA for any purposes other than “transiting” between its interconnection points located in the Commercial Areas and those in the NBP IA in order to provide services in the NBP IA. NBI’s MIP may not rely on its network that transits the Commercial Areas (built and operated using a State subsidy) to provide services in direct competition with Eircom or other operators in the Commercial Areas.

356 In fact, NBI stated in its response that “...the NBP network build will, from an end-user access point of view, be confined to the IA, with further extensive build required to traverse areas outside the IA in order to provide connectivity inside it...In addition, under the NBP Project Agreement, NBI’s activities are limited solely to the wholesale level and, as noted earlier, it is prohibited from using the State subsidised network to provide any electronic communications services at all outside the IA.”<sup>187</sup>

357 It is also noteworthy that Recital 19 of the EC State Aid Decision looks at the possibility of backhaul deployment by NBI and states that:

*“The new network will consist of passive and active elements (including ducts, poles, dark fibre, exchanges, active equipment)...the proposed State aid scheme aims to support the roll-out of NGA networks. The scheme targets NGA white areas. The Irish authorities explain that while they encourage the reuse of existing infrastructure... limited backhaul deployment may be necessary to achieve the objectives of the scheme in certain situations. The Irish authorities clarify that such backhaul is exclusively ancillary to the deployment of the NGA network and therefore will be built and used only insofar as needed for the coverage of the target white NGA areas and not to support services provided outside the intervention area.”*

358 Footnote 18 (in Recital 19) of the EC State Aid Decision also specifies that:

*“Aid may thus be used to build limited backhaul in order to reach the intervention area where it is appropriate e.g. to traverse the eir 300,000 area (see recital (43)) and to get from small remote local exchanges back to the access network.”*

359 It is clear therefore that the likes of backhaul is ancillary to the deployment of the NGA network and would be built and used only as needed for the coverage of the target NBP (IA) areas and not to support services provided outside the IA. It also confirms that state aid may be used to build limited backhaul in order to reach the

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<sup>187</sup> Page 11 of NBI’s Non-Confidential Response dated 18 November 2020.

NBP IA.

360 The choice of the LRIC methodology for setting the charges for NBI's MIP access to CEI for transit purposes in the Commercial Areas is based on the premise that NBI cannot use the State subsidy outside the NBP IA to serve customers and compete in this area. It recognises that Eircom should suffer no loss of wholesale or retail revenues in this area while it allows Eircom to recover its efficiently incurred costs caused by NBI's shared access and promotes efficient use of existing reusable CEI assets. However, if over the price control period NBI uses its network in the Commercial Areas to offer commercial services that result in it (or its customers) competing with Eircom's downstream services, then the LRAIC+ methodology shall apply. Hence, NBI in this case would pay the same price as a Generic Access user in the Commercial Area subject to adjustments for process costs (which are already paid for by NBI upfront) and a differentiated WACC (discussed in Section 7).

### 5.6.3 ComReg's Final Position

361 Having considered all of the Respondents' Submissions as well as the advice from Dot Econ (at Annex 2 of this Decision), ComReg remains of the view that the proposed LRIC methodology is appropriate for determining the charges for NBI's MIP access to CEI for transit purposes in the Commercial Areas, for the reasons set out above and previously at Section 5.4 of the CEI Consultation.

362 Given the unique nature of NBI's CEI access, and in particular the scale of CEI access required by NBI and the fact that NBI cannot compete or serve customers in the Commercial Areas using its subsidised network, ComReg continues to consider that a LRIC methodology is warranted for setting the price for NBI's CEI access in the Commercial Areas, as discussed at paragraph 215.

363 The LRIC methodology means that Eircom shall recover no more than the long run incremental costs incurred by it as a result of NBI's shared use of Eircom's CEI i.e., the LRIC approach. This approach does not include any contribution to the shared network costs or common corporate costs. For the purposes of this Decision a 'transit' pole is a pole where either Eircom or another operator other than NBI has deployed fibre. Similarly, 'transit' duct is a duct that has either fibre and / or sub duct from Eircom or another operator other than NBI. The annual review process discussed at Section 10 will consider any updates to the volumes of transit poles based on the latest view of actual fibre deployment at that time.

364 If the case arises over the price control period that NBI uses Eircom's CEI in the Commercial Areas to offer commercial services that result in NBI (or its customers) competing with Eircom's downstream services, then the LRAIC+ methodology shall apply.

## 5.7 NBI's MIP access to CEI in the NBP IA

### 5.7.1 Position set out in the Consultation

365 For **NBI's MIP access to CEI in the NBP IA** ComReg recognised in the Consultation that the scale of NBI's access to Eircom's CEI in the NBP IA is expected to be very significant and for a long-term duration. In addition, ComReg considered that NBI's fibre network roll out in this particular area will enable the migration of customers off Eircom's existing copper network onto the fibre network being deployed by NBI for the purposes of the NBP. The expectation is that premises in the NBP IA will ultimately be served by NBI's fibre service so that NBI's MIP could emerge as the only user of a significant proportion of Eircom's CEI in the NBP IA. As a result, NBI's MIP may be the only costs (and revenues) that Eircom receives for the use of its CEI in this area. The expected replacement of Eircom's copper network with NBI's fibre network means that NBI's use of Eircom's CEI in the NBP IA will ultimately impact on Eircom's downstream revenues from the copper based wholesale services sold to premises in the NBP IA.

366 ComReg considered that Eircom's ability to fund / recover the cost of maintaining its CEI in the NBP IA from the revenues it receives from the wholesale customers on its copper network will be eroded over time, with the prospect that all CEI costs in the NBP IA may eventually have to be recovered from NBI's MIP. Hence, ComReg proposed that the CEI costing methodology for NBI's MIP access to CEI in the NBP IA should ensure a) the recovery of shared network costs using a methodology which encourages efficient migration to fibre (which is considered further in Section 6) and b) that Eircom can recover the long run incremental cost caused by NBI's demand for CEI in this area.

367 In the CEI Consultation ComReg also recognised that in the NBP IA the likelihood that NBI's fibre network will gradually displace Eircom's copper network means that the majority of any future CEI investment by Eircom is likely to be solely to support the provision of CEI access to NBI's MIP in the NBP IA. Hence, Eircom's investment in its CEI network in the NBP IA is to make its duct and poles 'NGA ready' for the sole benefit of NBI's fibre rollout in this area, at a level similar to those undertaken by Eircom for the purpose of its 300k FTTH Rural Network. ComReg considered that such a level of investment in the NBP IA would only be warranted if NBI requires access to Eircom's CEI. Absent rollout plans for an NGA network that leads to demand for CEI access from Eircom, it would be economically rational for Eircom to 'sweat' the existing assets until it can retire its copper network, subject to achieving its quality of service line performance targets.

368 While Eircom is expected to ultimately retire its copper network and possibly switch to being a reseller (of NBI's services to its customers), nonetheless, Eircom may be expected to replace a significant number of its poles in advance of NBI's fibre



deployment in the NBP IA. As much of this pole replacement only arises because NBI's MIP is seeking access to Eircom's poles in the NBP IA the associated investment should be considered to be incremental to NBI's MIP access in the NBP IA.

369 ComReg also considered that even if the costing methodology to determine the prices for NBI's MIP access to CEI in the NBP IA should only allow Eircom to recover (at least) its incremental costs to support that CEI access, the resulting CEI costs (and prices) in the NBP IA are likely to be higher than the CEI costs (and prices) for NBI's MIP access to CEI in the Commercial Areas. However, the fact that Eircom's customers will migrate to NBI's fibre services in the NBP IA means that ComReg also has to consider the impact that NBI's deployment may have on the revenues that Eircom can generate from its customer base in the NBP IA and the implications this could have for overall cost recovery for Eircom particularly during the transition period when customers are present on both Eircom's copper network and on NBI's fibre network.

370 In the CEI Consultation ComReg noted the principle established in the 2018 Pricing Decision (D11/18), according to which all common corporate costs of Eircom's access network should be recovered only from services sold in commercial areas.

371 ComReg recognised that while FTTC VUA prices (which include a portion of CEI costs) set in the 2018 Pricing Decision reflected this principle, no changes were made to the standalone prices of CEI to reflect this principle as there had been no material demand for CEI access.

372 ComReg proposed that this principle should be reflected in the CEI charges so that there would be consistency in the approach to common corporate costs recovery between the various wholesale access prices pursuant to the 2018 Pricing Decision.

373 ComReg explained that the principle established in the 2018 Pricing Decision meant that common corporate costs of Eircom's access network should be recovered only from services sold in commercial areas on the basis that services in the non-commercial area did not have sufficient margins to make a contribution to Eircom's common corporate costs. As a result, the prices that Eircom might charge an NBP operator for access to poles and ducts in the Intervention Area would not need to include a common cost mark-up.<sup>188</sup> This is discussed further in Section 5.7 of the ANM Decision.

374 Hence, ComReg reached the preliminary view that the costing methodology that should apply in the case of NBI's MIP access to CEI in the NBP IA, should ensure that Eircom recovers a contribution towards the CEI shared network costs as well as the incremental cost caused by NBI's demand through the shared use of the CEI

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<sup>188</sup> See footnote 161 of the 2018 Pricing Decision (ComReg Decision D11/18).

but with no contribution towards the common corporate costs.<sup>189</sup> This meant that the proposed costing methodology for NBI's MIP access to CEI in the NBP IA should include TD HCA costs for reusable assets and a form of BU-LR(A)IC for non-reusable assets but with no contribution to common corporate costs.

375 ComReg invited the views of respondents (in Question 3 of the CEI Consultation) on the proposed costing methodology in the case of NBI's MIP access to Eircom's CEI in the NBP IA.

### 5.7.2 Respondents' Views and ComReg's Response

376 Eircom, NBI, Vodafone, Sky, BT, ALTO and Siro commented on ComReg's proposed costing methodology of BU-LRAIC and TD HCA for NBI's MIP access to Eircom's CEI in the NBP IA.

377 Siro<sup>190</sup> and NBI generally supported ComReg's approach, although NBI suggested that ComReg should consider an impairment adjustment to Eircom's CEI asset base in the NBP IA<sup>191</sup>. The issue of impairment review is addressed separately at section 5.8.2.

378 BT<sup>192</sup>, ALTO<sup>193</sup>, Sky<sup>194</sup> and Vodafone<sup>195</sup> disagreed with ComReg's costing approach for NBI's MIP in the NBP IA on the basis that common corporate costs should be recovered from services in both the Commercial Areas and the NBP IA, as otherwise there was a risk of a cross subsidy from the services sold in the Commercial Areas to those services sold in the NBP IA. Eircom sought clarity on how common corporate costs would be recovered across CEI and other access services in both urban and regional markets.<sup>196</sup> Siro had concerns that if common costs are to be spread across 'Various Wholesale Access Products' that this may lead to an increase in the cost of these products in the future.<sup>197</sup>

379 BT<sup>198</sup>, ALTO<sup>199</sup> and Eircom<sup>200</sup> sought clarity on the methodology and prices that would apply in the event of a third operator accessing Eircom's CEI in the NBP IA.

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<sup>189</sup> In order to be consistent with the principle adopted in the 2018 Pricing Decision, ComReg considered that the costs to be recovered from the CEI prices for NBI's MIP access in the NBP IA should not include a mark-up to account for common corporate costs.

<sup>190</sup> Page 3 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>191</sup> Page 20 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>192</sup> Page 7 of BT's Non-Confidential Response dated 18 November 2020.

<sup>193</sup> Page 5 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>194</sup> Sky's Non-Confidential Response dated 18 November 2020.

<sup>195</sup> Page 6 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>196</sup> Paragraphs 89-92 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>197</sup> Page 3 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>198</sup> Pages 4-5 and 10 of BT's Non-Confidential Response dated 18 November 2020.

<sup>199</sup> Pages 3-4 and 9-10 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>200</sup> Paragraph 94 of Eircom's Non-Confidential Response dated 18 November 2020.

380 The recovery of common corporate costs relates to all wholesale access services on Eircom's network but it is only how Eircom's costs should be recovered from CEI access services that is considered here. The recovery of common corporate costs from other access services such as Virtual Unbundled Access ('VUA') is dealt with in Section 5.7 of the ANM Decision.

### Recovery of common corporate costs from CEI services in NBP IA

381 Sky provided extensive commentary on the issue of recovery of common corporate costs.<sup>201</sup> Sky claimed that the exclusion of a mark-up for common costs in the NBP IA "...directly contradicts the 2013 EC Recommendation wherein including a mark-up for common costs is the rule rather than the exception."<sup>202</sup> Sky considered that given ComReg's objective of promoting competition and efficient investment it is difficult to see how that objective is in any way being advanced by determining that Eircom's services in the non-Commercial / NBP IA footprint does not have to make any contribution to shared/common costs.<sup>203</sup> Sky also claimed that ComReg is responsible for putting what appears to be an anti-competitive regime in place (through ComReg Decision D11/18) and that if ComReg does not unwind those current proposals and properly address cross-subsidisation concerns in particular, Ireland will risk being in breach of Article 106 of TFEU.<sup>204</sup>

382 However, as already discussed in Section 3, in determining the appropriate CEI charges for NBI's MIP access to CEI in the NBP IA ComReg recognises that the prospects of entry by another commercial operator is small so that ComReg's statutory objective of promoting competition and encouraging efficient investment does not involve setting a price control that creates sustainable and long term competition with Eircom, and facilitate new commercial entry, by either CEI providers or alternative wholesale broadband providers. Instead, in this case, in the NBP IA promoting competition and encouraging efficient investment means avoiding inefficient duplication of CEI assets, to allow for the cost effective deployment of NBI's network and to ensure that Eircom is allowed to recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of those assets with NBI's MIP.

383 The CEI costing methodology for NBI's MIP access to CEI in the NBP IA ensures that any incremental costs caused by NBI are paid to Eircom, and in addition, that NBI's MIP pays a contribution towards Eircom's CEI shared network costs i.e., Eircom can recover its LRAIC. This ensures that Eircom can recoup the incremental CEI investments that it incurs in the NBP IA, which will ultimately solely benefit NBI's MIP, once Eircom decommissions its copper network (or removes its copper cables in the case of poles). In addition, the price for NBI's MIP access to CEI in the NBP

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<sup>201</sup> Sky's Non-Confidential Response dated 18 November 2020.

<sup>202</sup> Paragraph 43 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>203</sup> Paragraphs 72-73 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>204</sup> Paragraph 79 of Sky's Non-Confidential Response dated 18 November 2020.

IA reflects the fact that reuse of existing CEI infrastructure is appropriate in order to avoid inefficient investment through duplication of fixed costs and having duplicate (Eircom's and NBI's) networks running in parallel after the new fibre network is rolled out. Where CEI can be reused, use of Eircom's actual costs from its HCAs, along with a reasonable rate of return, ensures that there is no over or under recovery of costs by Eircom.

384 Consistent with Paragraph (34)<sup>205</sup> of the 2013 EC Recommendation, ComReg recognises that the reuse of existing CEI is an essential aspect of encouraging efficient investment. The 2013 EC Recommendation recognises that the high cost of CEI deployment means that it is unlikely that an access operator will seek to replicate a duct and pole network when it has the option to access an existing network. This means that CEI access services should be priced in such a way as to encourage efficient entry by avoiding unnecessary CEI duplication while maintaining the investment incentives of the CEI's owner by allowing it to recover its efficiently incurred costs plus a reasonable rate of return on its capital employed.

385 Since the CEI Consultation and given due consideration to the issues raised by Respondents regarding the recovery of common corporate costs from services sold in the NBP IA, ComReg has revisited the composition of Eircom's common corporate costs to establish what common corporate costs could in fact be considered incremental to the CEI services sold to NBI's MIP in the NBP IA. In other words, ComReg has reassessed Eircom's common corporate costs to determine which costs would scale or would be likely to vary for a fixed line access operator like Eircom who faces both changes in its service demand for its fixed line services and in the size of the footprint (or area) that it will serve as a fixed line telecoms provider over the next few years. This exercise has allowed ComReg to ensure that the LRAIC approach for setting the charges for NBI's MIP access to CEI in the NBP IA considers all incremental costs, including any central overheads that, while common, are also avoidable in the long run following a significant change in Eircom's service set. This is discussed further below.

386 The NBP is expected to have a significant impact on Eircom's fixed access network both in terms of the volume of fixed line access services Eircom provides into downstream wholesale markets and the size of the footprint it will cover as a fixed line access provider. Hence, this raises the question whether some central overhead costs, might in fact be considered incremental when Eircom's network footprint changes.

387 According to Dot Econ:

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<sup>205</sup> "...civil engineering assets (for example ducts, trenches and poles) are assets that are unlikely to be replicated. Technological change and the level of competition and retail demand are not expected to allow alternative operators to deploy a parallel civil engineering infrastructure, at least where the legacy civil engineering infrastructure assets can be reused for deploying an NGA network."

*“...care needs to be taken to identify common costs appropriately in the context of a major change in Eir’s activities due to the NBP. In particular, some costs that might have previously been considered fixed and common in the context of established patterns of operating and established copper network may in fact be incremental when considering migration from copper to fibre and progressive replacement by a fibre network within the IA... This reclassification reduces the scale of the issue of common cost recovery, but also tends to increase incremental costs within the IA.”<sup>206</sup>*

388 As a result, ComReg considers that its costing approach should give specific attention to the incremental costs associated with all of Eircom’s demand in the NBP IA, as NBI is expected to replace Eircom as the principal fixed line access provider of downstream access services in the NBP IA. ComReg recognises that isolating the incremental cost for the NBP IA demand also allows for the identification of all costs associated with a standalone operator for the commercial footprints, including the direct and indirect network costs and the associated level of common corporate costs.

389 As noted by Dot Econ:

*“...whether or not we consider a particular cost as common or incremental depends on the range of services that are hypothetical ceased when defining incremental cost (the “increment”). If we broaden the range of services that might hypothetically be ceased, we may reclassify a cost as incremental that previously appeared as common.”<sup>207</sup>*

390 ComReg acknowledges that some judgement is required to determine the extent that common corporate costs will scale (or vary) due to the changes in overall service demand or changes in the type of services offered, particularly considering that there will be a period when Eircom is expected to replace its copper cables with fibre cables in the area outside the NBP IA and where it is expected to cease being the main fixed line access service provider in the NBP IA.

391 **Network Rates** are rates that Eircom pay to local authorities based on a global valuation of Eircom’s fixed network. Similar to other public utilities, the Valuation Office determines the Net Asset Value (**NAV**) of Eircom's fixed network based on an assessment of the profit that Eircom has been able to achieve from the services that it supplies using that fixed network.

392 ComReg considers that the returns that Eircom makes from CEI access could increase the rateable valuation of its network. The fact that Network Rates are based on the global valuation of Eircom’s fixed network undertaken by the Valuation Office means that it is not possible to either directly or indirectly associate the

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<sup>206</sup> Section 1 of Dot Econ’s note on the recovery of common costs at Annex 2 of the ANM Decision.

<sup>207</sup> Section 3 of Dot Econ’s note on the recovery of common costs at Annex 2 of the ANM Decision.

network rates charge with specific assets in Eircom's network and so Network Rates can be considered as a common corporate cost. ComReg understands that the rateable valuation for Eircom's fixed network is based on an assessment of profits, where the profitability of the undertaking being rated is assessed with a view to determining a 'Net Annual Value', similar to what a hypothetical tenant / operator would pay for the use of the network (also known as, Receipts and Expenditure Method).<sup>208</sup> A contribution towards Network Rates was not included in the proposed CEI LRAIC prices for NBI's MIP in the CEI Consultation.

393 Sky questioned why no consideration was given to the mechanism already in place for sharing local authority rates on a pole route basis with access seekers. Sky claimed that ComReg has assumed that Network Rates are a category of common costs that should only be recovered from the Rural/Urban Commercial footprints.<sup>209</sup>

394 ComReg considers that as copper access services in the NBP IA tend to have low or negative margins Eircom's global valuation could actually increase if it ceased providing these downstream wholesale services and it withdraws the high cost copper network in the NBP IA. Eircom's global valuation could also increase as it starts to provide CEI access services to NBI's MIP, as CEI access is always profitable for Eircom, given that the price is determined with reference to the cost of the individual asset (pole or section of duct) and includes a return on capital employed. This is in contrast to downstream wholesale services, for which prices are based on the average cost resulting in the cost of some lines being below the average price and some above. Consequently, it seems reasonable to consider Network Rates as being incremental to CEI access in the NBP IA even if they are not incremental to the copper access services sold in the NBP IA. Therefore, ComReg considers that a contribution to the recovery of the costs of Network Rates should be included in the LRAIC of the CEI access charge for NBI's MIP in the NBP IA, which represents a change from the approach taken in the CEI Consultation where the cost of network rates was not included in the LRAIC price for NBI's MIP access to CEI in the NBP IA.

395 Similarly, for **cost accounting and accounting separation** obligations, ComReg considers that Eircom will be required to provide further financial and demand details on CEI access by NBI's MIP as part of its HCAs. Given the expected scale of CEI access required by NBI's MIP in the NBP IA and the fact that Eircom will be required to make extensive investments in CEI, it will be necessary to report ducts and poles in a transparent way in Eircom's HCAs. ComReg considers that it should be possible for Eircom to establish processes that will facilitate the harvesting, analysis and reporting of the necessary data to comply with the necessary reporting

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<sup>208</sup> The basis of valuation of all rateable property throughout the State is "Net Annual Value", as defined in section 48 of the Valuation Act. This applies to both public utility undertakings valued on a global basis and conventional rateable properties such as shops, offices and industrial facilities operated by other businesses.

<sup>209</sup> Paragraph 88 of Sky's Non-Confidential Response dated 18 November 2020.

obligations, which is discussed in Section 10. Consequently, ComReg considers that a cost contribution to the recovery of Eircom's cost accounting and regulatory reporting obligations should be included in the LRAIC of the CEI access charges for NBI's MIP in the NBP IA.

396 However, Eircom is not expected to require the same level of field staff to support CEI access in the NBP IA as would be required to maintain and operate a copper access network in that area. In particular, the maintenance staff required to fix cable faults<sup>210</sup> will no longer be required when Eircom retires its copper access network in this area. Consequently, ComReg has treated some of these costs e.g., personnel (HR) or transport management costs, as scalable (or incremental) to the CEI access service in the NBP IA. Those resources directly involved with NBI's MIP are being supported by HR, finance and other central areas so some allocation of these common corporate cost functions is warranted. However, the scalable share of these costs in the context of CEI access for NBI's MIP is lower than it is for the downstream wholesale services such as WLR or CG SABB.

397 The changes made to the PAM and DAM to reflect the revised approach discussed above, as well as the overall monetary impact, is discussed as part of the cost modelling approach in Section 5.11.2.

398 Separately, and in order to avoid any possible double cost recovery, the ANM (in Section 5.7 of the ANM Decision) discounts the common corporate costs to be recovered from commercial downstream wholesale services to recognise the amount of costs that are being recovered directly through the CEI access charges for NBI's MIP in the NBP IA. The revisions to the common cost allocations in the ANM (and in the PAM/DAM) should ensure that all LRAIC costs that might not be incurred if the CEI access service by NBI's MIP in the NBP IA footprint was not provided are attributed to that service. In this way any concerns that there might be a cross subsidy to those CEI services from the services sold in other parts of the network are addressed.

399 As set out by Dot Econ:

*“Different services making different contributions to common cost recovery is not in itself a cross-subsidy. A cross-subsidy arises where a service does not cover its incremental costs and a contribution is made through a margin earned through other services priced above their incremental cost.”<sup>211</sup>*

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<sup>210</sup> The majority of the reduction in the size of the R&M teams between the BU Scenario and the TD scenarios in the ANM is associated with the lower level of faults that is achieved by replacing the older overhead copper cables that are deployed in rural areas with newer cables that are significantly less fault prone. Consequently, the modelled reduction in team sizes is greater in those regions with exchanges that comprise a larger number of rural lines than in the regions where a greater proportion of the lines are in urban areas.

<sup>211</sup> Section 1 of Dot Econ's note on recovery of common corporate costs at Annex 2 of ANM Decision.

400 However, this is not the case in the context of the services priced in the PAM and DAM models as the costs that are incremental to the CEI access services are attributed to those services.

401 For the **remainder of common (corporate) costs in the NBP IA**, ComReg considers that any contribution from NBI's MIP in the NBP IA, which are not caused by NBI's MIP, could lead to competitive distortions. Eircom could use these additional revenues as an opportunity to gain a competitive advantage, for example, to reduce the prices of wholesale access services where it is faced with competition from rival network operators. This in turn could have the adverse effect of reducing incentives for competition from alternative infrastructure providers in the Commercial Areas.

402 Dot Econ similarly advises that there would be a

*“risk of competitive distortion within the CA from applying a mark-up for common costs on CEI in the IA:*

- *First, this would be a new and additional source of profitability for Eir in the short term until the prices of other services adjust (whether due to regulation, or competition) to make correspondingly smaller contributions to common costs. This additional profit would derive from Eir's uncontested position as supplier of CEI in the IA.*
- *Second, wholesale and access services being somewhat cheaper in the CA (as their contribution to Eir's common costs would be reduced) risks, to some limited degree and over the longer term, reducing incentives for competitive providers.”<sup>212</sup>*

403 ComReg is of the view that the revised approach to the allocation of common corporate costs, as set out above, should ensure that the prices charged by Eircom in relation to NBI's MIP access to CEI in the NBP IA reflects an appropriate contribution to all relevant costs and overheads associated with the provision of Eircom's CEI access service in the NBP IA, while maintaining the appropriate investment incentives for alternative infrastructure providers in the Commercial Areas. It also confirms that the principle established in the 2018 Pricing Decision, that all costs of Eircom's access network that are not incremental to the NBP IA should be recovered from services sold in commercial areas, remains a reasonable approach.

404 Sky raised other issues, around the pricing of WLR and the recovery of common costs<sup>213</sup>, the definition of “Commercial Areas” used in the CEI Consultation and in

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<sup>212</sup> Section 7 of Dot Econ's note on recovery of common costs at Annex 2 of ANM Decision.

<sup>213</sup> Paragraphs 26-30 of Sky's Non-Confidential Response dated 18 November 2020.



ComReg Decision D11/18<sup>214</sup> and references to the common costs of Eircom's competitor in the Commercial Area e.g., SIRO.<sup>215</sup> These issues are addressed by ComReg in Section 5.7 of the ANM Decision.

### **Possible third operator in the NBP IA on a commercial basis**

405 BT<sup>216</sup> and ALTO<sup>217</sup> considered that another operator such as Eircom may enter parts of the NBP IA to provide its own fibre access and that the model needs to take this into account as there is an opportunity and incentive for Eircom to "cherry pick" the NBP IA.

406 Eircom sought clarity on whether additional access from an operator in the NBP IA, specifically in the case of pole access, represents a second operator (even in the circumstance when NBI and Eircom are already on the pole) or third operator. Eircom noted that if the generic operator is deemed to be the second operator when Eircom undertakes its copper switch off, then the generic operator becomes the sole bearer of the remaining cost despite NBI's presence and it is unclear what price the generic access operator will be charged.<sup>218</sup>

407 ComReg has considered the points raised by BT, ALTO and Eircom.

408 Currently, the commercial footprints are determined with reference to those premises that can avail of a commercial NGA service as distinct from premises that have been designated to be in the NBP IA and are expected to receive a viable NGA service from NBI's MIP. However, commercial operators are not precluded from offering services to premises in the NBP IA, and ComReg recognises the possibility that premises that have been designated by DECC as being in the NBP IA could ultimately receive NGA services from a commercial operator. However, ComReg remains of the view, as set out in Section 3, that it is highly unlikely that there will be competing wholesale NGA networks in the NBP IA (as defined) for the foreseeable future.

409 Notwithstanding that view, Eircom or another operator may decide to provide fibre access services to end-users in certain parts of the NBP IA which could ultimately benefit consumers/end-users. In the event that commercial NGA services are extended to premises that have been designated as being in the NBP IA, this may be regarded as an expansion of the Commercial Area footprint, and the associated demand and costs may be included in any future assessment of cost oriented prices for CEI access. Operators, such as Eircom, could target NBP IA premises that are adjacent to their existing FTTH networks by deploying FTTH fibre on poles and in ducts that would previously have been only used by Eircom's copper network or

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<sup>214</sup> Paragraphs 22 and 31-32 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>215</sup> Paragraphs 100-102 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>216</sup> Pages 4-5 and 10 of BT's Non-Confidential Response dated 18 November 2020.

<sup>217</sup> Pages 3-4 and 9-10 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>218</sup> Paragraph 94 of Eircom's Non-Confidential Response dated 18 November 2020.

shared with NBI's fibre network. Currently, the primary distinguishing feature between a pole in the NBP IA footprint and a pole in the Rural Commercial Area footprint is that the latter poles already support a fibre cable that has been deployed as part of Eircom's 300k Rural FTTH network, i.e., a pole accessed by NBI when it is the sole user of the pole or the only other user of the pole is Eircom's copper access network. Hence, if Eircom extend its 300k Rural FTTH network by deploying additional fibre cables on poles and ducts, those poles and ducts could become part of the Rural Commercial Area network, and access to that CEI by NBI's MIP could be regarded as transit access for the purposes of determining CEI access charges (and so be based on incremental costs).

410 If another operator (other than NBI or Eircom) decides to deploy its fibre cables on Eircom's poles in the NBP IA on a commercial basis, this may also be considered an extension of the Commercial Area footprint, as noted above. In this case and based on similar assumptions to those at paragraph 409, the OAO could pay the Generic Access CEI price. If NBI and the OAO are the only two operators present on the pole then the OAO could pay the total Generic Access CEI price as if it was the sole user of the pole, and NBI could pay the "transit" access incremental price. Similarly, if Eircom is also present on the pole with two operators NBI and the OAO then both Eircom and the OAO could share (50:50) the total Generic Access price of the pole, as NBI would only be subject to "transit" access incremental pricing for poles on the basis that NBI cannot compete for or serve customers in Commercial Areas. However, ComReg considers that the possibility of a third operator deploying its fibre network in the NBP IA on a commercial basis is unlikely. Should this become a material issue in the future ComReg will review the possible implications that such developments could have for CEI access pricing.

### Other issues

411 Sky claimed that prices below Average Variable Costs (AVC) are abusive under EU law, where it made some comparisons between the approach taken by ComReg on the recovery of common costs in the NBP IA and the case of *AZKO v Tetra Pak II* on the issue of predatory pricing. Sky concluded that the approach by ComReg to pricing in the NBP-IA would mean that it would fail the AKZO/Tetra Pak AVC test.<sup>219</sup>

412 However, the costing methodology determined for the CEI access charges for NBI's MIP in the NBP IA allows Eircom to recover all of the incremental costs caused by NBI's MIP as well as a contribution towards the shared (fixed) network costs. AVC is based on the variable cost of producing an additional unit of output but it does not include an allocation of fixed costs. Hence, ComReg's approach to CEI charges for NBI's MIP in the NBP IA does not reflect a price below the AVC, as suggested by Sky.

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<sup>219</sup> Paragraphs 74-76 of Sky's Non-Confidential Response dated 18 November 2020.

### 5.7.3 ComReg's Final Position

413 Having considered the Respondents' Submissions and taking into account advice from Dot Econ, ComReg has revised its approach to the recovery of common corporate costs by respecifying the LR(A)IC associated with its CEI services sold to NBI's MIP in the NBP IA. This means that certain common corporate costs that can scale, due to the changes in Eircom's overall service demand or changes in the type of services offered by Eircom in the NBP IA, are respecified from fixed common corporate costs to scalable common corporate costs that are considered incremental to Eircom's CEI service sold to NBI's MIP in the NBP IA.

414 In addition, ComReg has concluded that the remainder of common (corporate) costs in the NBP IA, which are not caused by or related to NBI's demand for CEI access, should not be recovered from NBI's MIP as any additional contribution to common corporate costs in this area could lead to competitive distortions, for the reasons outlined above and previously at Section 5.4 of the CEI Consultation. The impact of these changes is set out in Section 9.

415 Hence, for NBI's MIP access to CEI in the NBP IA, Eircom shall recover no more than the long run average incremental cost incurred by NBI as a result of its shared use of Eircom's CEI i.e., the LR(A)IC approach, as well as a contribution to the CEI shared network costs. This means the costing methodology is a combination of BU-LR(A)IC (for non-reusable CEI assets) and TD HCA (for reusable CEI assets) as well as a contribution to the CEI shared network costs, but with no additional contribution to common corporate costs.

416 Table 8 below summarises ComReg's position on the costing methodologies that shall apply for Generic Access to CEI and for NBI's MIP access to CEI, as discussed above at Sections 5.5-5.7.

**Table 8: Costing methodologies for CEI Access**

	Generic Access to CEI	NBI's MIP Access to CEI	
<i>Geographic Footprint</i>	<i>National</i>	<i>Commercial Areas</i>	<i>NBP IA</i>
<i>Costing methodology</i>	LRAIC+ (with TD HCA)	LRIC	LR(A)IC (with TD HCA)

## 5.8 Costing principles for Reusable and Non-Reusable CEI Assets

### 5.8.1 Position set out in the Consultation

417 In Section 5.5 of the CEI Consultation ComReg considered how the reusable and non-reusable CEI assets should be valued in order to determine the appropriate

costs for access to Eircom's CEI.

418 For **Reusable CEI Assets**, ComReg was of the preliminary view that Reusable CEI Assets should be valued based on a RAB and set by reference to Eircom's HCAs. ComReg considered that the definition of reusable civil engineering assets used in the 2016 Access Pricing Decision continued to be relevant in the context of CEI and so reusable civil engineering assets should include duct, trenches, poles and chambers, which can be reused for the rollout of NGA services (**'Reusable CEI Assets'**). ComReg noted that the 2013 EC Recommendation defined reusable civil engineering assets as:

*"...those legacy civil engineering assets that are used for the copper network and can be reused to accommodate an NGA network."*

419 ComReg recognised that CEI assets are both very costly to deploy and have long life-times which means that their duplication is generally avoided — as such parallel networks may not be appropriate from an economic efficiency perspective, although they are not precluded. Therefore, facilitating joint use of existing infrastructure is generally more economically efficient and ensuring recovery of costs becomes the key objective.

420 Paragraph 34 of the 2013 EC Recommendation sets out that the Reusable CEI Assets should be valued on the basis of a regulatory asset base (**'RAB'**) approach derived from the SMP operator's accounts.

421 ComReg proposed that for Reusable CEI Assets, it would carry forward the valuation method used in the 2016 Access Pricing Decision. This approach based the valuation of Eircom's Reusable CEI Assets on Eircom's accounting NBV directly taken from its HCAs and projected the NBV forward by including an allowance for future investment in related network assets over the price control period. Furthermore, the Reusable CEI Assets in the 2016 Access Pricing Decision were valued based on the NBV from Eircom's HCAs and depreciated over the remaining lifetime of the asset by applying a tilted annuity formula which uses as a parameter the asset price index – this approach was referred to in the 2016 Access Pricing Decision as **'Eircom's Indexed Regulatory Asset Base (RAB)'**. ComReg used an asset specific price index (as part of the tilted annuity formula) instead of the retail price index (as suggested in the 2013 EC Recommendation) which should ensure that regulated prices follow the evolution of network asset prices. In any event, ComReg considered that the effect was not likely to be material.

422 ComReg considered that by using the RAB approach proposed, the more CEI assets (duct and poles) that Eircom replace the greater the increase in the actual costs recorded for CEI in Eircom's HCAs. Furthermore, it is also the case that the more Eircom replaces in terms of CEI (either by way of replacing older poles or clearing duct blockages), the greater is the proportion of its CEI network which

becomes reusable for NGA.

423 ComReg also recognised that the RAB approach for Reusable CEI Assets (set by reference to Eircom's regulatory accounting values from its HCAs) ensures that Eircom is not recovering more than it has invested in reusable infrastructure assets while allowing other operators to access this CEI at an efficient price level. ComReg also believed that this approach should facilitate strict cost recovery for those Reusable CEI Assets while taking utmost account of Paragraph 34 of the 2013 EC Recommendation.

424 For **Non-reusable CEI Assets**, ComReg was of the preliminary view that Non-reusable CEI Assets should be valued on the basis of a RAB approach based on replacement costs with reference to the estimated level of investment expected from Eircom and NBI.

425 ComReg included among non-reusable civil engineering assets, all ducts, trenches, poles and chambers which cannot be reused for NGA without further investment by Eircom (the '**Non-reusable CEI Assets**'). ComReg noted that the nature and scale of this upfront investment will tend to be dependent on the condition of the existing assets. For poles the majority of such investment will relate to the replacement of existing poles that are considered unsafe or otherwise unfit for the deployment of new cables, while investment in underground ducts can be required to repair faulty infrastructure or clear congested sections and blockages so that sub ducts can be deployed to accommodate new fibre cables.

426 Paragraph 33 of the 2013 EC Recommendation specifies that the calculation of wholesale access prices should be based on a RAB approach using replacement costs, except for Reusable CEI Assets. Furthermore, Paragraph 31 of the 2013 EC Recommendation specifies that a BU-LRIC+ costing methodology should be used to determine the replacement / current costs.

427 ComReg proposed accordingly to continue to value the Non-reusable CEI Assets based on a RAB approach using replacement costs, which is consistent with Paragraph 33 of the 2013 EC Recommendation.

428 ComReg also recognised that with better information now available to it, compared to 2016, it could project the level of investment in CEI that Eircom can be expected to undertake each year as FTTH networks are extended to pass every premises in Ireland, based on Eircom's planned FTTH overlay in the Urban Commercial Area and on NBI's fibre rollout in the NBP IA. Furthermore, ComReg proposed that the cost estimates for future investment in CEI can also be informed by Eircom's experience in the Rural Commercial Area for its 300k FTTH Rural Network, updated to reflect the latest available information on equipment and contractor costs associated with CEI deployment in Ireland.

429 In the CEI Consultation ComReg pointed out that all the CEI routes where Eircom has recently deployed FTTH can now be classified as 100% reusable for NGA. As a result, the full costs of Eircom's RAB on these routes can be determined by the value of these assets as derived by a full (100%) TD valuation of these assets as recorded in Eircom HCAs for year ended 30 June 2019<sup>220</sup>.

430 ComReg also noted that it expects the recorded investment in CEI in other parts of Eircom's network to increase as Eircom actively replaces / upgrades CEI either to facilitate its own overlay of FTTH in the Urban Commercial Area or for upgrades to its CEI network in the NBP IA so as to facilitate the deployment of NBI's FTTH network over the next 7 years.

431 As a result, the estimated percentages used in the 2016 Access Pricing Decision for the assumed replacement rates for CEI assets i.e., 8% for poles and 5% for duct based on BU-LRAIC+ costs, can now be updated to reflect the estimated level of CEI investments that Eircom is expected to undertake each year to support its FTTH rollout as well as NBI's expected fibre deployment plans in the NBP IA.

432 ComReg invited the views of respondents (in Question 4 of the CEI Consultation) on the proposed costing principles for Reusable CEI Assets and Non-reusable CEI Assets.

### 5.8.2 Respondents' Views and ComReg's Response

433 ComReg received a direct response to Question 4 from four Respondents, namely Eircom, NBI, Vodafone and ALTO. BT<sup>221</sup>, Virgin Media<sup>222</sup> and Siro<sup>223</sup> stated that they had no comments on the proposed costing principles for Reusable CEI Assets and Non-reusable CEI Assets and Sky did not address the issues raised in Question 4 in their general response.

434 Vodafone<sup>224</sup> and Eircom generally agreed with ComReg's proposed approach for valuing Reusable CEI Assets and Non-reusable CEI Assets, although Eircom commented that it is not generally possible to establish in advance which assets will be reused and which will not.<sup>225</sup> Eircom claimed that there is an inconsistency between ComReg's approach to setting the RAB for the Reusable CEI Assets compared to the approach recommended in the 2013 EC Recommendation.<sup>226</sup> NBI considered that the values for poles and ducts in the NBP IA should be calculated

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<sup>220</sup> The 2013 EC Recommendation defines the 'Regulatory accounting value' as "the value of an asset as recorded in the audited regulatory accounts of an undertaking which considers actual utilisation and lifetimes of the assets, which are typically longer than those recorded in statutory accounts and which are more in line with technical lifetimes".

<sup>221</sup> Page 7 of BT's Non-Confidential Response dated 18 November 2020.

<sup>222</sup> Page 3 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>223</sup> Page 4 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>224</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>225</sup> Paragraph 104 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>226</sup> Paragraphs 136-138 of Eircom's Non-Confidential Response dated 18 November 2020.

specifically for the IA and not based on a national average CEI valuation and that reusable assets in the PAM and DAM should be revalued to reflect its earning potential in the counterfactual case where there is no NBP or where Eircom's CEI is not used by the NBP provider.<sup>227</sup>

435 Eircom commented also on the pole replacement rate for the NBP IA and that duct incremental costs for NBI's MIP should be charged upfront, which ComReg has considered later in Section 5 at paragraphs 596-599 and in Section 9 at paragraphs 991-996, respectively. ALTO called on ComReg to assess the scale of historical under-investment by Eircom, which is addressed at paragraphs 573-584.

### **Impairment adjustment to Eircom's CEI in the NBP IA**

436 NBI suggested that for the purposes of calculating an appropriate start-point for the valuation of reusable assets in the PAM and DAM, Eircom should be required to revalue the relevant CEI infrastructure based on its earning potential.<sup>228</sup> NBI's advisors, Frontier Economics, claimed that the opening RAB in the NBP IA should reflect the cost that Eircom would expect to recover from that area in the "counterfactual scenario", absent NBP deployment. Frontier Economics submitted that the value of Eircom's future cashflows could be considered as the future cashflows from continuing to operate its copper network in the NBP IA, prior to the NBP tender. Given this, Frontier Economics considered that if the discounted future cashflows generated by operating in the NBP IA was less than the NBV of the CEI assets calculated by applying straight-line depreciation, then it would be appropriate to apply an impairment adjustment.<sup>229</sup> Frontier Economics suggested that ComReg should consider whether its approach provides a reasonable opening valuation for the CEI assets in the NBP IA, or whether it would be more appropriate to apply an impairment adjustment to reflect the expected value that Eircom would have generated, absent the NBP, from continuing to operate a copper network.<sup>230</sup>

437 ComReg does not agree that an impairment adjustment is appropriate for Eircom's CEI asset base in the NBP IA. In the NBP IA, ComReg recognises that the deployment of NBI's FTTH network will ultimately lead to Eircom switching off its copper network with the prospect that NBI will emerge as the sole user of Eircom's CEI in this area. However, when considering whether an impairment adjustment to the opening value of Eircom's CEI assets might be appropriate, ComReg must recognise the need to maintain consistency with past regulatory decisions, particularly when those decisions have determined the level of costs that Eircom has been able to recover to date.

438 To date, WLR and CG SABB have been the primary downstream services that Eircom has provided using its poles and ducts in the NBP IA. ComReg recognises

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<sup>227</sup> Pages 25/26 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>228</sup> Page 25 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>229</sup> Page 20 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>230</sup> Page 21 of Frontier Economics Non-Confidential Report dated November 2020.

that, absent Eircom's role as a CEI provider to NBI's MIP, this CEI could become stranded once Eircom switches off its copper network. In the 2016 Access Pricing Decision ComReg imposed a cost oriented price for WLR based predominantly on the TD national annual costs<sup>231</sup> (adjusted for efficiencies) which Eircom incurred in providing the WLR service, reducing Eircom's WLR price from €18.02 to €15.91 (price for 2016/17). Those annual costs included the annualised costs of Eircom's CEI assets derived using a straight-line depreciation approach based on the regulated asset lives for CEI, which ComReg determined in ComReg Decision D03/09 (the '**2009 Asset Lives Decision**')<sup>232</sup>. This decision extended the pole asset life from 15 to 30 years and the duct asset life from 20 to 40 years to more closely align with the average economic life of these CEI assets.

439 Extending the asset lives in this way reduced the annualised costs for CEI in Eircom's HCA (or Separated Accounts) and in the cost models used to set cost-oriented prices, resulting in lower cost-oriented prices for WLR and other wholesale access services as determined in the 2016 Access Pricing Decision (D03/16) than would have been derived using the shorter CEI asset lives. This has also meant that the NBV for CEI in Eircom's HCAs is higher than the equivalent NBV in Eircom's Statutory Accounts, where the original asset lives of 15 years for poles and 20 years for ducts are used.

440 Hence, for the reasons set out above, ComReg does not agree that an impairment adjustment is appropriate.

441 NBI also submitted that as CEI in the NBP IA has not been remediated by Eircom to the same extent as that in the Commercial Areas it will generally be older, have lower initial investment and greater accumulated depreciation. Accordingly, the value per pole and for duct should be calculated specifically for the NBP IA as a national average pole or duct cost/valuation may result in the base including assets which are fully depreciated at the wrong valuation.<sup>233</sup>

442 In response to NBI's point, ComReg considers that modelling costs for 3 different footprints (as is the case in the PAM and DAM) is consistent with the issue raised by NBI as the CEI costs in each footprint is informed by the timing of Eircom's historic and planned investments. For example, Eircom's CEI investment since 2016 has been concentrated in the Rural Commercial Area to coincide with Eircom's Rural 300k FTTH deployment and the cost modelling approach (discussed in more detail at Section 5.11) assumes that all CEI is 100% NGA ready in the Rural Commercial Area by 2019. In contrast, the CEI models (PAM and DAM) recognise that CEI investment in the Urban Commercial Area and the NBP IA footprints is scheduled to ramp-up in the near future as Eircom's deploys FTTH in the Urban

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<sup>231</sup> The line card was based on a BU-LRAIC+ valuation.

<sup>232</sup> ComReg Document No 09/65 - Response to Consultation Document No. 09/11: Review of the regulatory asset lives of Eircom Limited, dated August 2009.

<sup>233</sup> Page 25 of NBI's Non-Confidential Response dated 18 November 2020.



Commercial Area as part of Ireland's Fibre Network ('IFN') and invests in the NBP IA to provide CEI access to NBI's MIP. Furthermore, as noted in paragraph 381 of the CEI Consultation, ComReg has made the assumption in the DAM that the residual duct specific NBV observed in the FAR is related to duct build or renewal in Commercial Areas as ComReg could find no evidence of investment in duct infrastructure since 1990 in the rural areas comprising the NBP IA.<sup>234</sup> In the case of poles, ComReg noted in paragraph 379 of the CEI Consultation that it would be reasonable to expect the age profile of the pole network not to vary significantly by geographic footprint and ComReg has no objective basis to change its assumption of modelling the residual FAR based on a national average.

### Reuse of poles in Rural Commercial Area:

443 Eircom stated that poles in the Rural Commercial Area should not be assumed to be 100% reusable as proposed by ComReg in paragraph 310 of the CEI Consultation and that in the medium to long run, a proportion of these poles will need to be replaced. According to Eircom, ComReg must allow for some element of forward-looking future capex to be priced into the replacement of that infrastructure.<sup>235</sup>

444 To clarify, the PAM has allowed for future capital costs associated with ongoing business as usual ('BAU') pole replacement in the Rural Commercial Area, as set out in paragraph 525(b). Hence, for poles the future capital costs in the Rural Commercial Area in the PAM takes into account the ongoing pole replacement as a result of pole testing programmes by Eircom and pole replacement as a result of storm damage or other incidents.

### Consistency of approach with 2013 EC Recommendation

445 Eircom suggested that ComReg must adjust the initial NBV for Reusable CEI Assets in order to be consistent with Paragraph (35)<sup>236</sup> and Paragraph (36)<sup>237</sup> of the 2013 EC Recommendation, so that the indexation method would be applied to calculate current costs for the RAB of reusable legacy civil engineering assets.<sup>238</sup>

446 To clarify, and as recalled above, the RAB valuation approach applied to Eircom's Reusable CEI Assets as proposed in the Consultation is a continuation of the approach adopted in the 2016 Access Pricing Decision for determining the existing

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<sup>234</sup> It should be noted that Eircom's information is recorded at an exchange level, not based on geographic footprint, and so it could differ.

<sup>235</sup> Paragraph 112 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>236</sup> Paragraph (35) states "*In the recommended costing methodology the Regulatory Asset Base (RAB) corresponding to the reusable legacy civil engineering assets is valued at current costs, taking account of the assets' elapsed economic life and thus of the costs already recovered by the regulated SMP operator. This approach sends efficient market entry signals for build or buy decisions and avoids the risk of a cost over-recovery for reusable legacy civil infrastructure...*".

<sup>237</sup> Paragraph (36) states that "*The indexation method would be applied to calculate current costs for the RAB corresponding to the reusable legacy civil engineering assets...*".

<sup>238</sup> Paragraphs 135-138 of Eircom's Non-Confidential Response dated 18 November 2020.

prices for Generic Access to CEI, LLU / SLU and for WLR.

447 As part of the 2016 Access Pricing Decision ComReg considered that the example of a retail price index used by the European Commission in the 2013 EC Recommendation would inflate Eircom's accounting NBV and could result in an over recovery<sup>239</sup> of costs by Eircom and possibly higher prices. However, the heavily depreciated nature of much of Eircom's CEI (prior to 2009 the asset life for poles was 15 years and for ducts was 20 years) combined with the impact of holding gains and the lower WACC rate on annualised costs indicates that any over recovery would not be material. Nonetheless, ComReg decided to take Eircom's accounting NBV directly from its accounts and project the NBV forward by including an allowance for future investment in related network assets over the price control period. This approach ensured that for Reusable Assets Eircom would not be recovering more than what they were investing in network infrastructure while allowing other operators to access this non-replicable infrastructure at an efficient price level. ComReg considered that this approach should also facilitate strict cost recovery for the Reusable Assets.

448 As a result, the Reusable Assets in the 2016 Access Pricing Decision were valued based on the net book value ('NBV') from Eircom's accounts and depreciated over the remaining lifetime of the asset by applying a tilted annuity formula which uses as a parameter the asset price index. In addition, ComReg depreciated the NBV over the remaining asset lifetime using an asset specific price index (as part of the tilted annuity formula) instead of the retail price index which should ensure that regulated prices follow the evolution of network asset prices.

449 Accordingly, ComReg is only carrying forward the RAB approach used in the 2016 Access Pricing Decision, subject to a number of refinements, based on a more informed measurement of the projected level of CEI investment by Eircom, as outlined in paragraph 312 of the CEI Consultation. ComReg continues to consider that the existing RAB approach for Reusable CEI Assets is a reasonable basis for valuing those reusable legacy ducts and poles for purposes of NGA deployment.

### 5.8.3 ComReg's Final Position

450 Having considered all of the Respondents' Submissions, ComReg remains of the view that Reusable CEI Assets shall be valued based on a RAB approach and set by reference to Eircom's HCAs and Non-reusable CEI Assets shall be valued on

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<sup>239</sup> By applying a RPI (or CPI) to assets bought many years ago inflates/increases the asset value (given that the CPI has been positive over the long-term) compared to the price that Eircom paid for these assets at the time of purchase. Hence, Eircom would over recover its costs compared to what it initially paid for these assets. ComReg considers that for assets which are reused for NGA services it is important that prices encourage efficient reuse of those assets by all operators. Therefore, it would be inappropriate to set the price above efficient costs as it is preferable to "buy" access to these assets rather than "build". In addition, this approach ensures strict cost recovery, in that Eircom recoups the money that it invested in the asset plus a rate of return.

the basis of a RAB approach based on replacement costs for the reasons outlined above and previously in Section 5.5 of the CEI Consultation.

## 5.9 Depreciation methodology for CEI access

### 5.9.1 Position set out in the Consultation

451 In Section 5.6 of the CEI Consultation ComReg considered a number of depreciation methodologies in order to establish the appropriate depreciation charge/cost associated with the CEI assets.

452 The options considered by ComReg included the following:

- (a) HCA;
- (b) CCA - Operating Capital Maintenance ('OCM') or CCA-OCM;
- (c) CCA - Financial Capital Maintenance ('FCM') or CCA-FCM;
- (d) Standard annuity;
- (e) Tilted annuity; and
- (f) Economic depreciation.

453 The **HCA depreciation method** is widely used by companies in statutory accounts and it is also used by Eircom in its regulated HCAs. This approach reflects the book values (i.e., NBV or GBV) of the relevant assets derived from the SMP operator's FAR and depreciated over their remaining useful life, usually with a constant (straight line) depreciation charge per year. The fact that the HCA approach uses the SMP operator's costs reduces the chance of under recovery of costs as the value is linked to the actual investment made. Some of the SMP operator's assets may be fully depreciated but still in use and the HCA approach should ensure that Eircom is not over recovering the costs of these assets. ComReg was of the preliminary view that the HCA approach may be a pragmatic and proportionate approach to adopt where there are limited prospects of investment by alternative infrastructure providers. This HCA depreciation approach facilitates comparison with Eircom's HCAs and can be useful to reflect yearly changes in the level of investment incurred. Hence, the HCA approach is compatible with ensuring exact cost recovery.

454 The **CCA method** allows the net asset value to change, compared to the HCA approach. The **CCA OCM approach** seeks to maintain the operating or output capacity of the asset while the CCA FCM approach seeks to maintain the value of the originally invested capital. The CCA-OCM approach does not ensure cost recovery i.e., the sum of discounted annuities is not equal to the initial investment.

Therefore, this approach is generally not used in setting regulatory prices. The **CCA-FCM method** requires the revaluation of assets and this can be done in several ways, including the use of indexation. While the CCA-FCM can be implemented using an index, the annuities calculated with this approach do not increase in line with the index. ComReg considered that the CCA-FCM ensures strict cost recovery since they are calculated based on the NBV of the assets, derived from Eircom's accounts. This approach is also consistent with the 2013 Recommendation. However, in order to ensure regulatory consistency with the existing depreciation approach (of tilted annuity) used to set the CEI prices, ComReg was of the preliminary view that the CCA FCM should not be considered further.

455 The **standard annuity approach** is a flat annuity based on the depreciation charge and the cost of capital i.e.,  $\text{annuity} = \text{depreciation} + \text{cost of capital}$ . As standard annuities give rise to constant costs each year it is a valid approach when asset prices and service demands are stable.

456 A tilt is applied to an annuity to reflect the expected changes in the prices of assets and is intended to provide economic signals to market players, giving market players incentives to invest now if prices are expected to increase or delay investment if prices are expected to decline. The tilted annuity approach is a commonly used approach used in electronic communications regulation. The **tilted annuity approach** calculates annuities which evolve with asset price trends which means that regulated prices derived from this method are evolving smoothly. This approach is relatively easy to calculate even if it requires assessing price trends which can be a difficult exercise. The CEI price control set by ComReg in the 2016 Access Pricing Decision and re-imposed in the 2018 WLA /WCA Market Review Decision uses the tilted annuity approach.

457 The **economic depreciation approach** aims to recover all incurred costs (operating and capital costs) by ensuring that the total of the revenues generated by the cost oriented prices across the lifetime of the business are equal to the efficiently incurred costs, including cost of capital, in present value terms. This is achieved by applying a discount factor on future cash-flows, which is equal to the WACC. Economic depreciation is the most robust method from a theoretical point of view but is also the most complex to implement because it requires several assumptions. When asset prices are changing fast and/or when the number of customers/level of demand is fluctuating and/or operating costs are changing fast, the economic depreciation calculates regulated prices that remain stable over the economic lifetime of assets (tilted annuities only have this feature when asset prices are changing significantly but the level of demand is relatively stable).

458 In the CEI Consultation ComReg considered that **Generic Access to CEI in the Commercial Areas** is expected to be used by operators seeking to extend their networks to compete directly with Eircom in downstream wholesale markets. In the

Commercial Areas, the objectives of encouraging investment and promoting competition remains relevant and hence a depreciation approach should help inform the build-or-buy decisions of Eircom and other infrastructure providers.

459 In the 2016 Access Pricing Decision, ComReg adopted a tilted annuity approach to set the CEI access prices on the basis that Eircom's CEI would primarily be used by rival operators seeking to extend their networks to compete directly with Eircom in downstream wholesale markets, and that CEI prices needed to inform investors build-or-buy decisions to be consistent with the objective of encouraging infrastructure-based competition.

460 In the CEI Consultation ComReg also noted that the main cost oriented access service sold by Eircom in the downstream wholesale markets in the Commercial Areas is Fibre to the Cabinet - Virtual Unbundled Access ('**FTTC based VUA**') and a tilted annuity approach has been adopted to cost the LLU and SLU costs inputs that inform the cost oriented prices set for FTTC based VUA<sup>240</sup>, as determined in the 2018 Pricing Decision.

461 For **Generic Access to CEI in the NBP IA**, ComReg did not anticipate significant demand by other operators in this area, as NBI is expected to emerge as the main user of ducts and poles. As a result, ComReg proposed to use the same depreciation approach (of a tilted annuity) to that proposed above for Generic Access requests in the Commercial Areas. In the absence of other reasons, which would justify changing the approach, this also ensures consistency with the tilted annuity approach used to date.

462 Hence, ComReg reached the preliminary view that the tilted annuity approach should continue to apply when determining the relevant costs for Generic Access to CEI services across all areas. This maintains regulatory consistency with the existing approach adopted in the 2016 Access Pricing Decision and also with the approach adopted for other cost-oriented services (FTTC based VUA) that use CEI.

463 ComReg also pointed out that in the case of legacy CEI assets that can be reused for the provision of NGA services, the tilted annuity approach should be applied to the NBV of the asset in Eircom's HCAs thereby taking into account the asset's elapsed economic lifetime and avoiding the risk of over recovery of costs for legacy Reusable CEI Assets. For Non-reusable CEI Assets that cannot be reused for the provision of NGA services, ComReg proposed that the tilted annuity is applied to the replacement costs of those assets to ensure that Eircom is capable of recovering the efficient investments it is expected to make in order to make CEI

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<sup>240</sup> WLR is also sold outside the NBP IA. Although the national price for WLR is set with reference to Eircom's TD HCA costs for the provision of WLR nationally this is because ComReg Decision D03/16 specified that Eircom shall charge the higher of (i) the national TD HCA costs or (ii) the BU-LRAIC+ costs for Non-reusable Assets and active equipment in the Modified LEA. The prices were higher based on (i).

assets ready for NGA deployment. ComReg considered that the proposed tilted annuity approach is appropriate where the asset(s) concerned are non-reusable and where the objective is to encourage the deployment of alternative infrastructure.

464 ComReg dismissed the economic depreciation approach for determining the annualised costs associated with CEI prices for a number of reasons. ComReg considered that implementing an economic depreciation approach required assumptions not just on asset price trends but also on service demand and in relation to the effect that any changes in service demand can have on unit costs for that service. ComReg also noted that it does expect some changes in the demand for the different services that are supported by Eircom's CEI, either as a result of the transition from copper to fibre services on Eircom's network or due to increased CEI access to facilitate greater competition between Eircom and rival platforms. However, ComReg considered that such changes in service demand are unlikely to affect the unit cost of CEI access services to an extent that would warrant introducing the added complexity that an economic depreciation approach would entail.

465 For **NBI's MIP access to CEI in the Commercial Areas** ComReg proposed in the CEI Consultation that a tilted annuity approach should apply. In the Commercial Areas, the objectives of encouraging investment and promoting competition remains relevant and hence the depreciation approach chosen by ComReg in the context of CEI prices should help inform the efficient investment decisions of Eircom and other infrastructure providers.

466 For **NBI's MIP access to CEI in the NBP IA**, ComReg considered that setting incentives to promote competition and to encourage investment are not relevant for the reasons already set out. Hence, ComReg proposed that the existing titled annuity approach was not an appropriate depreciation approach for the CEI access prices relevant to NBI's MIP in the NBP IA. As competition from rival network providers is not expected to emerge in the NBP IA the need to correctly inform build-or-buy decisions is less relevant than it would be in an area that can support more than one network operator. Therefore, the primary objective for ComReg in respect of CEI services provided in the NBP IA is to ensure that the SMP operator (Eircom) can recover its efficiently incurred costs, which is most appropriately addressed by either an HCA (straight line) depreciation approach or a standard annuity approach.

467 Furthermore, ComReg noted that the main services currently provided by Eircom in the NBP IA are copper based services e.g., SB-WLR, the prices of which are set with reference to Eircom's TD HCA costs. Consequently, using a straight line depreciation approach to inform CEI prices in the NBP IA seemed to be reasonable as it maintained consistency with the existing cost recovery principles used to recover these costs from wholesale access prices, and would also be easier to reconcile with Eircom's HCAs. Hence, for NBI's MIP access in the NBP IA, ComReg reached the preliminary view that the HCA approach (or straight line depreciation)

based on Eircom's HCAs that allows Eircom to recover its efficiently incurred investments should be used to determine the annuity associated with the CEI assets.

468 In the case of legacy CEI assets that can be reused for the provision of NGA services, ComReg proposed that the annuity is applied to the NBV of the assets from Eircom's HCAs thereby taking into account the asset's elapsed economic lifetime and avoiding the risk of over recovery of costs for legacy Reusable CEI Assets. For Non-Reusable CEI Assets (that cannot be reused) for the provision of NGA services, it was proposed that the annuity be applied to the replacement costs of those assets to ensure that Eircom is capable of recovering the efficient investments it is expected to make in order to make CEI ready for NGA deployment

469 ComReg invited the views of respondents (in Question 5 of the CEI Consultation) on the proposed depreciation approaches to determine the annuity associated with the CEI costs relevant to Generic Access to CEI as well as the CEI costs for NBI's MIP access to CEI in the NBP IA and in the Commercial Areas.

### 5.9.2 Respondents' Views and ComReg's Response

470 ComReg received a direct response to Question 5 from three Respondents, namely Eircom, NBI and BT. Vodafone<sup>241</sup>, Virgin Media<sup>242</sup> and Siro<sup>243</sup> stated that they had no comments while ALTO referred to its response to Question 3<sup>244</sup> (on the proposed costing methodologies). Sky did not address the issues raised in Question 5 in its general response.

471 Eircom<sup>245</sup> and NBI<sup>246</sup> generally agreed with the depreciation approaches proposed by ComReg, except for the approach for NBI's MIP access charge in the NBP IA. On the proposed straight line (HCA) depreciation approach for NBI's access to CEI in the NBP IA, NBI considered that ComReg should consider some adjustments to the asset lives for poles while Eircom suggested that ComReg should use a titled annuity approach.<sup>247</sup>

472 Also, in response to Question 5, BT raised concerns that Eircom's underinvestment in the maintenance of poles and ducts is unacceptable and the other operators within the NBP IA and the Commercial Areas should not bear such costs<sup>248</sup>, which ComReg has considered later in Section 5 at paragraphs 573-584.

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<sup>241</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>242</sup> Page 3 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>243</sup> Page 4 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>244</sup> Page 6 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>245</sup> Paragraphs 122 & 125 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>246</sup> Pages 28-29 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>247</sup> Paragraph 123 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>248</sup> Page 7 of BT's Non-Confidential Response dated 18 November 2020.

### **Straight line depreciation for NBI's MIP access to CEI in the NBP IA:**

473 Eircom disagreed with the straight-line depreciation approach for NBI's MIP access to CEI in the NBP IA, suggesting that ComReg should use the tilted annuity approach. Eircom claimed that the straight line depreciation method fails to generate the smooth prices over time that are provided by the tilted annuity methodology and as CEI prices also inform associated wholesale prices such as current generation broadband services and WLR in the NBP IA, those prices will also fluctuate as a result.<sup>249</sup>

474 ComReg disagrees with the arguments made by Eircom.

475 As outlined earlier in Section 3, ComReg's regulatory objectives of promoting competition and encouraging efficient investment in the NBP IA means allowing for a cost effective deployment of NBI's network by means of reuse of Eircom's CEI network and avoiding inefficient duplication of CEI assets while ensuring that Eircom is allowed to recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of those assets with NBI. As competition from rival network providers is not expected to emerge in the NBP IA the need to correctly inform build-or-buy investment decisions is less relevant compared to those areas outside the NBP IA that can support more than one network operator. Hence, in the NBP IA the main objective is to ensure that Eircom can recover its efficiently incurred investment which is most appropriately addressed by an HCA (or straight line) depreciation approach rather than a tilted annuity approach.<sup>250</sup>

476 In addition, in the NBP IA what NBI's MIP pays for CEI is not reflected as such in the fibre prices that NBI offer/charge in downstream markets as NBI's fibre prices are set by reference to the prices of Eircom's wholesale FTTH broadband services in Commercial Areas. Hence, the CEI access prices charged by Eircom to NBI's MIP in the NBP IA would not be expected to impact or give rise to fluctuations in the prices of other downstream wholesale services that uses that CEI. WLR is not based on a tilted annuity depreciation methodology (but based on a HCA / straight line depreciation approach) as determined in the 2016 Access Pricing Decision.

477 On the other hand, NBI along with Frontier Economics, considered that a straight line depreciation approach could apply but with changes to the asset lives, for NBI's MIP access to CEI in the NBP IA.<sup>251</sup> In this regard, Frontier Economics submitted that the pole replacement rate (or business as usual investment) is inconsistent with the asset life of poles (which is currently set at 30 years) and this will cause artificial fluctuations in capital charges. Frontier Economics stated that this inconsistency

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<sup>249</sup> Paragraphs 130-131 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>250</sup> ComReg also notes, as described at paragraph 411 (and footnote 101) of the CEI Consultation, both the PAM and DAM are currently set with a 0% price trend and so a tilted annuity with 0% price trend is the mathematical equivalent of a standard (straight line) annuity.

<sup>251</sup> Pages 28-29 of NBI's Non-Confidential Response dated 18 November 2020.



inflates the annualised cost for poles in the early years after the pole is deployed because it “accelerates” the recovery of the costs, by inflating the annual depreciation charge and it creates a unrealistic profile of Gross Book Value (GBV) and Net Book Value (NBV) for the assets, as these will fall to zero once the asset is fully depreciated, but then not increase again until the asset is replaced at a much later date. <sup>252</sup>

478 ComReg recognises that an asset life of 30 years is not consistent with the replacement rate of poles that has been observed in recent years (and which ComReg has carried over into future years). ComReg has considered the issue of asset lives (i.e., 30 years for poles and 40 years for duct) in Section 5.10 below.

479 Separately, and since the CEI Consultation, ComReg has reassessed its position regarding the appropriate depreciation approach for NBI's MIP access for transit purposes in the Commercial Areas. While ComReg proposed in the CEI Consultation that a tilted annuity approach should apply in the Commercial Area given ComReg's objectives to encourage investment, ComReg believes that having further reviewed this point, that the same HCA (straight line) depreciation approach that is applied in the context of NBI's MIP in the NBP IA should also apply to the Commercial Areas. NBI's CEI access price for transit purposes in the Commercial Areas is set to encourage investment incentives but rather is set to allow Eircom to recover its efficiently incurred incremental costs while at the same time encouraging reuse of existing Reusable CEI Assets. ComReg notes that the differences in cost from either approach are not relevant, given that ComReg has not identified (with the exception of the sub-duct itself) any capital costs incremental to NBI in the Commercial Areas. Hence, ComReg considers that the HCA / straight line depreciation approach should apply to NBI's MIP charges for CEI in the Commercial Area and in the NBP IA.

### Other issues

480 Eircom disagreed with ComReg's position at paragraph 347<sup>253</sup> of the CEI Consultation stating that the existing costing methodologies [for other wholesale services like WLR] use tilted annuities. <sup>254</sup>

481 As there has been no demand or use of CEI by other access seekers in the NBP IA to date, the recovery of costs associated with CEI has been from the provision of Eircom's WLR service. In the 2016 Access Pricing Decision the depreciation approach used to determine the annuity for WLR is the straight line / HCA approach. Hence, the straight line depreciation approach to determine the annuity for NBI's

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<sup>252</sup> Pages 23-24 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>253</sup> “...using a straight line depreciation approach to inform CEI prices in the NBP IA would seem to be reasonable as it maintains consistency with the existing cost recovery principles used to recover these costs from wholesale access prices, and would also be easier to reconcile with Eircom's HCAs.”

<sup>254</sup> Paragraph 134 of Eircom's Non-Confidential Response dated 18 November 2020.

MIP access to CEI in the NBP IA would ensure consistency with the existing HCA / straight line depreciation approach taken for WLR.

### 5.9.3 ComReg's Final Position:

482 Having considered all of the Respondents' Submissions and the advice from Dot Econ<sup>255</sup>, ComReg remains of the view that for the reasons set out above and previously in Section 5.6 of the CEI Consultation the depreciation methodologies below should apply in the context of CEI access and its final position is as follows:

483 For Generic Access to CEI, the tilted annuity approach shall be used to determine the annuity associated with the CEI asset costs.

484 For NBI's MIP access to CEI in the NBP IA and in the Commercial Areas, the HCA (or straight line) depreciation approach shall be used to determine the annuity associated with the CEI asset costs.

## 5.10 Asset Lives for CEI assets

### 5.10.1 Position set out in the Consultation:

485 In Section 5.7 of the CEI Consultation ComReg considered whether any changes should be made to the length of the regulatory asset lives associated with the CEI assets i.e., duct and poles. ComReg noted that it revised the asset life for poles and ducts in ComReg Decision D03/09<sup>256</sup> (the '**2009 Asset Lives Decision**'), such that the regulatory asset life for poles was amended from 15 years to 30 years to more closely align with the average economic life of poles and the asset life for ducts was changed from 20 years to 40 years to more closely align with the average economic life of ducts.

486 ComReg was of the preliminary view that the existing asset life of 30 years for poles and 40 years for ducts remained appropriate.

487 ComReg recognised that the asset life of 30 years for poles in the 2009 Asset Lives Decision was set at a time when Eircom's network was based entirely on copper, but that now in the case of a fibre access network the asset life for poles in the future could potentially be greater given that fibre cables tend to have lower weight and cross-sectional area when compared with copper cables. As a consequence, ComReg considered that this would reduce the load that the pole is expected to carry and could justify a longer asset life.

488 ComReg also noted that Paragraph (41) of the 2013 EC Recommendation provides

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<sup>255</sup> Section 11.5.4 of the Dot Econ Final Report at Annex 2 of this Decision.

<sup>256</sup> ComReg Document No 09/65 - Response to Consultation Document No. 09/11: Review of the regulatory asset lives of Eircom Limited ('**Regulatory Asset Lives Decision**').

that:

*“...When setting the economic life time of the assets in a modelled FttC network NRAs should take into account the expected technological and network developments of the different network components”.*

489 ComReg also noted that it had reviewed Eircom's data on pole replacements over a number of recent years from its internal pole database, although it was acknowledged by Eircom that the data was not complete. Based on this data, ComReg had observed that the average age of a pole when it was replaced was slightly longer than 30 years. However, this could reflect the fact that to date the pole has mainly carried copper cables and hence it may be that on a forward-looking basis, as FTTH is rolled out, the updated data could effectively show an increase in the expected life of a pole as fibre cables tend to be smaller and lighter than copper cables.

490 Alternatively, ComReg also recognised that the reason for the average age of replacement of poles in excess of 30 years could be a consequence of Eircom 'sweating' assets and tolerating sub-standard poles in the network longer than would be deemed appropriate from an efficiency perspective. Consequently, ComReg considered that sufficient evidence did not exist at this time to warrant a change to the existing asset lives for either poles or ducts.

491 ComReg invited the views of respondents (in Question 6 of the CEI Consultation) on the proposal that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively.

### 5.10.2 Respondents' Views and ComReg's Response:

492 ComReg received a direct response to Question 6 from four Respondents, namely Eircom, NBI, Siro and ALTO. BT<sup>257</sup>, Vodafone<sup>258</sup> and Virgin Media<sup>259</sup> stated that they had no comments and Sky did not address the issues raised in Question 6 in its general response.

493 Eircom agreed with ComReg's proposal of maintaining the existing regulatory asset lives for Eircom's poles and ducts at 30 years and 40 years respectively.<sup>260</sup> NBI agreed with existing regulatory asset life for ducts at 40 years but suggested considering a longer asset life for poles of 40 years to align with the duct asset life.<sup>261</sup> Siro disagreed with ComReg and suggested that the asset life of a pole should be 40 years, and the asset life of ducts, 50 years.<sup>262</sup> ALTO suggested that

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<sup>257</sup> Page 8 of BT's Non-Confidential Response dated 18 November 2020.

<sup>258</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>259</sup> Page 3 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>260</sup> Paragraph 139 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>261</sup> Page 30 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>262</sup> Page 4 of Siro's Non-Confidential Response dated 18 November 2020.

ComReg should either extend the asset life for poles beyond 30 years or alternatively make adjustments for Eircom's historical under-investment.<sup>263</sup>

### Asset life for poles

494 NBI, Siro and ALTO suggested a longer asset life for poles, beyond 30 years.

495 NBI submitted that it understood that, in the past, Eircom's pole testing procedures included a practice that poles with an age greater than 40 years would be marked for replacement, regardless of condition but in recent years only those poles that require replacement are replaced and so age is no longer an automatic criterion for replacement.<sup>264</sup> In addition, NBI's advisors, Frontier Economics, suggested that the pole asset lifetime should be made consistent with the calculation of pole replacement costs (of 75 years)<sup>265</sup>, which ComReg considered at paragraphs 478.

496 NBI also referred to a 45 year pole asset life used in the Irish electricity market and a 2016 report from Oregon State University (on behalf of the North American Wood Pole Council) on longer assumed lifetime for poles of over 40 years.<sup>266</sup> NBI concluded that these combined with Eircom's revised policy on pole replacement above, would suggest that the current 30 years lifetime for Eircom's poles is far too short.<sup>267</sup>

497 ComReg has considered the views provided by NBI (and Frontier Economics), Siro and ALTO.

498 First, ComReg notes that NBI and Frontier Economics have also argued, as noted at paragraphs 436-440 above, that there should be an impairment to the opening value of Eircom's CEI assets in the NBP IA based on the NPV of future cashflows expected from its legacy copper network, which would impact on Eircom's ability to recover its initial investment in CEI regardless of the asset life. NBI's point on an impairment review and separately its proposal to extend the asset lives for poles seem to be at odds with each other. The argument to impose an impairment is predicated on the cost recovery of the pole asset being entirely dependent on the economic life of the copper network that the pole was originally deployed to support, while the argument to extend the asset life of the pole to 40 years emphasises the physical life of the pole over the potential economic life of the access network.

499 Second, ComReg notes that paragraph (35) of the 2013 EC Recommendation states that "*NRAs should set the lifetime of the civil engineering assets at a duration corresponding to the expected period of time during which the asset is useful and*

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<sup>263</sup> Page 7 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>264</sup> Page 32 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>265</sup> Page 23 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>266</sup> [https://woodpoles.org/portals/2/documents/TB\\_ServiceLife.pdf](https://woodpoles.org/portals/2/documents/TB_ServiceLife.pdf)

<sup>267</sup> Pages 32-33 of NBI's Non-Confidential Response dated 18 November 2020.

*to the demand profile.*" (emphasis added) ComReg considers that the existing asset lives for poles of 30 years reflects their average economic useful lives, as determined in the 2009 Asset Lives Decision.

500 In the 2009 Asset Lives Decision ComReg assessed information from a number of sources including Eircom's fixed asset register, suppliers of telecoms assets, asset lives applied in other jurisdictions as well as the impact of climate conditions and how severe weather conditions can impact on how long assets last. ComReg recognised in that Decision that while Eircom's poles can have a lifespan in excess of 30 years with some even lasting up to 40 or 50 years, there may also be cases of poles lasting less than 30 years (e.g., in the case of storm damage). ComReg considered accordingly that 30 years strikes an appropriate balance for the asset lives of poles in Ireland.

501 Third, as recalled above, as part of this CEI pricing review ComReg reviewed Eircom's data on pole replacements (although the data was incomplete) over a number of recent years and found that there was not sufficient evidence at this time to warrant a change to the existing asset lives for either poles or ducts.

502 Eircom agreed with ComReg that "*...there is insufficient evidence to justify amending the current asset lives for either poles or ducts.*"<sup>268</sup> In addition, Eircom submitted that "*...it is too soon to understand whether the removal of copper cables from pole routes and from duct sections can be completed without a cost, or damage to the infrastructure, that would not be off-set by any increase in subsequent economic life.*"<sup>269</sup>

503 Fourth, the fact that the regulated asset life of poles in the Irish electricity market has been set at 45 years does not necessarily imply that a similar asset life is appropriate for telecom poles in the NBP IA. Electricity distribution networks are unlikely to be subject to the same rate of technology change as telecoms, where it is possible that, in 30 years, advances in technologies such as mobile, satellite or FWA could reduce the telecom network's reliance on poles and ducts. There is even a possibility that electricity distribution networks can be adapted in the future to support telecoms, whereas the prospect of a telecoms network being used to distribute power is very remote. Consequently, even if the physical asset life of a telecom pole is similar to that of an electricity pole, their economic life could be very different.

504 As no convincing evidence was provided by any Respondents to the CEI Consultation to warrant a change to the existing asset life of poles, ComReg is of the view that the pole asset life should remain at 30 years in line with the 2009 Asset Lives Decision.

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<sup>268</sup> Paragraph 140 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>269</sup> Paragraph 142 of Eircom's Non-Confidential Response dated 18 November 2020.

### Asset life for duct

505 Siro was the only respondent to suggest an extended asset life for duct, from 40 years to 50 years, although NBI noted that duct asset life should be kept under review as part of the annual review and update to the DAM.

506 Similar to the position set out above at paragraph 499 on poles, ComReg is of the view that the existing asset lives for ducts of 40 years reflect their average economic useful lives, as determined in the 2009 Asset Lives Decision.

507 In the absence of any evidence at this time to warrant a change to the existing asset life of ducts, ComReg considers that the duct asset life of 40 years remains appropriate in line with the 2009 Asset Lives Decision.

### Other issues

508 Eircom submitted that "*...once NBI is the sole tenant for eir ducts and poles in the IA then asset lives for poles and ducts that are substantially in excess of the NBI contract term for use of that infrastructure represents a risk that eir must be allowed to pass to NBI.*"<sup>270</sup>

509 ComReg recognises that the contract term can have a bearing on the asset life. However, ComReg notes that most of the pole investment has either already taken place in the case of reusable poles, or is scheduled to take place in the early years of the NBP contract in the case of pole replacement. Consequently, Eircom's claim that the asset lives are substantially in excess of the NBI contract term is overstated, as retaining the 30 year asset life should result in most of the pole network being close to being fully depreciated particularly given the prospect that NBI's network may remain active beyond the 25 year contract period and given the possibility that these customers are likely to continue to require a broadband service beyond NBI's contract. It is also the case that the contract terms between Eircom and NBI will see most of the investment in duct remediation being charged upfront to NBI, which, when combined with the assumption in the DAM that the legacy duct infrastructure in the IA is already fully depreciated, will mean that NBI's MIP will bear all of the risk associated with duct investments in the NBP IA, to the extent that it will have to pay very little for ongoing duct access over the period of the contract.

### 5.10.3 ComReg's Final Position

510 Having considered the Respondents' Submissions ComReg remains of the view that the asset lives for poles and ducts should continue to be based on 30 years and 40 years, respectively, for the reasons set out above and previously at Section 5.7 of the CEI Consultation.

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<sup>270</sup> Paragraph 144 of Eircom's Non-Confidential Response dated 18 November 2020.

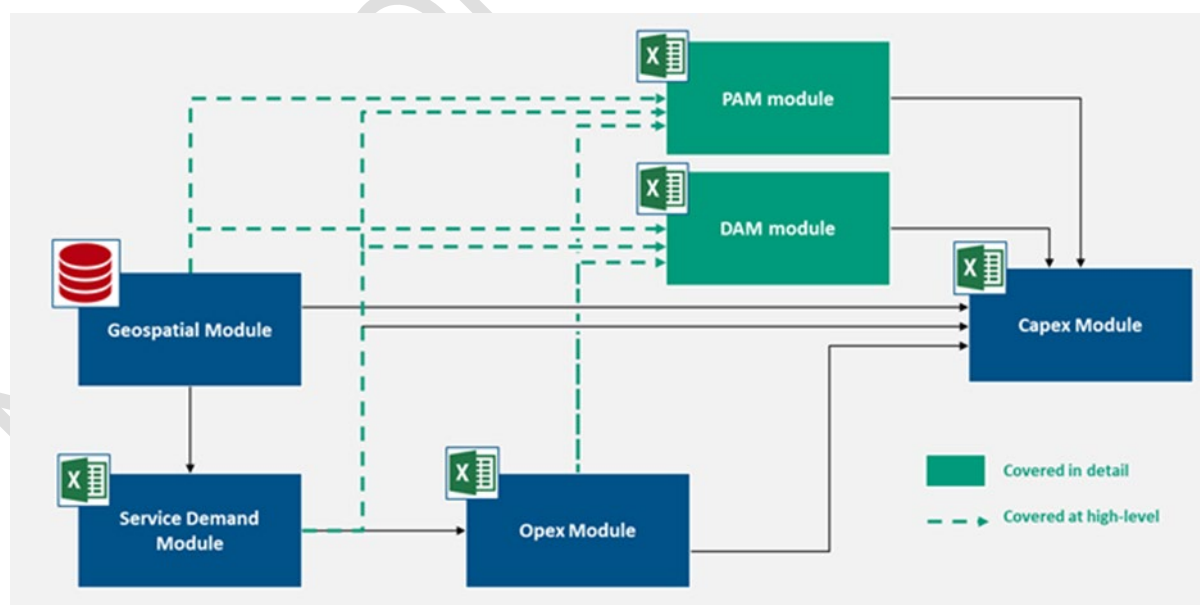
## 5.11 Determination of CEI unit costs

### 5.11.1 Position set out in the Consultation

511 Section 5.8 of the CEI Consultation set out ComReg's proposed cost modelling approach for calculating the level of costs associated with access to Eircom's CEI (duct and pole) services. ComReg noted that it had undertaken a review of the Revised Copper Access Model (Revised CAM) used in the 2016 Access Pricing Decision and two modules in the reviewed model, known as the Access Network Model or '**ANM**', were concerned with the costing of CEI Access, namely the Pole Access Model ('**PAM**') used to determine the pole access costs and the Duct Access Model ('**DAM**') used to determine the duct access costs, over a 40 year model period.

512 The ANM is used to determine the costs of providing copper and fibre services across Eircom's fixed access network and is the subject of a separate but related Decision in ComReg Decision [Dxx/21] (ANM Decision).

513 The PAM and DAM are two of the six modules that make up the ANM. The other ANM modules include capital costs, operating costs, service demand and geospatial module. Please see Figure 2 for an overview of the structure of the various modules in the ANM.



Source: Cartesian Consultants

514 The PAM and the DAM model relevant pole and duct access costs from 2020 to 2060 in the three geographic footprints i.e., the Urban Commercial Area, the Rural Commercial Area and the NBP IA, and for both types of CEI access i.e., Generic

Access to CEI and for NBI's MIP.

515 Access to the non-confidential version<sup>271</sup> of the PAM and the DAM, as well as the associated documentation, was provided to a number of interested parties who requested access during the consultation process.

516 The costs for poles access and duct access (including Sub-Duct Access) services in the PAM and DAM, respectively, continue to be calculated based on a combination of TD HCA, based on Eircom's HCAs for the costing of poles or ducts that can be reused for the provision of NGA and with a form of BU-LR(A)IC(+) for CEI that needs to be replaced for the purposes of providing NGA services.

517 While the cost modelling approach for the CEI access prices set in the 2016 Access Pricing Decision was constrained by the lack of information available at the time in relation to actual and planned NGA deployments in Ireland, much more extensive information on FTTH roll-out is now readily available to ComReg and this information has been used in the PAM and DAM.

518 In particular, the PAM and DAM include information gathered from Eircom including financial / costing information that is largely based on its financial year ending 30 June 2019. Separately, ComReg also obtained information from Eircom and NBI on their detailed rollout plans, as this is considered a key driver for future CEI investment by Eircom.

519 ComReg invited the views of respondents (in Question 8 of the CEI Consultation) on the proposed cost modelling approach as implemented in the draft versions at consultation of the PAM and DAM for calculating the per unit costs associated with pole and duct access (in particular Sub-Duct Access), having explained ComReg's approach to the following matters in particular:

- a) Approach to determining the RAB
- b) Approach to determining the value of Reusable CEI Assets
- c) Approach to determining the value of Non-reusable CEI Assets
- d) Calculation of Pole and Duct replacement costs
- e) Calculation of Capital annuities and depreciation method
- f) Calculation of Operating costs, Incremental costs and shared network costs.

520 When **determining the appropriate RAB**, ComReg modelled the level of capital costs associated with CEI to reflect a full FTTH rollout in each of the three geographic footprints and the capital required to maintain this network thereafter so that it is 'NGA ready'. In addition, as a first step, ComReg calculated the current

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<sup>271</sup> The non-confidential versions of the PAM and DAM excludes information considered to be confidential by Eircom and NBI and assessed in line with ComReg's confidentiality guidelines in ComReg Document 05/24. Any confidential values in the PAM and Draft DAM have been randomised.



value associated with Reusable CEI Assets with reference to the Eircom's HCAs (for the financial period ending in 30 June 2019) and, as a second step, the level of capital costs for each of the subsequent years based on replacing Non-reusable CEI Assets at current replacement costs to allow the continued provision of copper-based services and ultimately FTTH services.

521 For **determining the valuation of Reusable Assets**, ComReg followed a similar approach to that taken in the 2016 Access Pricing Decision whereby the valuation of Eircom's Reusable CEI Assets is based on Eircom's accounting NBV directly taken from its HCAs and projected the NBV forward by including an allowance for future investment in related network assets over the price control period. Furthermore, for the purposes of deriving charges for Generic Access to CEI, the valued Reusable CEI Assets are depreciated over the remaining lifetime of the asset by applying a tilted annuity formula which uses as a parameter the asset price index. However, a 0% price trend was assumed for the tilted annuity to reflect that costs underpinning these assets are likely to be stable, as a result of contractor rates (a significant element of costs) being set for more than one year. ComReg also used Eircom's fixed asset register ('**FAR**') for the financial period ending 30 June 2019 and implemented some adjustments to the NBVs of the FAR in order to determine the capital value of Reusable CEI Assets as follows:

- (a) For poles, ComReg removed the material costs (non-labour costs) related to Eircom furniture to provide drops to its customers and other items, which provide no benefit to an access seeker.<sup>272</sup> ComReg also adjusted the external labour costs of pole replacement by removing the incremental labour associated with replacing poles with furniture and modelled these costs separately as an incremental service.
- (b) For ducts, ComReg used the details of the capital expenditure of Eircom's 300k FTTH network programme in the Rural Commercial Area to estimate and remove the costs incurred by Eircom in self-providing unstructured duct<sup>273</sup> to resolve conflicts on its aerial cable network.<sup>274</sup> ComReg also estimated and removed the costs associated with street cabinet assets, which it considered not to be relevant to a wholesale duct access service. In the absence of a detailed disaggregation of the duct asset class, ComReg used a similar approach as the one used in the Revised CAM, by using the bottom-up cost valuation of the inventory<sup>275</sup> (derived from the geospatial module in the ANM) mapped to the duct asset class. From this, ComReg

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<sup>272</sup> These costs are then included in the ANM Capex Module and recovered across all Eircom's other services e.g. WLR.

<sup>273</sup> Unstructured duct refers to underground transitions within overhead routes, which are not generally engineered to the same standard as those ducts within underground distribution routes.

<sup>274</sup> The costs of unstructured duct are included in the ANM Capex Module and recovered across all Eircom's other services e.g. WLR.

<sup>275</sup> Trenches, ducts, chambers, street cabinets, line terminations, etc.

then calculated the relative share of these non-relevant assets and applied this to the historic NBVs.

522 In order to attribute the capital costs from Eircom's FAR to the geographic footprints (of NBP IA, Rural Commercial Area and Urban Commercial Area) ComReg used Eircom's 300k FTTH network programme in the Rural Commercial Area, which it allocated in full to the Rural Commercial Area. For the remaining FAR capital costs (including historic capital costs recorded in the FAR), and in the absence of available information to allow a direct attribution to footprints, ComReg apportioned it to the three geographic footprints using the following assumptions:

- (a) For poles, the allocated capital costs are based on the relative number of poles in each of the footprints, as provided by Eircom.
- (b) For ducts, the capital costs are only allocated to the Commercial Areas, with the split to the Urban Commercial Area and the Rural Commercial Area based on the access trench lengths (derived from the geospatial module in the ANM), weighted by the average trench capital cost per meter in each of these footprints (reflecting relative differences in trench size and surface types)<sup>276</sup>.

523 ComReg also considered that duct renewal is not typically a recurring activity. Further, ComReg assumed that there would have been very limited duct investment since 1990 in rural areas comprising the NBP IA as most rural access routes are overhead. Therefore, in the absence of any evidence to the contrary, ComReg made an assumption in the DAM that the residual NBV observed in the FAR is related to duct build or renewal in Commercial Areas (and not in the NBP IA).

524 For **determining the valuation of Non-reusable Assets**, ComReg assessed the replacement costs for ducts and poles separately. For poles, ComReg considered two types of pole replacement i.e., business as usual pole replacement and accelerated pole replacement (i.e., the difference between the business as usual and the rate of replacement during a FTTH rollout).

525 ComReg calculated the **business as usual ('BAU') pole replacement** as follows:

- (a) The average level of pole replacement in the combined Urban Commercial Area and in the NBP IA areas (i.e., where FTTH networks have not yet been deployed), in the five years to June 2019 is based on the historic breakdown of the number of poles replaced and the pole population in each of the footprints, which was provided by Eircom;
- (b) In all three geographic footprints, ComReg calibrated the planned pole test

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<sup>276</sup> By surface type we mean carriageway, footway and verge. These are discussed further in Section 6, below.

failure rate to a rate of 10% over a full testing cycle, on the basis that Eircom typically operates on a 12-year testing cycle, allowing, in addition, for a proportion of pole replacement outside the planned testing cycle due to weather storms or other damages. ComReg noted that this resulted in an average rate of [§< [REDACTED] ] poles being replaced every year (in all three footprints) consistent with the level of pole replacement observed in the combined Urban Commercial Area and NBP IA footprints (above). This level of BAU replacement represented circa [§< [REDACTED] ] poles being replaced nationally per year and a level of capital investment of circa [§< [REDACTED] ] per year (of which circa [§< [REDACTED] ] would relate to the NBP IA footprint).

526 The **accelerated pole replacement** was calculated as follows:

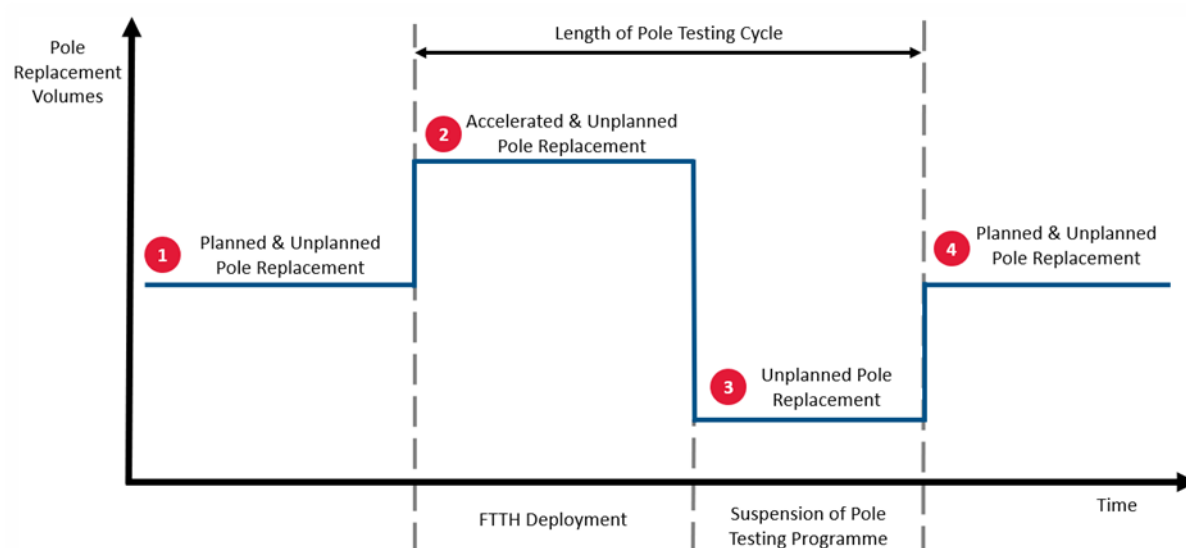
- (a) The average level of pole replacement in the Rural Commercial Area, i.e., where the rollout of FTTH was completed in 2019, is based on data provided by Eircom. Over the four years of this rollout (from 2016 – 2019), ComReg has calculated in the PAM that a total of [§< [REDACTED] ] of poles in this footprint were replaced. This corresponds to circa [§< [REDACTED] ] poles being replaced in this period and a total capital investment of circa € [§< [REDACTED] ].
- (b) In the NBP IA footprint, ComReg assumed a total level of pole replacement of 20% (over the entire seven-year period) similar to that observed in the Rural Commercial Area over the NBI rollout period. ComReg considered this a reasonable assumption, on the basis that the Rural Commercial Area (being equally made up of largely rural areas) would be expected to face a physical obsolescence of its pole network not too dissimilar to that of the NBP IA and on the basis of having a similar pole age profile resulting from pole testing being regularly performed.
- (c) For the Urban Commercial Area, ComReg assumed a level of pole replacement of circa 25% based on Eircom's information, over a five-year FTTH rollout period (2020-2024).

527 To estimate the level of pole replacement in each year of an FTTH rollout, ComReg used the pole base derived from the ANM geospatial module, based on the exchanges which in any given year become FTTH enabled, for each of the geographic footprints.

528 In advance of an FTTH rollout, all poles in the footprint are assumed to be tested. Hence, upon completion of an FTTH rollout and for the remaining duration of a pole testing cycle, ComReg assumed no further planned testing activity. ComReg nevertheless allowed for a residual level of unplanned pole replacement, based on

information provided by Eircom, as a result of unexpected pole failure caused by weather storms or other damages. This approach is illustrated in Figure 3 below.

**Figure 3: Forecast pole replacement volumes**



Source: Cartesian Consultants

529 In calculating the **capital costs of pole replacement**, ComReg took account of the costs incurred by Eircom during its 300k FTTH Rural Network deployment as well as more recent cost information provided by Eircom. ComReg also noted in this context that sub-contractor labour is a significant cost component and ComReg used the most recent rates that Eircom agreed with the sub-contractors to inform the cost modelling exercise.

530 Further, in the absence of information from Eircom ComReg assumed a price trend of 0%, on the basis that sub-contractor rates, which are a significant cost component, are effectively fixed for a multi-year period corresponding to a FTTH rollout. In addition, ComReg considered that no further efficiency adjustment is required to the costs, as a more resilient CEI network resulting from the significant capital refresh and the transition to fibre will likely yield lower faults and lower preventive maintenance which will work to offset wage inflation.

531 The capital costs of pole replacement included the costs associated with the Asset Retirement Obligation (the '**ARO**'). The ARO applies to all the poles that Eircom has installed since 2004 and recognises the cost that Eircom must incur to ensure the appropriate disposal of those poles when they are eventually retired from the network. The cost modelling exercise recognised the fair value of the expected future cost of the ARO in the capital employed calculations.

532 For **duct replacement costs**, ComReg reviewed the costs incurred by Eircom as part of its 300k FTTH Rural Network deployment. As only a small share of the costs

incurred in ducts is related to the deployment of new trench or new ducts, with the majority of the costs being incurred to clear blockages in existing ducts to allow sub-duct to be deployed, ComReg considered that calculating a BAU level of duct replacement or renewal was not appropriate and so ComReg only calculated the duct replacement or renewal costs during a FTTH rollout programme in the DAM.

533 ComReg assumed that the driver for duct replacement or renewal is the length in kilometres of underground route being intervened in advance of deploying FTTH. ComReg reviewed the costs incurred by Eircom as part of its 300k FTTH Rural Network programme with a view to informing the level of network activity expected in a FTTH rollout. The costs incurred as part of Eircom's 300k FTTH network programme in the Rural Commercial Area were summarised into a number of duct activities including sub-duct installation (including duct blockage clearance), chamber remediation or rebuilding, footpath and carriageway reinstatement, new trench/duct and other remediation activities.

534 For both the Urban Commercial Area and NBP IA footprints, where FTTH is expected to be rolled out in future years, ComReg assumed that the entire underground route is provided with sub-duct,<sup>277</sup> on the basis that all premises in these two footprints should be served by FTTH using the existing Eircom duct network.

535 ComReg also estimated an average of two duct clearances per kilometre of underground route in all three footprints, based on an analysis of information provided by Eircom. Hence, the costs (and prices) for duct access include the cost of clearing duct blockages.

536 For the remaining remediation activities (and which are noted at paragraph 533 above), ComReg calculated an average occurrence per metre over the rural commercial underground route length, based on the number of occurrences (of the remaining activities e.g., chamber rebuild) from the costs incurred under each of these activities and the associated sub-contractor unit rates.

537 In terms of determining the capital costs, ComReg took account of the costs incurred by Eircom during its 300k FTTH Rural Network deployment in the Rural Commercial Area as well as cost information provided by Eircom, in order to establish the capital costs associated with replacing or renewing a segment of underground duct route.

538 With the exception of sub-duct, ComReg retained the estimates of the costs of materials for each of the duct remediation activities (noted at paragraph 533 above) based on the Revised CAM, as Eircom did not provide any updated information in this regard. In addition, the capital costs in the DAM reflected Eircom's estimates of

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<sup>277</sup> The cost of sub-duct includes all of the costs associated with installing sub duct i.e., clearing duct blockages, the cost of rod, rope and test and process related costs.

payments to local authorities or the National Road Authority relating to the presence (or disturbance) of Eircom's network on public spaces.

539 For estimated contracted labour and assumed price trends for duct remediation, ComReg adopted the same approach as that used for pole replacement costs, as summarised above.

540 For **determining capital annuities and depreciation methods** the capital annuities were calculated in the following way:

(a) In the Urban Commercial Area and in the Rural Commercial Area, the capital annuities for Reusable CEI Assets were modelled based on a straight-line depreciation method (from Eircom's HCAs) taking into account a return on capital based on the Eircom regulated WACC. The capital annuities for Non-reusable CEI Assets are based on a tilted annuity method, also applying the regulated WACC.

(b) In the NBP IA footprint, the capital annuities for Reusable CEI Assets were modelled based on a straight-line depreciation method (from Eircom's HCAs) while taking into account of a return on capital based on the Eircom regulated WACC. The capital annuities for Non-reusable CEI Assets are also based on a straight line depreciation method, also applying the regulated WACC.

541 On the **operating costs associated with CEI**, the operating cost information was taken from Eircom's HCAs based on an average of the two financial periods ending June 2018 and June 2019 as a typical year.

542 For determining the direct operating costs of repair and preventative maintenance, ComReg used Eircom's HCAs (at paragraph 541), and Eircom's activity-based cost model, to identify the relevant costs associated with these two cost categories. Eircom's HCAs only identify repair and preventive maintenance costs for the aerial or the underground network in its entirety, which mainly includes poles, ducts and the aerial and underground cable. ComReg made the following assumptions:

(a) For repair costs, a share of the total direct costs<sup>278</sup> derived from Eircom's HCAs (at paragraph 541) was attributed to the physical repair of poles and ducts, based on analysis of faults provided by Eircom from its fault handling system. Eircom noted that where a fault damages both cable and the underlying civils infrastructure, Eircom's fault handling system records the fault against cable. However, for poles, ComReg considered that where a customer's service is reported as being faulty (for instance as a result of a weather storm event), this is more often related to the aerial cable than to failure of the pole and only in limited situations (for

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<sup>278</sup> The direct costs are the pay and non-pay costs of Eircom's service assurance field force.

example, where the straightening of the pole is sufficient to restore service) the associated cost is expensed. Similarly, for ducts ComReg would expect that only a limited number of faults should be expensed.

- (b) For preventive maintenance associated with poles, an estimate of [€  
██████████] of the total costs attributed to preventive maintenance of the aerial network in Eircom's HCAs (at paragraph 541), which relates mainly to the pole testing programme, was used. This is based on a breakdown of preventive maintenance by programme provided by Eircom. ComReg also considered an estimate for costs of tree trimming associated with poles (for example, to facilitate the replacement of a faulty pole). However, the tree trimming programme is primarily an aerial cable activity, so this estimate was set at [€  
██████████] of tree trimming programme, as provided by Eircom.
- (c) For preventive maintenance associated with ducts, an estimate of [€  
██████████] <sup>279</sup> of the total costs attributed to preventive maintenance of the underground network in Eircom's HCAs, relating mainly to the retrieval of redundant copper cables to free up duct space, was used. This was based on a breakdown of preventive maintenance by programme provided by Eircom.
- (d) For the attribution of operating costs to the three geographic footprints, ComReg assumed that these should be based on relative volumes by year. For poles, this is done based on the relative number of poles in each of footprint, while for ducts, trench lengths by footprint are used.

543 The common corporate costs, which typically include general IT system costs, office accommodation and transport management as well as corporate costs such as finance, legal, HR and senior management were extracted from Eircom's HCAs (see paragraph 541), and Eircom's activity-based cost model. ComReg proposed that these costs be calculated as a mark-up of 18.9% on the capital annuities. The percentage mark-up is calculated in the ANM by dividing the total common corporate costs by total ANM capex. ComReg proposed that these common corporate costs should only be recovered by Eircom through the services it provides in the Commercial Areas in line with the principle discussed earlier adopted in the 2018 Pricing Decision.<sup>280</sup> Hence, this mark-up was calculated based on the ANM capex in Commercial Areas and consequently, it was only be applied on the capital

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<sup>279</sup> Eircom noted that majority of costs recorded against underground preventive maintenance in recent years is related to retrieval of large redundant copper cables to free up duct space and additionally to recondition copper cabinets (e.g. repairing and resealing doors) but have not provided a breakdown of costs.

<sup>280</sup> Although this may not be the case given our proposal to apply a LRIC methodology for NBI's CEI access for transit purposes in the Commercial Areas.

annuities of poles and ducts in the Commercial Areas and not in the NBP IA.

544 In terms of **identifying the incremental costs** in the NBP IA, the specific capital costs associated with making Eircom's CEI 'NGA ready' in advance of NBI's fibre rollout are recovered solely through the CEI prices levied on NBI's MIP. ComReg identified the additional capital cost i.e., subcontractor labour of pole replacement related to pole furniture (DP enclosures) as an incremental cost to the access seeker and those costs are not calculated as part of an annual charge for a pole (see Section 8 below). In the NBP IA, the following capital costs (annuities) associated with Eircom's CEI assets are considered as incremental costs:

- (a) The capital costs relating to accelerated pole replacement during a FTTH rollout;
- (b) The capital costs relating to the deployment of sub-duct<sup>281</sup>, including to clear duct blockages as DFE<sup>282</sup> as well as remaining duct remediation during a FTTH rollout.

545 With regards to the Commercial Areas, all pole capital costs (annuities), i.e., both BAU and accelerated pole replacement, and all duct capital costs (annuities) during a FTTH rollout were modelled as **shared network costs**, to be recovered from all the CEI users. Based on the information to hand, ComReg did not identify any capital costs for poles that would be considered incremental to NBI's transit access in the Commercial Areas and that should be recovered in the annual pole access charge.

546 In the case of duct access, all duct capital costs that are incurred to make a duct network NGA ready were modelled as shared network costs, except for sub-duct which is modelled as an incremental cost to the access seeker. ComReg considered that it is uncertain whether Eircom may in all cases have sufficient capacity, so ComReg assumed that any Sub-Duct Access request would require a new sub-duct to be installed in all requests. Furthermore, even on the occasions that sufficient spare capacity exists to facilitate the duct access request on a specific route, its use by the access seeker necessarily limits the capacity available to other potential users of sub-duct on that route in the future, ComReg considered that it is appropriate to model the full cost of sub-duct as an incremental cost. This approach recognises in the Commercial Areas the opportunity cost to Eircom of its ducts being occupied and in the NBP IA that no other opportunity to fill the sub-duct may be presented to Eircom.

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<sup>281</sup> This includes the costs of rod, rope & test of sub-duct.

<sup>282</sup> A significant part of the sub-contractor labour costs incurred with duct blockage clearances are charged as 'differences from estimate' ("DFE"), based on the actual volumes of duct blockages encountered when laying sub-duct. To allow for this, ComReg estimated in the CEI Consultation that an average of two duct blockages clearances per kilometre of underground route in all three footprints, based on information provided by Eircom.



547 ComReg categorised all operating costs (including the cost of duct and pole maintenance and common corporate costs) as a shared network cost and did not identify or explicitly model any incremental operating costs other than process costs (discussed at Section 5.12 below) and ongoing wholesale costs such as product management, billing or account management (described below).

548 In the context of NBI's MIP in the NBP IA and for NBI's transit access in the Commercial Areas, ComReg estimated possible incremental operating costs associated with ongoing wholesale costs such as product management, billing or account management. ComReg believed that these costs were likely to continue over the entire duration of the CEI access, and ought to be included as part of the recurring access prices, unlike the one-off process costs associated with NBI's MIP (described below at Section 5.12). ComReg included an estimation of these costs in the PAM and DAM.<sup>283</sup>

### 5.11.2 Respondents' Views and ComReg's Response:

549 ComReg received a direct response to Question 8 from four Respondents, namely Eircom, NBI, BT and ALTO. While Sky did not respond directly to Question 8, ComReg has considered Sky's general response in its assessment of responses to Question 8 below. Vodafone<sup>284</sup>, Virgin Media<sup>285</sup> and Siro<sup>286</sup> stated that they had no comments on the proposed cost modelling approach for the PAM and DAM.

550 Eircom raised a number of issues with the cost modelling approach, including concerns about the information used for establishing the costs for duct investments<sup>287</sup>, reuse and replacement assumptions for poles<sup>288</sup>, the recovery of common corporate costs<sup>289</sup>, service demand assumptions<sup>290</sup> and inconsistency between depreciation approaches for reusable and non-reusable CEI assets coupled with changes to the WACC rate<sup>291</sup>. NBI noted that the CEI charges derived from the CEI models were consistent with the approach set out in the CEI Consultation (and Cartesian's report) but it claimed that there were two potential errors in the models relating to the calculation of the NBV and depreciation.<sup>292</sup>

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<sup>283</sup> These incremental operating costs are only relevant on a 'per customer' approach and would not be appropriate in the case of a 'per operator' as those costs would already be included in the allocation of common corporate costs.

<sup>284</sup> Page 7 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>285</sup> Page 4 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>286</sup> Page 5 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>287</sup> Paragraphs 154-156 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>288</sup> Paragraphs 105-110 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>289</sup> Paragraph 164 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>290</sup> Paragraph 159-163 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>291</sup> Paragraphs 167-168 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>292</sup> Pages 38-39 of NBI's Non-Confidential Response dated 18 November 2020.

551 Sky<sup>293</sup>, ALTO<sup>294</sup> and BT<sup>295</sup> reiterated their concerns about the treatment of common corporate costs and that the services sold in the Commercial Areas should not cross subsidise those services in the NBP IA. Sky also raised other cost modelling issues including treatment of Eircom's historical underinvestment in CEI<sup>296</sup>, the assumed incremental pole capital costs for NBI's transit services in the Commercial Areas<sup>297</sup> and the pole replacement assumption (of 25%) in the Commercial Areas<sup>298</sup>.

### Model updates to reflect Eircom's IFN costing data

552 Eircom submitted that the financial information ComReg collected from it on underground investments required to deploy fibre optic cable into provincial and rural ducts is not a good indicator of the underground costs of deploying an urban FTTH network. Eircom noted that the only parts of the provincial and rural underground CEI upgraded for the rural FTTH deployment were those routes leading from the OLT site to the overhead ribbon routes. According to Eircom, these routes do not include underground infrastructure within housing developments, which will be typical of ducts that require remediation for the Urban FTTH deployment – Ireland Fibre Network ('IFN') now being rolled out by Eircom, and so Eircom suggested that the DAM should be populated with the cost data from the IFN financial reports.<sup>299</sup>

553 Eircom also outlined a number of issues with ComReg's modelling assumptions regarding the urban duct deployments. Eircom claimed that the IFN urban FTTH deployment is based on an agreed price per home passed and not directly related to the most recent rate card for ducting or cabling activities, that the experience of Rural Commercial Area remediation may not be relevant to Urban Commercial Area and that sub-duct will only be deployed to the last fibre DP rather than all urban ducts being fitted with sub-duct.<sup>300</sup>

554 Further to Eircom's response, since the CEI Consultation ComReg requested the IFN data from Eircom for the purpose of assessing the relevant Urban Commercial footprint costs in the DAM. However, the IFN cost data provided by Eircom is not disaggregated to the level of detail that ComReg requires for the CEI cost models. Eircom's IFN data reflects [redacted], but not disaggregated by the different CEI activities (e.g. pole replacement, chamber rebuild, sub-duct installation) which are used to derive the costs in the PAM and

<sup>293</sup> Raised throughout Sky's Non-Confidential Response dated 18 November 2020.

<sup>294</sup> Pages 7-8 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>295</sup> Page 9 of BT's Non-Confidential Response dated 18 November 2020.

<sup>296</sup> Paragraphs 80-83 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>297</sup> Paragraphs 89-91 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>298</sup> Paragraphs 92-94 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>299</sup> Paragraphs 154-156 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>300</sup> Paragraph 176 of Eircom's Non-Confidential Response dated 18 November 2020.

DAM. In addition, the IFN information from Eircom is based on a sample of just over [REDACTED] of IFN reach planned for CEI.

555 For these reasons, ComReg considers that Eircom's IFN data does not provide sufficient disaggregated detail on the costs associated with the various duct activities (e.g., chamber rebuild, sub-duct installation) nor does it allow the costs which are incremental to Eircom's fibre or copper networks to be isolated and excluded from the overall cost of duct access. By contrast, ComReg considers that the duct costing information used in the DAM based on Eircom's 300k Rural FTTH network programme (paragraphs 532-539) and the most recent contractor rates disaggregated by the different CEI activities (paragraph 518), provides a more robust and appropriate basis for determining the estimated costs associated with duct costs the Urban Commercial Area. ComReg's cost analysis in the DAM is based on a granular disaggregation of duct activities, which allows for identifying those activities which are relevant (or not) to a duct access service. In addition, the recently agreed contractor rate card, is broken down by each job type e.g., pole replacement, sub duct installation, etc. in the IFN (similar to the case in the Intervention Area), as opposed to a single (total) contractor rate provided as part of the IFN data which does not provide sufficient comfort that the relevant costs associated with providing a wholesale duct access service are included.

556 In the **DAM**, ComReg did reflect some of Eircom's IFN data. ComReg updated the costs associated with the sub-duct to reflect the mix of sub-ducts deployed by Eircom for its own consumption in the IFN and updated the per metre cost for sub-duct installation (including rod, rope and test) labour costs to exclude the estimated element of one duct blockage clearance. Accordingly, ComReg increased the number of 'differences from estimate' ('**DFE**') duct blockage clearances from two duct clearances per kilometre of underground route in the DAM to three duct clearances in the final DAM in all three footprints.

557 ComReg also updated the average material cost of the chambers, which are of a relatively smaller size than those observed in the review of Eircom's 300k FTTH Rural Network costs, based on the planned material costs to complete the CEI construction phase.

558 In addition, ComReg reflected Eircom's update on the timing of its IFN deployment in both the rollout assumptions in the DAM and in the PAM.

559 Regarding the **PAM**, Sky<sup>301</sup> and ALTO<sup>302</sup> both questioned the (high) level of pole replacement expected in the Urban Commercial Area at a rate of 25%.

560 Since the CEI Consultation ComReg has revised the pole replacement rate assumption for the Urban Commercial Area to reflect Eircom's recent IFN data. The

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<sup>301</sup> Paragraph 92 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>302</sup> Page 6 of ALTO's Non-Confidential Response dated 18 November 2020.

pole replacement rate assumption for the Urban Commercial Area has been reduced from 25% to less than 20% [3< [REDACTED] ] over a five-year FTTH rollout period (2020-2024). This update ensures that the PAM reflects the most recent information from Eircom on what it expects to replace in terms of poles in the Urban Commercial Area over the next 5 years.

561 In addition, and based on Eircom's IFN data, ComReg has updated the assumed number of poles that Eircom expects to replace in the Urban Commercial Area, down from [3< [REDACTED] ]. ComReg also updated the material costs for poles in the Urban Commercial Area, having observed from the IFN data that poles in this area are on average lighter compared to those in Eircom's 300k Rural FTTH network.

### Recovery of incremental common corporate costs for CEI

562 Further to the decision in Section 5 (5.7.2) to reassess Eircom's common corporate costs in order to determine the extent those costs will scale (or vary) due to the changes in Eircom's overall service demand or changes in the type of services offered by Eircom in the NBP IA, ComReg (with the assistance of Cartesian) has updated the PAM and DAM to reflect this reassessment.

563 The PAM and DAM have been updated to reflect those common corporate costs which are considered scalable (or incremental) to the CEI services sold to NBI's MIP in the NBP IA. These costs include Network Rates and costs associated with cost accounting and accounting separation obligations. ComReg has also updated the PAM and DAM to reflect a reduction in personnel and transport management costs, given that the cost of managing and supporting the expected smaller staff numbers needed to maintain the CEI in the context of providing CEI access to NBI's MIP is not expected to be as material compared to the cost of managing and supporting the number of staff required to operate and maintain Eircom's legacy copper network in the NBP IA.

564 The changes are applied to the common corporate cost percentage mark-up applied to the capital annuities of poles and ducts in the NBP IA. The mark-up is calculated by dividing the total scalable CEI common corporate costs attributable to the provision of CEI in the NBP IA by the total ANM capex incurred in providing commercial services. Thus, the relevant capex would include the capex associated with providing CEI services nationally (i.e., in all footprints) and providing copper and fibre fixed line services in Commercial Areas only and so it excludes the capex associated with the specific network elements associated with providing copper fixed line services in the NBP IA i.e., cable capex.

565 As a result of those modifications above, ComReg has estimated that over 20% of common corporate costs are attributable to NBI's MIP for access to Eircom's CEI in the NBP IA, on the basis that these common corporate costs are likely to scale due to changes in the costs associated with the provision of CEI access for NBI's

MIP in the NBP IA. Hence, a share of these common corporate costs is now reflected in the LR(A)IC of the CEI access charges for NBI's MIP in the NBP IA. Please see the impact of this change on the prices for CEI access by NBI's MIP in the NBP IA in Section 9.

566 Sky submitted that the way the model is designed, adding an additional footprint (i.e., the "Intervention Area") to be liable for common costs will only increase the output prices of poles and ducts in that footprint with no off-setting reduction in the other two footprints and that "...this does not reflect what would happen in practice and suggests a significant modelling design flaw".<sup>303</sup>

567 To avoid any such double cost recovery, in the ANM Decision ComReg has discounted the common corporate costs to be recovered from commercial downstream wholesale services to recognise the amount of costs that are being recovered directly through the CEI access charges for NBI's MIP in the NBP IA. The revisions to the common (corporate) cost allocations in the ANM (and in the PAM/DAM) should ensure that all LR(A)IC costs that might not be incurred if the CEI access service by NBI's MIP in the NBP IA footprint was not provided are attributed to that service.

#### Updates to costs for Generic Access to CEI in PAM and DAM

568 In subsection 5.5.2 above, ComReg decided to revise the approach for setting the national prices for Generic Access to CEI, from the average costs in the Urban Commercial Area and Rural Commercial Area, to the costs in the Urban Commercial Area only. The PAM and the DAM have been updated accordingly to reflect this revised approach, and an 'uplift' which had been omitted from the draft PAM and DAM was added to recognise that the CEI network in the Urban Commercial Area is not 100% 'NGA-ready' until the IFN is completed.

569 The phased nature of the Eircom's FTTH deployment means that the modelled costs in the Urban Commercial Area are only reflective of a 100% 'NGA-ready' CEI network upon completion of the FTTH deployment in 2024. Hence, ComReg has implemented the uplift to the costs for Generic Access to poles in the PAM and for Generic Access to ducts in the DAM between 2020 and 2023 so that the CEI network costs are always, and in any given year, reflective of a 100% 'NGA-ready' CEI network (i.e., irrespective of the phased Eircom FTTH deployment). In the PAM and DAM this CEI uplift has been implemented for each year by calculating the volume of CEI (number of poles to be replaced and kilometres of ducts to be remediated) which are yet to be made 'NGA-ready' and by calculating the associated annualised capex, based on replacement costs / current costs. Hence,

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<sup>303</sup> Paragraph 5 of Sky's Non-Confidential Response dated 18 November 2020.

the outstanding balance of CEI to be made 'NGA-ready' — and therefore the 'CEI uplift' — will be at its highest in 2020 and will reduce to zero by 2024.<sup>304</sup>

570 It should also be noted that since the CEI Consultation there has been a change to the common corporate cost mark-up for Generic Access to CEI. The main reason for the increase between the consultation and final versions of the PAM and DAM is because the 18.9% mark-up used in the CEI Consultation was inadvertently calculated using an annualised network cost based on the 8.18% WACC while the 25% mark-up in the final PAM and DAM is calculated using an annualised network cost based on the 5.56% WACC. The impact of this is set out in Section 9.

### BAU investments and incremental investments in CEI

571 NBI submitted that where Eircom replaces a pole and the replacement cost includes labour and equipment to move existing copper cables to the new pole the costs of moving the copper assets are not relevant to NBI's use. NBI considered that the share of net replacement cost funded by it must always be capped at 100% of the investment required for a new pole that is capable of being used in the deployment of a fibre network. NBI submitted that where extra costs are incurred to maintain or improve copper-based services, it is only reasonable that ComReg should ensure full cost recovery either through the USO or by recovering those costs from copper based services nationally but it is not appropriate for NBI or its wholesale customers – and, ultimately, retail FTTH customers in the IA – to pay for an improved copper network.<sup>305</sup>

572 NBI's advisors, Frontier Economics, made similar arguments to NBI, suggesting only those CEI costs incurred to serve NBI should be considered, excluding therefore the costs incurred to maintain Eircom's copper-based services. Frontier Economics submitted that ComReg does not appear to have followed this approach in estimating the incremental capital cost of Eircom's copper service, as it does not explicitly estimate the capex in the scenario where CEI in the NBP IA only needs to serve the NBI network. According to Frontier Economics, there may therefore be costs that are incremental to Eircom's copper network that remain in the estimated cost base.<sup>306</sup>

573 Sky, BT<sup>307</sup> and ALTO<sup>308</sup> considered that under-investment by Eircom in its CEI in the past should not be rewarded and that ComReg should carry out an assessment of this matter in line with the recommendation from Dot Econ. Sky commented on "*...the scale of over recovery of costs by Eircom in recent years, as clearly*

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<sup>304</sup> The same approach is applied by ComReg in the ANM Decision for the purpose of deriving the LLU and SLU inputs used in the NGA Cost Model to set FTTC VUA and FTTC Bitstream. ComReg considers that this ensures that operators looking to use Eircom's CEI network to compete in downstream markets consume an NGA-ready CEI network in conditions that are consistent.

<sup>305</sup> Pages 26-27 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>306</sup> Pages 35-37 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>307</sup> Page 8 of BT's Non-Confidential Response dated 18 November 2020.

<sup>308</sup> Pages 6-7 of ALTO's Non-Confidential Response dated 18 November 2020.

*evidenced in its statutory and regulatory accounts...*" and in its view Eircom has been permitted to charge wholesale prices based on models that assumed its network was being adequately maintained but that in the case of the NBP IA, in particular, the level of on-going investment was not aligned with prices Eircom was charging for services in these footprints.<sup>309</sup>

574 In response, ComReg agrees that in general where investments can be objectively identified as being incremental to Eircom's copper network or NBI's fibre network then those costs should be allocated to the respective service being provided over that network. In the case of the NBP IA, specific capital costs associated with making Eircom's CEI 'NGA ready' in advance of NBI's fibre rollout are considered incremental costs associated with NBI's MIP.<sup>310</sup>

575 However, any unplanned pole replacements (e.g., storm events, accidental damage) that occur before NBI's fibre rollout are included in the 'business as usual' (BAU) expenditure, as Eircom has an obligation to provide fit for purpose CEI access and therefore needs to maintain BAU levels of network investment. This means that the BAU replacement of poles by Eircom in advance of those poles being required for NBI's fibre network deployment cannot objectively be regarded as an incremental cost to the copper services. ComReg considers that such pole replacements should be considered as BAU investment costs which should be shared between Eircom and NBI's MIP, as both operators benefit from that investment.

576 ComReg recognises that the cost of replacing a pole is higher than the cost of installing a new pole as pole replacement involves cable management and the disposal of the existing pole. However, where these costs arise only because of NBI's access request, e.g., where Eircom would not have replaced the pole or rearranged cables in advance of fibre deployment, then ComReg considers that it is reasonable that NBI's MIP should contribute to the recovery of such costs. In addition, ComReg does not agree that the charge to NBI's MIP should be capped at 100% of the investment required for a new pole. NBI is benefitting from the fact that it is getting access to an existing pole network, where the average pole cost is less than the cost of installing a new pole. To facilitate access to this pole network Eircom will have to replace a proportion of the existing poles and re-arrange copper cables to accommodate NBI's fibre cable.

577 As for rewarding past under-investment by Eircom in CEI, as discussed in Section 5.8, the Reusable CEI Assets (poles and ducts) are valued based on the NBV taken directly from Eircom's HCAs i.e., the values are based on the unadjusted historic costs and reflect past investment patterns and the level of depreciation incurred.

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<sup>309</sup> Paragraphs 80-83 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>310</sup> ComReg identified the additional capital cost i.e., subcontractor labour of pole replacement, related to pole furniture (DP enclosures) as an incremental cost to the relevant access seeker, and so it has been considered separately (in Section 8) outside of the ongoing pole access charge.

This approach is the same as the approach adopted in the 2016 Access Pricing Decision.

578 This approach ensures that for Reusable CEI Assets Eircom will not be remunerated for capital expenditure that it did not incur or for CEI assets that have been fully depreciated. It therefore facilitates cost recovery for the Reusable Assets while allowing other operators to access this non-replicable infrastructure at an efficient price level.

579 Notwithstanding the above, ComReg considers that where there is evidence of a catch-up level of investment so as to offset previous historic delays by Eircom in making such investment, this should be reflected in Eircom's RAB for the Reusable CEI Assets and hence in the CEI access prices, so that Eircom is remunerated for those costs. For poles, ComReg considers that while it is desirable that a refresh of Eircom's pole network is treated as an ongoing activity given Eircom's USO performance obligations and the general need to ensure the safe operation of its network, this does not mean that a constant level of pole investment will be observable at any point in time and instead the assessment should be on the basis of the pattern of investment over time. For ducts, the same considerations do not necessarily apply. Investment in the underground network tends to be more ad hoc and driven by the rollout of cable deployments, including extensions to new housing developments.

580 Taking into consideration the issues raised above and given ComReg's decision on the cost sharing approach for the shared pole network costs in the NBP IA (discussed in Section 6.5.2), ComReg has revised the BAU investment levels for poles.

581 In the CEI Consultation (and summarised at paragraph 525 above), ComReg estimated the level of BAU pole replacement in the PAM based on the average level of pole replacement experienced across the Urban Commercial Area and the NBP IA areas in the five years to June 2019. Given that the level of pole replacement observed in these footprints is below the average BAU replacement set in the Revised CAM, which may have been caused by Eircom's operational focus being diverted to its 300k FTTH Rural Network, ComReg considers that the cumulative difference provides a notional delay in the level of BAU replacement from 2016 which should now be reflected as an increase in BAU pole replacement levels over the FTTH rollout period (2020-2024).

582 Hence, the updated BAU pole investment levels result in an average rate of [§< [REDACTED] ] poles being replaced every year (in all three footprints).

583 The level of BAU replacement has been increased from circa [§< [REDACTED] ] poles being replaced nationally per year (at a capital investment of circa [§< [REDACTED] ] per year (of which circa [§< [REDACTED] ] would relate to the



NBP IA footprint)) in the CEI Consultation to circa [§< [REDACTED] ] poles being replaced nationally at a capital investment value of circa [§< [REDACTED] ].

584 This adjustment to the BAU pole investment levels means that the incremental cost to NBI's MIP of Eircom's accelerated pole replacement will be reduced, and so too as a consequence will the prices for Generic Access seekers.

585 Frontier Economics also submitted that ComReg may have overestimated the incremental duct related costs to NBI. According to Frontier Economics, there may be spare capacity in Eircom's sub-ducts in the NBP IA which could be made available to NBI, without the need for Eircom to incur additional capital costs in deploying new sub-duct for NBI. Frontier Economics stated that "*...it would be reasonable to include some costs on these routes to reflect the opportunity cost of using the spare capacity. However, that opportunity cost is zero within the IA, given that absent the NBP tender there is no reasonable prospect of an alternative operator using that spare capacity to deploy a parallel network.*"<sup>311</sup>

586 ComReg considers that it remains to be the case that there is uncertainty on whether there is spare capacity in Eircom's sub-ducts and hence the need to deploy new sub-duct. However, ComReg does not consider it reasonable to categorically assume that, where there is spare capacity in Eircom's sub-ducts in the NBP IA, the opportunity cost to Eircom of making that capacity available is zero. Instead, it would be reasonable to expect that Eircom has only deployed sub-duct where either it has already deployed fibre or is planning to deploy fibre and the spare capacity exists as a result of a commercial decision by Eircom. For example, spare sub-duct might have been deployed on core routes traversing the NBP IA or because it was deployed for the purpose of reaching out to business customers with very high-capacity connectivity. As pointed out by Frontier Economics, in these situations the opportunity cost would be non-zero. As result, ComReg remains of the view that it is reasonable to model the prices for NBI on the basis that a sub-duct is required in all cases.

587 BT<sup>312</sup> and ALTO<sup>313</sup> considered that should Eircom cut back on maintenance of the network there is a risk that a severe weather event could give rise to a disproportionate number of poles requiring unplanned replacement. In ALTO's view Eircom should "roll-up these types costs into its annual account to set the cost of duct and poles for future years" and so ALTO considered that it should offer the same to other providers and roll the cost into the future rental pricing.

588 In response to BT and ALTO, ComReg would point out that the BAU investment levels for poles in the PAM, discussed at paragraph 582, includes a percentage of unplanned pole replacement [§< [REDACTED] ]. In addition, ComReg notes that

<sup>311</sup> Page 37 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>312</sup> Page 14 of BT's Non-Confidential Response dated 18 November 2020.

<sup>313</sup> Page 14 of ALTO's Non-Confidential Response dated 18 November 2020.

Eircom has previously capitalised costs that it incurred when remediating damage to its overhead copper network caused by severe weather events in 2017.<sup>314</sup>

### CEI depreciation valuations and implementation of WACC change

589 Eircom stated that it is incorrect for ComReg to depreciate the remaining lifetime of reusable assets using a straight line depreciation based on Eircom's HCAs and the non-reusable assets using a tilted annuity and to update the price path annually including for revised WACCs. Eircom submitted that *"In changing the depreciation method (and more generally resetting the tilted annuity), ComReg does not allow for efficient cost recovery of eir's costs for the deployment of assets that occurred in the regulatory environment mandated by ComReg. In other words, that new pole investment between 2016 and the date of a new decision by ComReg, would recover costs based on a WACC of 8.18% and a tilted annuity for that recovery of investment costs. The dangers of resetting a tilt has been acknowledged by ComReg in previous decisions but is totally ignored in this Consultation."*<sup>315</sup> Eircom suggested that the models need to be updated with the WACC that was in place at the time Eircom replaced its CEI, as otherwise it is inconsistent with Regulation 13(2) of Access Regulations.<sup>316</sup>

590 ComReg recognises that one of ComReg's objectives is to ensure, in setting the CEI access prices, that Eircom can recover the cost of its efficient investments in CEI along with a reasonable rate of return. ComReg acknowledges that changing the depreciation method or updating the WACC on those assets where the capital cost recovery is tied to a tilted annuity depreciation method may lead to an inconsistent path of recovery (other things being equal), and recognises that, in principle, the approach taken to update the WACC in the CEI Consultation could lead to some under recovery of costs, particularly when there has been meaningful demand for the services. This is notably the case with the LLU/SLU inputs used in the NGA Cost Model to inform FTTC prices in the 2018 Pricing Decision. Therefore, ComReg has updated the capex annuities from 2020 in both the PAM and DAM cost models, by re-setting the NBV on the basis of an amortisation of capital (depreciation) from 2014 to 2019 based on the previous regulated WACC of 8.18%.

591 However, as discussed in Section 7 (WACC), in particular at paragraph 886, the WACC reflects the returns investors expect rather than compensates them for historical investment decisions. It is important that regulated returns reflect the risks that companies face in making investments and that the relevant WACC encourages future efficient investment in telecommunications infrastructure in Ireland. It is also important to note that ComReg does not have an obligation to ensure financeability. It is for Eircom to manage its risks, including the risks

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[https://www.eir.ie/opencms/export/sites/default/.content/pdf/regulatoryinformation/HCA\\_Accounts\\_2018.pdf](https://www.eir.ie/opencms/export/sites/default/.content/pdf/regulatoryinformation/HCA_Accounts_2018.pdf), page 30.

<sup>315</sup> Paragraph 168 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>316</sup> Paragraph 127 of Eircom's Non-Confidential Response dated 18 November 2020.

associated with expected rates of return evolving over time. It is precisely because Eircom's rate of return is uncertain (and because that uncertainty is systematic) that Eircom's regulated WACC is above the risk-free rate.

592 **NBI** identified two potential errors in the calculation of NBV and depreciation in the CEI charges.<sup>317</sup> In relation to the NBV in the PAM and DAM, NBI noted that Eircom's CEI capex is assumed to be incurred at the start of the year and it suggested that this should be changed to reflect the capex being incurred in middle of the year as in practice expenditure is usually made throughout the year.<sup>318</sup>

593 While ComReg does not in principle disagree with NBI's suggestion, ComReg considers that the assumption used in the PAM that the CEI capex is incurred at the start of the year is also a reasonable modelling assumption which was used previously in the Revised CAM (used to set CEI access prices) and ComReg believes there is value in maintaining consistency of approach in this regard.

594 While NBI agreed with the historical depreciation approach for poles used to take account of the change in the pole asset life in 2009 (from 15 to 30 years), it claimed that approach had been implemented incorrectly in the PAM.<sup>319</sup>

595 Taking into account NBI's point, ComReg reviewed the calculations in the PAM and it has made corrections to the PAM and DAM to reflect the comment made by NBI, although the impact is small.

### **CEI reuse and replacement rates in the NBP IA**

596 In the case of poles in the NBP IA, Eircom stated that a reuse assumption of around 85% was appropriate based on an expedited 7-year roll-out by NBI.<sup>320</sup>

597 However, ComReg is of the view that the 20% pole replacement assumption used in the PAM in the CEI Consultation is a reasonable basis for the expected pole replacement in the NBP IA given that is based on data provided by Eircom. Eircom submitted granular CEI data to ComReg at the outset of this CEI pricing review on the pole replacement rate for its 300k Rural FTTH Network, which, given that it has similar network characteristics to that of the NBP IA, is appropriate to use for setting the assumed pole replacement rate for the NBP IA. ComReg notes that Eircom's suggested pole reuse assumption of 85% in the NBP IA would seem to indicate that the level of pole access prices for NBI's MIP could be adjusted downwards in the future (all things being equal), and ComReg will monitor these assumptions as part of the annual review process (discussed in Section 10), and compare the expected replacements rates against the level of pole replacement effectively undertaken by Eircom. If appropriate the pole access price trajectory for NBI's MIP can be

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<sup>317</sup> Page 38 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>318</sup> Page 38 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>319</sup> Page 40 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>320</sup> Paragraphs 105-106 of Eircom's Non-Confidential Response dated 18 November 2020.

corrected then.

598 Separately, Eircom submitted views on the existing 92% reuse assumption for poles set by ComReg in the 2016 Access Pricing Decision. Eircom claimed, on the basis of its experience in deploying its 300k FTTH Rural Network, that the 92% reuse assumption substantially under-estimate the rate at which poles are required to be replaced to allow safe deployment of extensive new fibre cable overhead ribbons. According to Eircom, [REDACTED] [REDACTED].]

599 ComReg does not believe Eircom's conclusions are correct. First, to clarify, the PAM does not apply the 92% reuse factor for poles used in the Revised CAM. As outlined in Section 5.8 of the CEI Consultation and as summarised above, ComReg has used the information available from Eircom's 300k Rural FTTH Network to determine the assumed reuse and replacement rates for poles in the NBP IA. Second, it is not the case that the reuse factor of 92% for poles used in the Revised CAM substantially under-estimated the level required to make the pole network NGA-ready. In the 2016 Access Pricing Decision ComReg set Eircom's pole access prices based on (1) an allowance for BAU pole investment of [REDACTED] poles each year and (2) an additional 8% replacement of Eircom's current pole base [REDACTED] to allow for future investment requirements to facilitate the deployment of NGA technology. This means that since 2016, the pole access prices derived from the Revised CAM has allowed for a total pole replacement rate in 2020 that is well in of excess of 8% [REDACTED].

600 BRG Consultants also noted that no BAU capex has been included for the NBP IA in the DAM despite the NBP IA accounting for 10.4% of the total access trench length. Further, BRG stated that BAU capex is the largest element of cost in the Commercial Areas, so its exclusion in the NBP IA will have a large impact on the price. BRG called on ComReg to investigate this further.<sup>321</sup>

601 In response to BRG Consultants' point, ComReg would point out that this assumption follows from the fact that there has been very limited investment in duct in the NBP IA in recent decades with the result that the legacy duct is expected to be fully depreciated, particularly given the fact that the asset life for duct was 20 years prior to 2009. Please see ComReg's views at paragraph 442.

### Service demand assumptions

602 Eircom commented on the Service Demand Module of the ANM, stating that the forecast take-up of FTTH services, the initial level of Eircom copper services, and the timing of any Eircom retirement of copper services are presented as hard coded

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<sup>321</sup> Paragraphs 145-146 of BRG's Non-Confidential Report dated 18 November 2020.

inputs into the PAM and, as a result, it is not fit for purpose and does not meet the consultation requirements under Article 6 and 7 of the Framework Directive.<sup>322</sup>

603 Eircom also claimed that the PAM contains a "fundamental modelling error", which would arise from inconsistency in the treatment of NBI take-up and the timing of copper switch-off between the alternative options presented by ComReg. As a result, the trajectories of the "per operator" and "per customer" rates for annual pole rental in the NBP IA (Table 16, p. 163 of the CEI Consultation) would be the outcome of two "entirely different forecasts"<sup>323</sup>

604 In response, ComReg notes, first, that the Service Demand Module has been fully consulted on in the ANM Consultation. The CEI Consultation also clearly explained that the PAM and DAM rely on outputs from the Service Demand Module, Geospatial Module and Operating Cost Module in the ANM which were the subject of separate consultation and that the Respondents' Submissions to the ANM Consultation would be taken into account by ComReg before deciding on the appropriate approach to service demand. Section 5 of the ANM Decision sets out in detail ComReg's consideration of submissions received in respect of the Service Demand Module, including Eircom's, and ComReg's conclusions.

605 Second, ComReg is unclear what Eircom means when it states that ComReg presented prices that are based on "entirely different forecasts". For the avoidance of doubt, there is only one forecast of NBI's fibre rollout (based on NBI's submitted plan) and only one forecast with respect to Eircom's assumed copper switch-off (based on the assumption stated in the ANM). The NBI rollout determines the volume of CEI which will be consumed by NBI's MIP each year while the timing of the copper switch-off determines whether CEI is used solely by NBI or shared between NBI and Eircom. Hence, the relative mix of single use CEI and shared use CEI is independent of the chosen cost sharing approach (for shared CEI).

606 ComReg also notes that Eircom commented that the assumed migration of copper to fibre in the NBP IA would "not happen as forecast".<sup>324</sup> However, this assessment appears to be based on a misinterpretation of the active volume information in the PAM and DAM<sup>325</sup> which is calculated based on the subset of exchanges, where both Eircom and NBI are present (and where CEI is shared) and not based on the total across all exchanges.

### Other issues

607 Sky claimed that ComReg's position at paragraph 261 of the CEI Consultation that it "*...has not identified any capital costs for poles that would be considered*

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<sup>322</sup> Paragraphs 159-160 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>323</sup> Paragraph 161 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>324</sup> Paragraph 163 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>325</sup> This data is included in the "Input\_Service\_Demand" sheet of the PAM and DAM, labelled as "NBI Share of NBI/Eircom volumes".

*incremental to NBI's transit in the Commercial Areas*" is completely at odds with evidence given by Eircom at a Joint Oireachtas Committee meeting.<sup>326</sup> According to Sky, Eircom explained that it had designed its 300k FTTH Rural Network with extra fibres and more expensive connection points that could be used to extend the footprint into the NBP IA. Sky considered that the "extra fibres" and/or "more expensive connection points" in order to facilitate NBI should rightly be passed onto NBI and not on other operators, with a corresponding and demonstrable reduction in the proposed regulated charges outlined in any final decision.<sup>327</sup>

608 However, ComReg notes that there is no allowance for fibre costs, connection points (splitters) or other cable related costs in the PAM and DAM, as these are not relevant to determining the CEI access costs / charges. CEI access arises when NBI's MIP makes use of Eircom's CEI to deploy its fibre cables, whereas the additional capacity identified by Eircom relates to capacity on Eircom's Rural 300k FTTH Network. Therefore, CEI access services are modelled only to recover the costs associated with civil engineering assets, such as poles, trench/ducts, chambers or sub-ducts (including the remediation or renewal of these assets for the purpose of allowing NGA networks to be deployed) and again, there is no allowance for fibre costs or connection points.

609 Sky commented that the mark-up (of 18.9%) in the PAM and DAM is a material "block" of the operating costs for CEI and that it is unclear why this is a static feature in the models.<sup>328</sup>

610 ComReg notes that this point was previously raised by Sky in separate correspondence with ComReg, which has been addressed in ComReg's Information Notice 20/116.<sup>329</sup>

### 5.11.3 ComReg's Final Position:

611 Having considered the Respondents' Submissions, ComReg, with the assistance of Cartesian Consultants, has updated certain parameters and information in the PAM and DAM to reflect a number of the issues raised by Respondents and also to reflect some further updates made by ComReg since the CEI Consultation as summarised below.

(a) Updates to reflect Eircom's IFN data (paragraphs 556-561);

(b) Modifications regarding the recovery of common corporate costs

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<sup>326</sup> Made by CEO Carolan Lennon at the Joint Oireachtas Committee meeting on 25 June 2019.

<sup>327</sup> Paragraphs 89-91 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>328</sup> Paragraph 4 of Sky's Non-Confidential Response dated 18 November 2020.

<sup>329</sup> Please see Annex 1, ComReg letter dated 4 December 2020, Query No. 4 at

<https://www.comreg.ie/publication/information-notice-operators-correspondence-on-clarifications-concerning-cost-models-access-network-model-pole-access-model-and-duct-access-model>

(paragraphs 562-567);

- (c) Changes to prices for Generic Access to CEI to reflect Urban Commercial Area costs and an uplift to ensure CEI prices reflect an 'NGA ready' network (paragraphs 568-569);
- (d) A change to the common (corporate) cost mark-up for Generic Access to CEI from 18.9% to 25% (paragraph 570);
- (e) A change to the cost sharing approach for NBI's MIP in the NBP IA (paragraphs 699-717) as well as adjustments to the BAU catch-up investment levels (paragraphs 581-584);
- (f) Updates to reflect latest WACC for CEI access by NBI's MIP (paragraph 906) and the latest WACC for Generic Access to CEI (paragraph 907);
- (g) Other changes: resetting NBV and WACC rates for historic investments (paragraph 590) and correcting for implementation approach for historic depreciation for poles (paragraph 594).

612 The changes to the PAM and DAM, identified at paragraph 611, are reflected in the prices set in Section 9 together with their (monetary) impact as compared with the draft prices set out in CEI Consultation.

## 5.12 CEI process related costs associated with NBI's MIP

### 5.12.1 Position set out in the Consultation

613 In the CEI Consultation ComReg recognised other costs that are relevant to CEI access including the costs of Eircom's staff that are engaged in planning, processing / ordering and managing the provision of CEI access i.e., process costs. These costs typically relate to the one-off labour costs of end-to-end processing of OAO access requests (including order administration, field surveying, generate billing records), including a contribution to wholesale costs (such as product management, billing or account management) required throughout the life of the service.

614 ComReg noted that in the 2016 Access Pricing Decision (and the 2018 WLA / WCA Market Review Decision) the annual prices for duct and pole access included an allowance for the recovery of those process related costs. ComReg was of the preliminary view that it may be reasonable in the case of Generic Access to CEI to continue to require Eircom to recover the process related costs in the recurring CEI access prices. In the PAM and in the DAM ComReg used the levels calculated for process costs in the Revised CAM in the 2016 Access Pricing Decision, absent updated information from Eircom, and those CEI process related costs were

including in the draft CEI prices for Generic Access set out in Section 9 of the CEI Consultation document.

615 ComReg also considered in the CEI Consultation that it is likely that additional Eircom resources may be assigned to process and manage the delivery of the requirements for CEI access for NBI's MIP and that this may be particularly relevant for NBI's MIP during the build phase of its network. Hence, ComReg proposed that the costs of such resources should be separately identified by Eircom and considered as an incremental cost to NBI's MIP access to CEI rather than treated as a general cost that is recovered across all services using Eircom's pole and duct network. ComReg reached the preliminary view that the process related costs for NBI's MIP should be considered separately (outside the ongoing CEI prices), by means of a one-off charge, which should be pre-notified to ComReg. Hence, ComReg excluded any CEI process related costs in the draft CEI prices for NBI's MIP set out in Section 9 of the Consultation document (other than a contribution to the ongoing wholesaling costs during NBI's access).

616 ComReg invited the views of respondents (to Question 7 of the CEI Consultation) on whether CEI process related costs should be recovered as part of the recurring prices for Generic Access to CEI while the process related costs could be recovered as a one-off charge in the case of NBI's MIP access to CEI, which should be pre-notified to ComReg.

### 5.12.2 Respondents' Views and ComReg's Response

617 ComReg received a direct response to Question 7 from seven Respondents, namely Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. Sky did not address the issues raised in Question 7 in their general response.

618 Eircom<sup>330</sup>, Siro<sup>331</sup>, ALTO<sup>332</sup> and BT<sup>333</sup> agreed with ComReg's proposal regarding the treatment of CEI process related costs. However, Eircom considered that process related costs for NBI are subject to commercial agreement and will not be pre-notified to ComReg.<sup>334</sup> ALTO and BT considered that one-off CEI process related charges for NBI's MIP and pre-notification of them should only be relevant to the "build phase" and once that is complete that the approach should then be consistent with the billing approach for the rest of Industry. NBI questioned whether the upfront charges that it has paid to Eircom has been pre-notified to ComReg and it also sought clarity from ComReg that there is no over-recovery of costs by Eircom between the costs included in the recurring CEI monthly prices and any one-off

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<sup>330</sup> Paragraph 146 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>331</sup> Page 5 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>332</sup> Page 7 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>333</sup> Pages 8-9 of BT's Non-Confidential Response dated 18 November 2020.

<sup>334</sup> Paragraph 151 of Eircom's Non-Confidential Response dated 18 November 2020.



charges that it incurs.<sup>335</sup> Virgin Media raised issues regarding excess charges, which are addressed in Section 8. Vodafone commented that decisions on CEI pricing and the fixed line services in the ANM need to be made without delay, which ComReg considers is not relevant to the issue of the recovery of CEI process related costs.

### Pre-notification of upfront / one-off charges

619 NBI submitted that under its Infrastructure Access Agreement ('IAA') with Eircom, NBI has contracted to pay Eircom [€< [REDACTED] ] for its maintenance of the MIP programme team and NBI queried whether this charge was pre-notified to ComReg. NBI also stated that it paid Eircom a deposit of [€< [REDACTED] ] to commit to minimum usage levels of both pole access and duct access over the NBP network deployment period.<sup>336</sup>

620 Eircom claimed that "*Relevant process related costs are subject to commercial agreement with NBI as part of the MIP negotiation. ComReg has been informed at various stages that eir intended to remove the associated process related charges within D03/16 prices and charge a lower on-going rental on that basis. The level of process charges will depend on the division of roles, and on the deployment timetable agreed between the two parties. As such it will not be pre-notified to ComReg. When this negotiation is completed, eir will provide ComReg with information as to the level of the charge, and the costs to be recovered from that charge, so that a judgement can be made as to the impact on the prices set for NBI use of eir CEI.*"<sup>337</sup>

621 To clarify, all charges associated with CEI, including any CEI MIP charges, are regulated and subject to the price control obligation and transparency obligation, pursuant to the 2018 WLA/WCA Market Review Decision and as further specified in this Decision.

622 In the case of process related costs associated with NBI's MIP ComReg is of the view that it is appropriate that the costs of such resources are separately identified by Eircom and considered to be an incremental cost to NBI's MIP rather than treated as a general cost that is recovered across all services using Eircom's pole and duct network. ComReg remains of the view that the process related costs for NBI's MIP should be considered separately (outside the recurring CEI prices), by means of a one-off charge, and which should be pre-notified to ComReg. This approach should ensure that there is transparency on the various CEI charges associated with NBI's MIP and it allows ComReg to monitor and assess Eircom's compliance with its cost orientation obligation for CEI.

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<sup>335</sup> Pages 35-37 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>336</sup> Page 35 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>337</sup> Paragraph 151 of Eircom's Non-Confidential Response dated 18 November 2020.

### Assessment to ensure no over-recovery of costs

623 NBI sought clarity on a number of points to ensure there was no over recovery of costs by Eircom in relation to its CEI access charges. NBI noted that it carries out its own field survey work and so Eircom incurs no such costs when fulfilling orders from NBI for CEI access. In this regard, NBI requested ComReg to confirm that this cost item is excluded from the proposed NBI specific ongoing charges for CEI access.<sup>338</sup>

624 As noted in paragraph 418 of the CEI Consultation, the ongoing CEI access charges for NBI's MIP does not include any process related costs but includes a contribution to wholesaling costs (to take account of product development / management, billing or account management activities expected to occur for the duration of NBI's access). Hence, no field surveying costs are included in the ongoing CEI access price for NBI's MIP.

625 Having considered all of the Respondents' Submissions, ComReg remains of the view that CEI process related costs should be recovered as part of the recurring prices for Generic Access to CEI while the process related costs could be recovered as a one-off charge in the case of NBI's MIP access to CEI, which should be pre-notified to ComReg.

### 5.12.3 ComReg's Final Position

626 Having considered all of the Respondents' Submissions, ComReg remains of the view, for the reasons set out above and as discussed previously in Section 5.8 of the CEI Consultation, that for Generic Access to CEI, the CEI process related costs shall be recovered as part of the recurring prices. The process related costs include the costs of Eircom's staff (engineering or other) that are engaged in planning, processing / ordering and managing the provision of CEI access.

627 For NBI's MIP access to CEI, the process related costs may be recovered as a one-off charge, subject to Eircom's transparency obligations including the obligation of pre-notification to ComReg.

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<sup>338</sup> Page 36 of NBI's Non-Confidential Response dated 18 November 2020.

## 6 Cost sharing and pricing methodologies for CEI access

### 6.1 Overview

628 In this section ComReg determines the cost sharing mechanism applying for access to poles and access to ducts, for both Generic Access seekers and for NBI's MIP, across the various geographic footprints.

629 The position reached in this section of the document on the cost sharing methodology leads on from the position taken on the costing methodology determined in Section 5. In essence, the choice of costing methodology determines whether there are costs to be shared, i.e., shared network costs and common corporate costs, between the CEI users. How those shared costs should be allocated between users – which cost sharing methodology should be used – is the subject of this section.

630 One key consideration in this section is the issue of copper to fibre transition in the context of the NBP IA and the cost sharing option that best meets the incentives for Eircom to decommission its copper network in the NBP IA.

631 In reaching ComReg's position below, ComReg has taken into account the recommendations in the Dot Econ Final Report at Annex: 2 of this Decision.

632 In the remainder of this section of the document ComReg summarises its preliminary position from the CEI Consultation, analyses the Respondents' Submissions and, having regard to these Submissions, sets out its final position on the appropriate costing sharing / pricing approach for CEI access, under the following headings:

- (a) Cost sharing methodology for pole access (Generic Access and NBI's MIP);
- (b) Cost sharing methodology for duct access (Generic Access and NBI's MIP);  
and
- (c) Duct price by surface type for Generic Access.

### 6.2 Cost sharing methodology for pole access

633 In section 6.2 of the CEI Consultation ComReg considered three possible cost sharing approaches as a means to determining the pole access prices, as follows:

- (a) Per operator approach;

- (b) Primary / secondary user approach;
- (c) Per customer approach.

634 ComReg explained that the **per operator approach** is the cost sharing approach currently in place for pole access whereby the total pole access costs are divided by the number of operators using the pole. Under the per operator approach, the pole access price will vary depending on the number of operators (including Eircom) on the pole (rather than cables). ComReg also noted that the per operator approach is akin to a LRAIC+ approach (where all efficient costs are considered) and makes no distinction between costs that are incremental to one specific access seeker and the costs that are shared by all operators using the pole. Under the per operator approach the total costs (incremental, shared network costs and common corporate costs) are all included and averaged between the operators.

635 The main advantage noted by ComReg was the fact that the per operator approach is relatively simple to implement i.e., the total pole access costs are averaged across the number of operators sharing the pole. In addition, as this is the approach already in place for pole access, operators already understand and are familiar with it so implementation of it is not likely to be an issue. The main disadvantage of the per operator approach noted by ComReg was the fact that it requires Eircom to contribute a fixed amount to CEI costs that might become unsustainable over time as demand for copper services reduces. This is recognised in the Dot Econ Draft Report, where Dot Econ states that the 'equal sharing' (or per operator approach) gives Eircom "*...an excessive incentive to shut off the copper network once fibre roll-out is high and the number of residual copper customers is small.*"<sup>339</sup>

636 The **primary / secondary user approach** was also considered by ComReg in the CEI Consultation. By contrast to the per operator approach, the primary / secondary user approach allocates differently the costs that are incremental to the access seeker's specific use of a pole and the costs that should be shared between all the operators on the pole. Under this approach, as CEI access is intended to facilitate efficient entry by allowing another operator to access it, the SMP operator would always be considered the primary user and the CEI access seekers, the secondary user(s). The primary user and secondary user both pay their incremental costs arising from their pole access demand requirements but the shared network costs for pole access are borne by the primary user while the copper network remains (wholly / partially) in service.

637 ComReg recognised (along with its consultants Dot Econ) that the primary / secondary user approach sets strong (maybe excessive) incentives for the switch-off of Eircom's copper network and in fact may be seen as a somewhat extreme way of encouraging early shut down of the copper network. ComReg also noted

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<sup>339</sup> Section 8.2 of the Dot Econ Draft Report at Annex 2 of the CEI Consultation.

that the primary / secondary user approach could be seen as a reasonable basis for cost sharing if giving strong incentives for early copper removal from poles was considered desirable.

638 The third cost sharing option considered by ComReg in the CEI Consultation for allocating the shared network costs (including common corporate costs) for pole access was a **per customer approach** (or referred to by Dot Econ as the “Usage-based sharing” approach). The per customer approach involves allocating ‘shared network costs’ and common corporate costs in proportion to the relative number of copper and fibre customers served off the relevant pole. ComReg recognised that this option is somewhat similar to the primary / secondary user approach in that the pole users pay the incremental costs arising from their pole access demand requirements, but it is also akin to a per operator approach as it can also result in the attribution of shared network costs associated with poles between sharing operators. ComReg recognised the potential benefits of this approach but had some reservations regarding the possible practicality of implementing a per customer approach.

639 Having considered the various cost sharing options available to it ComReg assessed these options in order to establish a proposed way forward for allocating / sharing the shared network costs and common corporate costs between Generic Access seekers of Eircom's poles and separately for NBI's MIP access to poles. In summary, ComReg proposed that for Generic Access to poles, the existing per operator cost sharing methodology should be maintained and for Generic Access to ducts, the existing per metre of sub-duct approach should continue to be used. ComReg proposed that the per customer cost sharing approach should be used in the context of NBI's MIP access to CEI (poles and ducts) in the NBP IA.

640 ComReg invited the views of respondents (in Question 9 of the CEI Consultation) on the proposed cost sharing methodologies in the case of Generic Access to poles and for NBI's MIP access to poles in the NBP IA and for NBI's transit access in the Commercial Areas.

641 ComReg received a direct response to Question 9 from four Respondents, namely NBI, Eircom, BT and ALTO. Siro<sup>340</sup>, Virgin Media<sup>341</sup> and Vodafone<sup>342</sup> stated that they had no comments. Sky did not address the specific issues raised in Question 9 in their general response.

642 The discussion in this section of the document is addressed under the following headings:

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<sup>340</sup> Page 5 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>341</sup> Page 4 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>342</sup> Page 8 of Vodafone's Non-Confidential Response dated 18 November 2020.

- (a) Cost sharing methodology for Generic Access to poles;
- (b) Cost sharing methodology for NBI's MIP access to poles.

## 6.3 Cost sharing methodology for Generic Access to poles

### 6.3.1 Position set out in the Consultation

643 For **Generic Access to poles in the Commercial Areas** ComReg recognised that Generic Access seekers gain access to Eircom's ducts and poles to deploy their own cables to offer their network services in the downstream markets to compete with Eircom, rather than purchasing equivalent wholesale services from Eircom. Hence, in determining the appropriate costing methodology for Generic Access to CEI (particularly in the Commercial Areas), ComReg proposed that all of the pole access costs (incremental, shared network costs as well as common corporate costs) are recovered by Eircom.

644 ComReg recognised that while, to date, Eircom has been able to fully recover the costs of its pole access network from its other wholesale access services i.e., SB-WLR, FTTC based VUA and FTTH based VUA, Generic Access to CEI is expected to reduce Eircom's customer base in Commercial Areas and accordingly its ability to recover shared network costs as well as common corporate costs from wholesale services. Hence, ComReg considered that the per operator approach (based on the BU-LRAIC+ costs) is the most appropriate as it allows Eircom to recover all of its efficient costs including shared network costs and common corporate costs.

645 ComReg also considered that adopting a primary / secondary user approach allowing Eircom to recover only the incremental costs caused by a pole access seeker would result in giving rival operators a free ride to use Eircom's network to compete for Eircom's customers. ComReg believed that imposing a cost sharing approach for Generic Access to Eircom's poles that does not allow Eircom to recover a similar contribution to shared network costs and common corporate costs from each operator may create competitive distortions in the long run as an increasing proportion of these costs may need to be recovered from the residual customers Eircom retains. As a result, using the primary / secondary user approach for setting the price for Generic Access to poles could excessively erode Eircom's ability to recover its costs.

646 ComReg considered that a per customer approach would also allow Eircom to receive a contribution to the recovery of shared network costs associated with pole access. However, a per customer approach for Generic Access to poles looked impractical due to the difficulties in determining the relative number of customers that each operator serves using the shared poles.

647 Hence, ComReg proposed that the most appropriate cost sharing approach for

Generic Access users of poles in the Commercial Areas was the existing per operator approach as this approach would encourage market entry by allowing other operators to share the costs of existing infrastructure while helping to sustain viable competition by allowing competing operators contribute to the cost recovery of shared assets on equivalent terms and maintaining investment incentives by allowing Eircom to continue to recover its efficiently incurred costs over the long-run.

648 For **Generic Access to poles in the NBP IA** ComReg proposed in the CEI Consultation that given the likely lack of demand for Generic Access to poles in this area and that fact that ComReg proposed that a single national price should apply for Generic Access to poles based on the costs associated with the Commercial Areas, a consistent approach to the cost sharing mechanism adopted for Generic Access to poles in the Commercial Areas should apply. Hence, ComReg proposed that the existing per operator approach should continue to apply for sharing the shared network costs associated with Generic Access to poles in the NBP IA, based on the costs in the Commercial Areas.

649 ComReg invited the views of respondents (in Question 9 of the CEI Consultation) on the proposed per operator cost sharing methodology in order to determine the pole access price for Generic Access to poles, as described in subsection 6.3 of the CEI Consultation and as summarised above at paragraphs 643-648.

### 6.3.2 Respondents' Views and ComReg's Response:

650 None of the Respondents commented specifically on the proposed per operator cost sharing mechanism for Generic Access to poles.

### 6.3.3 ComReg's Final Position

651 Noting that none of the Respondents commented specifically on the proposed per operator approach for allocating the total pole costs among Generic Access users of poles, ComReg is satisfied that for Generic Access to poles the existing per operator cost sharing approach should continue to be used.

652 The per operator approach means that the total pole costs are shared equally among those Generic Access users present (i.e., that have active cables) on the pole, including Eircom.

## 6.4 Cost sharing methodology for NBI's MIP access to poles in the Commercial Areas

653 In this section ComReg considers the cost sharing methodology for poles access by NBI's MIP in the Commercial Area.

## 6.4.1 Position set out in the Consultation

- 654 For **NBI's MIP access to poles in the Commercial Areas** ComReg recognised that if an LRIC approach is adopted for NBI's transit access in the Commercial Areas on the basis that NBI cannot use its subsidised network outside the NBP IA to serve customers and compete with Eircom in the Commercial Areas, there would be no shared network costs or common corporate costs to be allocated to NBI's MIP. However, ComReg also made some observations on what might be an appropriate cost sharing approach for allocating any shared network costs and common corporate costs relevant to pole access by NBI for transit purposes in the Commercial Areas, should a costing methodology other than LRIC be adopted.
- 655 ComReg recognised that the possibility of using the existing per operator approach, could lead to Eircom recovering a significant part of the shared network costs of poles from NBI even though NBI will not compete to provide services in the Commercial Areas. As Eircom suffers no wholesale or retail revenue losses as a result of providing transit access to NBI, a contribution to Eircom's shared network costs for poles from NBI's MIP could lead to competitive distortions which in turn could have the adverse effect of reducing incentives for competition from alternative infrastructure providers in the Commercial Areas.
- 656 ComReg also considered that the per customer approach for attributing any shared network costs and common corporate costs for poles in the context of NBI's transit access in the Commercial Areas could be seen as more consistent with the fact that NBI cannot use its subsidised network outside the NBP IA to serve and compete for customers in the Commercial Areas. The per customer approach for NBI's MIP in the Commercial Areas could also be seen as equivalent to the primary / secondary user approach whereby NBI's MIP as the secondary user would be charged for pole access on the basis of the incremental costs, without any contribution to shared network costs or common corporate costs, thereby avoiding the risk of over-recovery of costs by Eircom.
- 657 In the CEI Consultation ComReg also considered that the economic principles that support the adoption of incremental costing in the context of NBI's transit access in the Commercial Areas are somewhat similar to the principles that ComReg considered in 2009 when determining the price for Line Share (shared access to the local loop) in ComReg Decision D04/09<sup>343</sup>. In the context of ComReg Decision D04/09, ComReg found that an incremental costing approach for Line Share was reasonable as Eircom had already recovered the costs of the local loop itself from its prices for its SB-WLR service. Hence, the recovery of any costs above the

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<sup>343</sup> ComReg Document No 09/66: Response to Consultation and Decision, Rental Price for Shared Access to the Unbundled Local Loop, dated 18 August 2009.



incremental costs would lead to a possible over recovery of costs by Eircom and so an incremental costing approach was considered proportionate and justified.

658 ComReg considered that the option of the per customer approach is consistent with the principles outlined in the approach used for Line Share to the extent that it takes into account the impact that providing another operator with pole access has on Eircom's ability to continue to recover its efficiently incurred costs. When the operator accessing the pole is restricted from competing directly with Eircom, as is the case for NBI's transit access in the Commercial Areas, the per customer approach only needs to consider the incremental costs (LRIC) associated with the pole access transit service. However, when the operator seeking access to Eircom's poles is in a position to compete with Eircom then the per customer approach would recognise the effect that such competition may have on Eircom's revenue streams from related wholesale access services and so all pole access costs (LRAIC+) should be considered.

659 ComReg proposed that for NBI's MIP access to poles in the Commercial Areas, the per customer approach could be seen as a reasonable alternative to the existing per operator approach, where there are shared network costs to be allocated among pole access users. ComReg noted however that if a LRIC approach is adopted as the preferred option for setting pole access prices for NBI's transit access in the Commercial Areas, then there would be no need to allocate shared network costs and common corporate costs and a decision on the cost sharing methodology would become moot.

#### 6.4.2 Respondents' Views and ComReg's Response

660 Eircom and NBI were the only Respondents to comment specifically on the cost sharing approach for NBI's MIP access to poles in the Commercial Areas.

661 NBI<sup>344</sup> agreed that the LRIC methodology is a reasonable basis for determining the pole access price for NBI's MIP in the Commercial Areas so there was no need to allocate shared network costs and common corporate costs as they are not part of the LRIC.

662 Eircom disagreed with ComReg<sup>345</sup>, reiterating its concerns about the LRIC costing methodology, which ComReg has considered at Section 5.6.2 of this Decision.

#### 6.4.3 ComReg's Final Position

663 Having considered the Respondents' Submissions, advice from Dot Econ and taking into account ComReg's decision to use the LRIC costing methodology for determining the pole access price for NBI's MIP in the Commercial Areas, for the

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<sup>344</sup> Page 44 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>345</sup> Paragraph 185 of Eircom's Non-Confidential Response dated 18 November 2020.

reasons set out in Section 5.6.2, there is no need for a cost sharing methodology as the shared network costs and common corporate costs are not part of the LRIC.

## 6.5 Cost sharing methodology for NBI's MIP access to poles in the NBP IA and implementation considerations

664 In this section ComReg addresses the cost sharing methodology for NBI's MIP access to poles in the NBP IA and the implementation considerations associated with the proposed per customer approach.

### 6.5.1 Position set out in Consultation

#### Cost sharing methodology for NBI's MIP access to poles in NBP IA

665 For **NBI's MIP access to poles in the NBP IA** ComReg considered in the Consultation that given the specific nature of pole access by NBI's MIP in the NBP IA (in particular, the fact that NBI does not have a pre-existing network and so is required to access existing CEI to deploy a new national network for the purposes of serving a specific sub-set of premises under the terms of the NBP contract) there were merits in a per customer approach. One of its advantages was the fact that the evolving scale of the bill payments would be more phased and would allow Eircom's contribution to shared CEI network costs to decline progressively as its ability to recover those costs from revenues from copper-based services declines.

666 ComReg recognised that in the case of access to Eircom's poles by NBI's MIP in the NBP IA, the fact that NBI is contracted to deploy a fibre network to service circa 537,000 premises (delivery points) that are currently only able to avail of a fixed line service from Eircom, means that a per customer approach could be objectively informed by the relative number of the NBP IA premises actively connected either to Eircom's or NBI's networks. ComReg also considered that the per customer option should contribute to a smoother evolution of copper access prices compared to the per operator approach and the primary / secondary user approach, while still allowing Eircom to recover its efficiently incurred costs associated with poles.<sup>346</sup> The per customer approach is a dynamic allocation rule as the proportion of costs borne by NBI increases gradually as the number of customers switching to fibre grows.

667 ComReg also noted that the incentive for Eircom to decommission its copper network may be strongest, and could even be considered excessive, under the primary / secondary user approach. This is because NBI's MIP would make no contribution to the recovery of shared network costs until Eircom actually removed

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<sup>346</sup> The per customer approach could be seen as similar to the customer-based mechanism that Eircom is expected to adopt as it completes its FTTH deployment to pass nearly 1.4m in the Urban Commercial Area. In essence, the revenues from copper-based services are likely to be giving way to fibre-based revenues as Eircom transitions its broadband customer base from a copper-based network to an FTTH solution.

its copper cables. This incentive may be reduced under the per operator approach as NBI's MIP would always contribute 50% of the annual pole access costs (assuming that only Eircom and NBI have cables present on the pole) as long as an Eircom cable is deployed on the pole. Nonetheless, this incentive could still be too high under the per operator approach once NBI's fibre roll-out is established and the number of residual copper customers on Eircom's network is small.

668 However, ComReg believed that the per customer approach may not provide Eircom with the same incentive to remove copper cables compared to either the primary / secondary user approach or even the per operator approach. Under the per operator approach Eircom will always have to recover 50% of the pole costs until it removes its cables from a pole after which NBI's MIP will incur 100% of the pole costs. In contrast, under the per customer approach the per-pole charge for NBI's MIP will exceed 50% once its share of the relevant customer base exceeds a certain level. Dot Econ, in Section 5.6.1 of the Dot Econ Draft Report at Annex 2 of the CEI Consultation, also noted that, under some assumptions, a per customer approach can result in an attribution of shared network costs that is a reasonable approximation of Ramsey Pricing<sup>347</sup> or 'equi-proportionate mark-ups' ('EPMU')<sup>348</sup> approaches. Dot Econ also considered that a per customer approach was more compatible with an efficient recovery of shared costs during the period when demand is transitioning from copper to fibre services.

669 The Dot Econ Draft Report concluded (at Annex 2 of the CEI Consultation) that a per customer approach could provide Eircom with reasonable *incentives* to decommission copper and suggested that the approach could be adjusted so that Eircom would take into account the cost benefits of eliminating network duplication and shut down the copper network in the same manner as an integrated provider facing all the costs and benefits of copper switch off and transition to fibre.

670 ComReg considered that while the per customer approach for NBI's MIP in the NBP IA, was capable of providing an appropriate cost sharing mechanism (for the shared network costs and common corporate costs for poles) between Eircom and NBI's MIP, ComReg recognised that maintaining the status quo of the per operator approach may also be reasonable.

671 ComReg considered that the per operator approach would mean that the total cost of pole access in the NBP IA would be shared between the operators accessing the poles, namely NBI's MIP and Eircom. Eventually all of the pole access costs could

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<sup>347</sup> Ramsey pricing considers what price should be charged for the various products sold in order to maximize social welfare (the sum of producer and consumer surplus) while earning enough revenue to cover its fixed costs. Under Ramsey pricing, the price markup over marginal cost is inverse to the price elasticity of demand: the more elastic the product's demand, the smaller the markup.

<sup>348</sup> EPMU is a method of allocating common costs where the (common) costs are split in proportion to the volume or turnover of products/services delivered by the network.

be incurred by NBI's MIP should Eircom switch off its copper network and remove all of its cables, leaving NBI's MIP as the sole user of poles in the NBP IA. With the per operator approach the charge for NBI's MIP should recover 50% (assuming that there are two operators sharing the pole) of the pole costs once it gains access to the pole and this charge would continue until Eircom removes its cables from the pole, at which time the charge for NBI's MIP, as the sole user, should recover all (100%) of the costs.

672 ComReg noted that under the per customer approach NBI's MIP would always pay the incremental costs from the time access is initially granted but the attribution of shared network costs would depend on the relative number of NBP IA customers served respectively by NBI's MIP and Eircom.

673 In both cases, the amount to be paid by NBI's MIP for poles access would be expected to increase over the transition period to NBI's full rollout of its fibre network and Eircom's likely copper switch-off (or in the case of poles, removal of its copper cables) but the timing of the increase under each approach is likely to differ. Under the per operator approach the amount to be paid in respect of CEI access for NBI's MIP is likely to be dictated initially by NBI's deployment plans followed by Eircom's ability to remove copper cables; while under the per customer approach it would be dictated by NBI's deployment plans followed by the rate at which customers migrate off Eircom's network onto NBI's network.

674 ComReg also considered that in the NBP IA, the incremental costs caused by NBI are likely to be significant given the extent of pole replacement that is expected over and above the business as usual (BAU) levels so as to ensure that NBI's MIP has access to a fit for purpose pole network. Under the per customer approach the cost of pole access to NBI's MIP is likely to only initially recover the incremental costs whereas under the per operator approach all the pole access related costs (incremental and shared network costs) are shared with NBI.

675 ComReg also recognised that under the per operator approach the per pole charge for NBI's MIP would likely remain unchanged over the course of the transition from Eircom's copper services to NBI's fibre services until eventually Eircom removes its copper cables along the pole route. In contrast, the per pole charge for NBI's MIP under the per customer approach would likely increase as NBI's relative share of the customer base in NBP IA increases, and NBI thereby would bear a larger share of the shared network costs for poles. The per customer approach would be lower initially and increase as NBI's relative share of customers increase but it should ensure that the recovery of costs is better aligned with the revenue streams of both operators (NBI's MIP and Eircom). However, ComReg recognised that Eircom's incentive to remove its cables was stronger under the per operator approach than the per customer approach as under the per operator approach Eircom would have to remove all cables before NBI's MIP would be required to absorb more than 50% of pole related costs under the per operator approach.

676 ComReg reached the preliminary view in the CEI Consultation that the per customer approach should be used to allocate the shared network costs between NBI's MIP and Eircom in the NBO IA, but if implementation of it were to be overly burdensome, maintaining the existing per operator approach would be a reasonable alternative.

677 ComReg invited the views of respondents (in Question 9 of the CEI Consultation) on the proposed cost sharing methodologies in order to determine the pole access price for NBI's MIP access to poles in the NBP IA.

### Implementation considerations for proposed per customer approach

678 Following on from ComReg's preliminary view that the per customer approach should be used to allocate the shared network costs between NBI's MIP and Eircom, ComReg considered two options in terms of selecting an appropriate customer base for NBI's MIP, as follows:

- (a) Option 1: Use the number of active customer lines (or relative share of customers connected to NBI and Eircom's network) to allocate the shared network costs for pole / duct access; or
- (b) Option 2: Use a customer threshold approach to allocate the shared network costs for pole / duct access.

679 ComReg noted that Option 1 would use the active customer lines on each of Eircom and NBI's networks in the NBP IA in order to allocate the shared network costs for CEI.

680 ComReg noted that under the per customer approach, the incremental costs for poles / ducts associated with NBI's MIP would be recovered from NBI's MIP while the shared network costs for poles / ducts would be recovered between Eircom and NBI's MIP in proportion to a metric such as the relative number of premises actively connected to their respective networks. ComReg considered that the fact that the recovery of shared network costs for poles / ducts between Eircom and NBI's MIP would be in proportion to the relative share of customers actively connected to each operator's network in the NBP IA should help optimise incentives for both Eircom and NBI regarding copper removal. ComReg also recognised that attributing the shared network costs for pole / duct access between Eircom and NBI's MIP on the basis of the number customers actively connected to each of the operator's networks in the NBP IA also reflected the relative extent that both operators benefit from their use of poles / ducts in the NBP IA.

681 ComReg considered that determining the price for CEI access for NBI's MIP in the NBP IA on per customer basis in each period requires data on which premises have been passed by NBI's MIP network and whether those premises are served by either Eircom or NBI. ComReg noted that NBI would have available information on premises passed and connected but that the equivalent information for Eircom's

copper-based services may be incomplete. ComReg considered that the possible challenge for Eircom in this regard is to ensure that its systems are updated to identify the number of the designated premises passed by NBI's MIP which remain connected to Eircom's network. ComReg invited the views of NBI and Eircom on the information that is currently available to them as well the information they could provide for the purpose of assessing the number of each operator's active connections in the NBP IA. ComReg also saw no good reason to conduct the analysis on an 'exchange area by exchange area' or 'route by route' basis. Such an analysis is likely to be overly complex to undertake and to monitor and it may lead to a higher potential for disputes.

682 ComReg contemplated using that same approach for NBI's transit access in the Commercial Areas. However, NBI should have no active customers in the Commercial Areas, and accordingly would bear none of the shared network costs under this option.

683 Option 2 would require setting a customer number or percentage threshold which, when reached by NBI, would trigger NBI's MIP contribution towards the shared network costs for pole access. Costs would then be allocated to NBI's MIP according to the amount by which NBI's MIP's customer lines exceed the threshold set, rather than NBI's MIP's share of customer lines.

684 Section 7.4 of the Dot Econ Draft Report set out the theoretical attractions of such an approach, namely somewhat better incentives for an efficient timing of the copper network shutdown. However, ComReg and Dot Econ recognised that this approach had the disadvantage of requiring that an additional parameter – the threshold – be chosen. Dot Econ also considered that rather than applying this approach on an area-by-area basis, an overall threshold could be applied to all areas, but the actual share of subscriber lines that are fibre may potentially vary if roll-out has been prioritised in some areas. If copper is decommissioned in an area, that area could be eliminated from the calculation. However, Dot Econ also recognised that there are potential difficulties associated with the implementation of such an augmented approach, including the definition of the appropriate geographic units at which the per customer approach should be applied and the fact that deriving the value of the specified 't' threshold requires an understanding of the level of network specific fixed costs of NBI's MIP.

685 Hence, ComReg reached the preliminary view that active customer lines (Option 1) was the most appropriate basis to implement the per customer cost sharing approach for NBI's MIP in the NBP IA (and in the Commercial Areas for NBI's transit access if there are shared network costs to allocate) provided that factors such as the need for reliable data and the accurate tracking of customer numbers by operator, could be effectively managed.

686 ComReg invited the views of respondents (in Question 11 of the CEI Consultation)

on the use of number of customer lines and in particular the use of the number of each operator's active connections on their networks (Eircom and NBI) to those designated premises (of circa 537,000 delivery points) in the NBP IA, as well as their views on the option considered for NBI's transit access in Commercial Areas in the event that a per customer approach was chosen in this area. ComReg also sought the views of NBI and Eircom on the information available to them now and in future that could be used to ascertain their respective number of customers in the NBP IA and information required for NBI's transit access in the Commercial Areas.

687 ComReg received a direct response to Question 11 from four Respondents, namely Eircom, NBI, BT and ALTO. Vodafone, Virgin Media and Siro stated that they had no comments and Sky did not address the issues raised in Question 11 in their general response.

### 6.5.2 Respondents' Views and ComReg's Response

688 Eircom, NBI, BT and ALTO were the only Respondents to comment specifically on the proposed per customer cost sharing methodology for pole access by NBI's MIP in the NBP IA.

689 NBI<sup>349</sup>, BT<sup>350</sup> and ALTO<sup>351</sup> generally agreed with ComReg on the proposed **per customer cost sharing methodology for pole access by NBI's MIP in the NBP IA**, while Eircom disagreed. Eircom disagreed<sup>352</sup> for a number of reasons including that the per customer approach is not simple to administer and the relevant active line information is not available<sup>353</sup>, it does not allow for 'optimal' migration in the NBP IA;<sup>354</sup> Eircom submitted a 'per operator plus' approach should instead be used<sup>355</sup>. ALTO and BT considered that the per customer approach should address opportunity and incentive for Eircom to "cherry pick" in the NBP IA, although ALTO also noted that the per customer approach maybe the most complex pricing approach to implement. ComReg has considered this point at Section 5 (5.7.2).

690 Eircom, NBI, BT and ALTO commented on the proposal to use active customers on each operator's network.

691 BT<sup>356</sup> agreed with ComReg's proposal to use active customers on each operator's network in order to implement the per customer cost sharing approach for NBI's MIP in the NBP IA, while Eircom and NBI disagreed. Eircom disagreed on the basis that there is no reliable data available or data that can be created to administer the

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<sup>349</sup> Page 46 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>350</sup> Pages 8-9 of BT's Non-Confidential Response dated 18 November 2020.

<sup>351</sup> Page 9 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>352</sup> Paragraph 185 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>353</sup> Paragraphs 231-235 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>354</sup> Paragraphs 222-229 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>355</sup> Paragraphs 236-239 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>356</sup> Page 11 of BT's Non-Confidential Response dated 18 November 2020.

per customer method.<sup>357</sup> NBI also disagreed with the proposed active customer line approach stating that it would overcompensate Eircom compared to the existing per operator approach and suggested an alternative means of implementing the per customer approach.<sup>358</sup> BT<sup>359</sup> and ALTO<sup>360</sup> both commented that Eircom may selectively deploy its own fibre services within the NBP IA and this needs to be considered as part of the overall pricing approach.

692 ComReg consideration of the points raised by Respondents and ComReg's response are set out below.<sup>361</sup>

### Implementation issues associated with per customer approach

693 Eircom stated that "...the per customer approach is not capable of being administered",<sup>362</sup> and that "...there is no reliable data available or that can be created to administer the per customer method."<sup>363</sup> In this regard, Eircom explained that the footprint of the NBP covers, in full or in part, multiple Eircom exchange areas and Eircom's wholesale customers are billed on a per exchange basis. Eircom added that this means that there is no reliable method by which to determine the current number of active customers on Eircom's network within an exchange area that overlaps with the NBP footprint.<sup>364</sup> According to Eircom, in the vast majority of cases in the NBP IA, the connection of customers to Eircom's network pre-dates structured (Eircode) addresses in Ireland. Eircom stated that while DCCAIE conducted a mapping exercise to determine the NBP area, this map is a patchwork overlay on Eircom's exchange boundaries and the sum of customers connected on an exchange basis will over-estimate and over-allocate the shared cost disproportionately to Eircom's active wholesale services leading to the stranding of costs, in Eircom's view.<sup>365</sup>

694 NBI claimed that ComReg's proposal, where the key metric is the number of Eircom copper lines that are in service within the IA, ignores the existence of other broadband platforms in the NBP IA, i.e., fixed wireless and 4G mobile, on which many households are dependent for connectivity at home. As the NBP network is rolled out it is likely that significant numbers of these customers located within the IA will quickly migrate from these 'fringe' platforms and the overall active base within the IA will rise, compared to the situation now. In this case NBI considered that

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<sup>357</sup> Paragraph 248 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>358</sup> Pages 50-52 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>359</sup> Pages 11-12 of BT's Non-Confidential Response dated 18 November 2020.

<sup>360</sup> Pages 11-12 of BT's Non-Confidential Response dated 18 November 2020.

<sup>361</sup> Given ComReg's decision not to proceed with the per customer cost sharing methodology for CEI access by NBI's MIP in the NBP IA, the proposal from the CEI Consultation (and related Question 12) to monitor and update the CEI models (PAM/DAM) for active customer line data is moot. Hence, ComReg has not summarised its position nor respondents' views as these are superseded by the issues discussed in this Section 6.5. The overall monitoring of the CEI price control is discussed in Section 10.

<sup>362</sup> Paragraph 235 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>363</sup> Paragraph 248 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>364</sup> Paragraph 258 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>365</sup> Paragraphs 259 & 261 of Eircom's Non-Confidential Response dated 18 November 2020



Eircom would have no option but to recover the cost of its entire CEI network in the IA from whatever volume of active customers it has and it cannot recover these costs from alternative platforms or from unserved demand.<sup>366</sup> NBI, along with Frontier Economics, proposed an adjustment to the approach whereby the projected volume of active NBI customers at the completion of copper switch-off in the IA would be used as the denominator, with the total active NBI users at a point in time used as the numerator. Frontier Economics claimed that the share of the costs to be recovered from NBI needs to take account of the fact that NBI will increase the size of the market compared to the counterfactual, rather than simply migrating customers from Eircom. Frontier Economics claimed that the denominator used to assess the share of costs that should be allocated to NBI should not be the total number of active customers in the IA at any given time, but instead the expected number of customers of NBI at the time of copper switch off, as this approach would ensure that the NBI share is 100% at the point of copper switch-off, as this takes account of the expected growth in subscriber numbers.<sup>367</sup>

695 Having considered the issues raised by Eircom and NBI, ComReg accepts that there are difficulties in terms of the practical implementation of the per customer approach, particularly in the absence of the relevant active customer line information from Eircom. Eircom confirmed that it does not have the location (Eircode) information for the majority of its active lines in the NBP IA. While Eircom has Eircode information for its FTTH lines and for some of its FTTC lines, the large majority of its existing copper-based voice and broadband lines in the NBP IA do not have Eircodes assigned to them. ComReg understands from Eircom that Eircode data is collected by Eircom at the point of sale and Eircom, by and large, is not actively selling legacy copper services.<sup>368</sup> This is a significant limiting factor in terms of implementing the per customer approach. ComReg considers that in the absence of the Eircode data in order to identify those Eircom active customer lines in the NBP IA, it is not plausible to proceed with the per customer cost sharing approach.

696 This point was also made in the Dot Econ Final Report:

*“For the per customer model to be feasible, data on customer lines would need to be available during the transitional period in which NBI builds out its network and customers migrate from copper. Therefore, even if steps were taken to improve data availability now, it is not clear that data would actually be available soon enough to allow the per customer model to be implemented.”<sup>369</sup>*

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<sup>366</sup> Pages 50-51 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>367</sup> Page 38 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>368</sup> ComReg understands from Eircom that Eircode data is only requested from Retail customers for billing purposes and not for service provisioning purposes.

<sup>369</sup> Section 9.3.3 of the Dot Econ Final Report at Annex 2.

697 ComReg has also considered the alternative implementation option put forward by NBI. However, the main drawback of NBI's proposal is the fact that Eircom would be expected to bill NBI based on (forecasted) customer information provided from NBI, not Eircom's actual data. ComReg does not believe that it is reasonable and appropriate that Eircom's basis for charging NBI's MIP would rely on information provided by NBI and is concerned that this will foster disputes. ComReg is also concerned that the very significant investments and costs at stake here could not be subject to scrutiny including by way of audit, because Eircom would not be in a position to stand over / support the volume data that it uses to bill or charge NBI. This also applies if estimations or approximations were used to determine the active customer line data on each operator's network.

698 For these reasons, ComReg is of the view, that despite the benefits of the per customer approach in terms of incentivising efficient migration from copper to fibre, the per customer approach is impracticable, in the absence of reliable active customer line information from Eircom. In the CEI Consultation ComReg recognised at paragraph 516 that if implementation of the per customer approach were to be overly burdensome, then the existing per operator approach is a reasonable alternative. In the following paragraphs ComReg sets out the appropriate alternative cost sharing approaches for allocating the shared network costs between NBI's MIP and Eircom in the context of access to poles in the NBP IA.

#### Alternative cost sharing approaches for pole access by NBI's MIP

699 The remaining cost sharing options for poles access by NBI's MIP in the NBP IA are:

- (a) The existing per operator approach; or
- (b) The 'per operator plus' approach.

700 The existing per operator approach as described in the CEI Consultation means that the total cost of pole access in the NBP IA would be equally shared between the operators accessing the poles i.e., NBI's MIP and Eircom, and each would pay 50% (assuming that there are two operators sharing the pole) of the pole costs once NBI's MIP gains access to the pole and this charge would continue until Eircom removes its cables from the pole, at which time the charge for NBI's MIP, as the sole user, would recover all (100%) of the costs.

701 In its response to the CEI Consultation, Eircom proposed a variant, the '**per operator plus**' approach, to determine the pole access charge for NBI's MIP in the NBP IA. Under this approach, the incremental pole replacement caused by NBI's MIP is borne by NBI (similar to the proposed per customer approach) but the shared network costs are allocated 50:50 between Eircom and NBI's MIP (as is the case

under the existing per operator approach).<sup>370</sup>

702 In selecting the most appropriate approach between the per operator, and the per operator plus, approaches, ComReg has had regard to a number of criteria, including simplicity of implementation; consistency of the approach with the cost causation principle; impact on revenues flows; and impact on the incentives for copper switch-off.

703 By way of preliminary comment, as regards the question of incentives for copper switch-off, ComReg notes Eircom's claim in its submissions that the CEI Consultation contains a number of inconsistent descriptions of copper switch off, stating that "*...there will likely be a period of time between the switch off of the copper network and the subsequent removal of copper (which may not be efficient or possible in the case of copper deployed in ducts). As such, ComReg should clarify that it is referring to copper switch off rather than copper decommissioning.*"<sup>371</sup> On the other hand NBI noted that "*...it would not be sufficient for Eircom to demonstrate that the copper cables on its poles along a particular route no longer carried any live traffic but instead that all the copper cables on the route had been removed and so that the sole occupant on the pole was NBI.*"<sup>372</sup>

704 For the avoidance of doubt, ComReg considers that the cost sharing approach for pole access in the NBP IA must encourage the migration off Eircom's copper services and the eventual retirement and physical removal of copper cables on Eircom's poles. ComReg discussed this point in Section 6 of the CEI Consultation<sup>373</sup>, emphasising that under the 'per operator' approach Eircom will "*...always have to recover 50% of the pole costs **until it withdraws its cables from a pole** after which NBI's MIP will incur 100% of the pole costs.*"<sup>374</sup> [emphasis added]. ComReg maintains this position in relation to the 'per operator plus' approach where Eircom should continue to pay 50% of the shared network costs for poles in the NBP IA until it removes its cables from the pole, after which NBI's MIP will incur 100% of the pole costs in this area. For the purpose of cost modelling, the average prices derived from the PAM/DAM for NBI's MIP in the NBP IA reflect that copper switch-off would be accompanied by physical removal of Eircom's copper cables.

705 ComReg recognises that the 'per operator plus' approach is more burdensome than the 'per operator' approach as it requires consideration of the difference in operator-specific incremental costs of using poles. As noted by Dot Econ in Section 10 of the Dot Econ Final Report at Annex 2, "*...differences in operator-specific incremental costs are more complex than Eir suggests and cannot simply be identified with pole*

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<sup>370</sup> Paragraphs 107 & 237-238 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>371</sup> Paragraph 223 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>372</sup> Pages 46-47 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>373</sup> See paragraphs 495, 504, 507, 509 and 511 of the CEI Consultation.

<sup>374</sup> Paragraph 495 of Eircom's Non-Confidential Response dated 18 November 2020.

*replacement outside the BAU cycle.*" <sup>375</sup> By contrast, under the per operator approach, the total pole cost is just split equally (in this case 50:50) between the operators sharing the pole.

706 However, it appears to ComReg for the reasons below that the 'per operator plus' approach however better implements in ComReg's view the principle of cost causation, accords revenue flows better with actual access and also mitigates the potential excessive incentives identified above for Eircom, under the 'per operator' approach, to accelerate the switch-off of its copper network.

707 In term of cost causation, ComReg agrees with Dot Econ that the per operator plus approach "...is better aligned with the broad principle of users paying the costs they cause", <sup>376</sup> as whatever costs are caused by NBI's MIP in accessing Eircom's poles in the NBP IA are paid by NBI, similar to the per customer approach as proposed in the CEI Consultation. ComReg notes that the principles for cost recovery are similar under both the 'per operator plus' and the per customer approaches, as NBI's MIP is paying for the incremental costs under both approaches.

708 Eircom noted in their response that "*Outside the business as usual pole replacement cycle (and associated replacement rate), the incremental pole replacement is solely driven by NBI's desire to deploy fibre on eir's poles.*"<sup>377</sup>

709 ComReg considers that it is reasonable to consider the *incremental* replacement of poles outside the BAU cycle as being an operator-specific incremental cost to NBI's MIP. Prior to the NBP, Eircom would have expected to be the sole user of CEI in the NBP IA, given that the prospects of entry by another commercial operator is small. However, with the deployment of the NBP Eircom is obliged to provide access to a significant volume of its poles to NBI's MIP in the NBP IA and the *additional* costs associated with this provision are NBI operator-specific incremental cost, and not specific to Eircom, and so this gives rise to a key difference between the two approaches, that is between the per operator and the per operator plus.

710 As regards revenue flows/timing of payments, the 'per operator plus' is similar to the existing 'per operator' approach and when compared with the 'per customer' approach, both provide greater certainty in this respect. This is because the revenues expected from the per customer approach are very much dependent on the rate of migration or take-up of NBI's fibre services in the NBP IA.

711 The 'per operator plus' approach however has the advantage that the revenue contributions from NBI's MIP to Eircom for pole access in the NBP IA should be relatively stable up to the point where Eircom removes its copper services (or physically removes its copper cables in the case of poles) at which stage 100% of

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<sup>375</sup> Section 10.4 of the Dot Econ Final Report at Annex 2.

<sup>376</sup> Section 10.4 of the Dot Econ Final Report at Annex 2.

<sup>377</sup> Paragraph 107 of Eircom's Non-Confidential Response dated 18 November 2020.

the pole costs will be incurred by NBI's MIP.

712 In that regard, the per operator plus approach addresses NBI's concern that under the per operator approach, it would have to pay 50% of the cost of poles including when customer take-up of FTTH services on the NBP network is very low and it only has access to minimal downstream service revenues.

713 The 'per operator plus' approach should also ensure that Eircom has better incentives to invest in its pole network to ensure the network is 'NGA ready', which is in the interest of end-users.

714 Reducing the quantum of shared networks costs (to be split 50:50 between Eircom and NBI) in turn mitigates the potential excessive incentives that Eircom, under the 'per operator' approach, may have to accelerate the switch-off of its copper network.

715 To recall, in the Dot Econ Final Report:

*"...the per operator, equal sharing approach currently in use for CEI access pricing does not generally replicate the incentives that would face an integrated operator of copper and fibre networks. It provides too great an incentive to shut down the copper network once fibre is more established, as it maintains a substantial minimum contribution to shared CEI costs from the copper network even as the number of copper customers falls."<sup>378</sup>*

716 The fact that Eircom may not, under the per operator plus approach, charge NBI's MIP 100% of the pole cost until it removes its cables from the poles addresses this concern by giving an incentive to Eircom to remove its cables in a timely manner after copper switch-off. This incentive does not exist under the per customer approach, where the charge to NBI is based on its share of active connections with the result that NBI's MIP could be paying 100% of the pole cost even if Eircom's copper cables remain on the poles.

717 In light of the above, ComReg has decided to change the cost sharing approach for determining the pole access prices for NBI's MIP in the NBP IA from a per customer approach to a 'per operator plus' approach.

#### **Implementation of 'per operator plus' approach:**

718 ComReg notes the advice in the Dot Econ Final Report that:

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<sup>378</sup> Section 8.5 of the Dot Econ Final Report at Annex 2.

*“...a reasonable and fair implementation of “per operator plus” pricing should reflect costs caused by the need for Eir to enable sharing of poles where, prior to the NBP there was no expectation that sharing would be likely. However, this needs to strip out investment in new poles that is not driven by NBI, but rather is catching up with historic underinvestment.”<sup>379</sup>*

719 The Dot Econ Final Report also states that:

*“...we need to be careful to distinguish between correcting for historic underinvestment in CEI within the IA and the need for genuine new investment to serve NBP. To the extent that there has been such underinvestment, it would be inappropriate to treat that as a cost that NBP should now bear entirely. Therefore, there is a practical question about assessing the reasonableness of assumptions about what costs are BAU and what are genuinely incremental due to NBI's sharing.”<sup>380</sup>*

720 Hence, in determining the relevant incremental costs associated with NBI's MIP access to poles in the NBP IA, it is important to distinguish between business as usual (BAU) investment required on Eircom's network, the investment that is incremental to NBI's MIP deployment and incremental costs caused by Eircom. ComReg recognises that historic under-investment by Eircom in its CEI network in the NBP IA should not be treated as incremental costs associated with NBI's MIP in the NBP IA.

721 In light of its decision to revise the cost sharing approach for NBI's MIP access to poles to a 'per operator plus' approach, and of the advice from Dot Econ above, and taking into account the issues raised by Respondents (as summarised at paragraph 573) regarding possible historic under-investment by Eircom in its pole network, ComReg has revisited the BAU investment levels in the PAM. The changes to the BAU investment levels are discussed as part of the cost modelling updates in Section 5.11.2 at paragraphs 581-584. In summary, these changes have resulted in a higher BAU investment level for poles over the FTTH rollout period (2020-2024), with a reduced incremental cost to NBI's MIP and a consequent reduction to the uplift applied to the costs for Generic Access seekers, all of which have been reflected in the final pole prices in Section 9.3 of this Decision.

722 In summary, the 'per operator plus' approach implemented by ComReg in this Decision takes into account the advice set out in Section 10 of the Dot Econ Final Report. The 'per operator plus' approach implemented by ComReg reflects the assumed incremental costs caused by NBI in the NBP IA and insofar as possible what is considered incremental to Eircom (using data available to ComReg), with the remaining shared networks costs (including BAU investments) split between

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<sup>379</sup> Section 10.4 of the Dot Econ Final Report at Annex 2.

<sup>380</sup> Section 10.3 of the Dot Econ Final Report at Annex 2.

Eircom and NBI in the case of poles and on the basis of per metre of duct/sub-duct in the case of ducts/sub-ducts.

### Other issues

723 Eircom claimed that ComReg's concern that "...the per-operator rule provides excessive incentives for copper switch-off seems very misplaced in light of the assumptions made in ComReg's own cost model." In this regard Eircom noted, along with BRG Consultants, that "ComReg's cost model assumes that fibre network rollout will be complete at a point in time when the fibre network has only a 28% share of customers and in their view this is unsurprising given the fact that telecom networks are rolled out on a "lumpy" rather than incremental basis."<sup>381</sup>

724 In response to Eircom's point, ComReg notes that the assumed forecasts of FTTH demand in the PAM and DAM models in the CEI Consultation were based on projections of take-up of FTTH in the early years after initial fibre deployment together with the assumption that copper retirement (or cable removal in the case of poles) will happen five years after fibre has been deployed in an area. As such, the demand estimates were not intended to reflect the consequence of any specific cost sharing mechanism and so it remains to be seen if copper retirement (and cable removal) is achievable in the timeframes suggested in the PAM and DAM.

725 Eircom also submitted that ComReg failed to consult on those premises (delivery points) in the IA that do not avail of Eircom's fixed line service (but access other technologies like mobile broadband, FWA and satellite services), those inactive premises in the IA that are not connected to any fixed network e.g. holiday homes or households deciding not to avail of any broadband service<sup>382</sup> and those "addressable" premises included in the Departments 537,000 premises where a downward adjustment is needed to correct for multiple addressable premises<sup>383</sup> within an Eircode<sup>384</sup>

726 To clarify, ComReg's proposal in the CEI Consultation was to determine "active" connections on either NBI's or Eircom's network, only. Therefore, data on "inactive" lines or connections on other networks are not relevant. In addition, ComReg had proposed in the CEI Consultation that the shared network costs would be allocated between Eircom and NBI on a "per customer approach" whereby these costs are allocated depending on the relative number of customers actively connected in the NBP IA served by NBI's MIP and by Eircom, respectively. Therefore, Eircom seems to have misinterpreted part of ComReg's proposal, as we did not intend to use DECC's 537k delivery points as a denominator.

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<sup>381</sup> Paragraph 221 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>382</sup> Paragraphs 233-234 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>383</sup> A single premise with mixed use (residential and commercial) by the same occupant.

<sup>384</sup> Paragraphs 266-269 of Eircom's Non-Confidential Response dated 18 November 2020.

### 6.5.3 ComReg's Final Position:

727 Having considered the Respondents' Submissions as well as the advice from Dot Econ, ComReg has modified its position on the cost sharing approach for determining the pole access price for NBI's MIP in the NBP IA from a per customer approach to a 'per operator plus' approach for the reasons set out above,<sup>385</sup> and a 'per operator plus' cost sharing methodology shall be used to determine the pole access charge for NBI's MIP in the NBP IA.

728 This approach means that NBI and Eircom should pay the incremental pole access costs they cause in the NBP IA and the shared network costs for pole access in the NBP IA will be split 50:50 between Eircom and NBI (assuming there are only two operators present on the pole) until Eircom removes its copper cables from the poles at which point NBI will pay all 100% of the poles costs as the sole user of the pole.

## 6.6 Cost sharing methodology for duct access

729 In Section 6.4 of the CEI Consultation ComReg considered the following three cost sharing options for allocating the shared network costs (including common corporate costs) for duct access among duct users, in order to determine the per unit duct access prices for both Generic Access and NBI's MIP:

- (a) Per metre of sub duct approach;
- (b) Primary / secondary user approach;
- (c) Per customer approach.

730 In Section 6 of the CEI Consultation ComReg explained that under the per metre of sub duct approach, the per metre cost-oriented price is derived by dividing the total cost relating to sub-duct access infrastructure by the total length of underground copper and fibre cables (fibre cables are generally deployed in sub ducts). A per metre price is consistent with the fact that the cost of trenches is sensitive to both the length and the size of the trench, which in turn is driven by the need for the ducts to accommodate sub-ducts (when available) or copper cables. It also allows to reflect capacity constraints by reference to duct occupancy because the unit cost of duct is dependent on the total amount of copper and fibre cables hosted on Eircom's network, noting that sub ducts tend to be of a similar size to copper cables in terms of circumference. ComReg also noted that the per metre of sub-duct approach is currently used under the price control for duct access set in the 2016

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<sup>385</sup> Section 10 of the Dot Econ Final Report at Annex 2.



Access Pricing Decision and re-imposed in the 2018 WLA / WCA Market Review Decision.

731 The other two cost sharing options (primary / secondary user and per customer) considered by ComReg in the context of duct access have already been described as part of the pole access cost sharing options at paragraphs 636-638 above.

732 ComReg pointed out in the context of the primary / secondary user approach that while many of the same considerations as those highlighted (and summarised above) for pole access equally applied in relation to duct access pricing, there was one main difference. For pole access, while it may be considered efficient to remove redundant cables from poles, as it helps to diminish the load on the pole, thereby helping to prolong its technical life, removing cables from a duct risks damaging other cables in the duct. Hence, ComReg noted that removal of redundant copper cable from ducts is generally only undertaken by an operator to overcome duct capacity constraints or when repairs to cables/ducts are being undertaken. On that basis different considerations govern the efficient retirement and eventual removal of copper cables for duct and duct access lends itself much less to a primary / secondary user approach than for pole access.

733 ComReg invited the views of respondents (in Question 10 of the CEI Consultation) on the proposed cost sharing methodologies in the case of Generic Access to ducts and for NBI's MIP access to ducts in the NBP IA and for NBI's transit access in the Commercial Areas.

734 ComReg received a direct response to Question 10 from five Respondents, namely NBI, Eircom, BT, Vodafone and ALTO. Virgin Media<sup>386</sup> and Siro<sup>387</sup> stated that they had no comments. Sky's general response did not consider the proposals raised in relation to Question 10.

735 The discussion in this section is addressed under the following headings:

- (a) Cost sharing methodology for Generic Access to ducts;
- (b) Cost sharing methodology for NBI's MIP access to ducts.

## 6.7 Cost sharing methodology for Generic Access to ducts

### 6.7.1 Position set out in the Consultation

736 For **Generic Access to ducts in the Commercial Areas** ComReg considered that the existing per metre of sub duct approach remained appropriate and reasonable. In particular, ComReg recognised that this approach provides for the recovery of all

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<sup>386</sup> Page 4 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>387</sup> Page 5 of Siro's Non-Confidential Response dated 18 November 2020.

duct related costs including an allocation of shared network costs and common corporate costs. Eircom is likely to continue to use its ducts in the Commercial Areas to provide wholesale access services to its Retail division and to other retail service providers. To ensure long term sustainability in that context, ComReg was of the preliminary view that the price for Generic Access to duct must be set at a level that allows Eircom to recover all duct related costs i.e., incremental costs as well as an allocation of shared network costs and common corporate costs.

737 ComReg also considered in the CEI Consultation that an approach which does not allow Eircom to recover a contribution of shared network costs and common corporate costs would likely have distortive effects on competition as Eircom would likely be left to recover an increasing proportion of these costs from the residual customers it retains. For this reason, ComReg considered that the primary / secondary user approach, which only allows for the recovery of the incremental costs of duct access, did not appear to be appropriate for Generic Access to Eircom's duct.

738 ComReg also considered that inappropriate cost recovery may be less of an issue with the per customer approach than it is with the primary / secondary user approach, as it would allow Eircom to receive a contribution of the shared network costs and common corporate costs from the price for Generic Access to duct but it would be difficult to implement. ComReg considered that it is not possible to have an objective basis to determine the relative number of customers that each operator is serving using shared ducts, and therefore that there was no objective basis on which to apply a per customer approach.

739 Hence, ComReg reached the preliminary view that for Generic Access to ducts in the Commercial Areas the existing per metre of sub-duct approach should apply. ComReg noted that this approach should promote market entry by enabling operators to share the costs of existing infrastructure, it helps sustain viable competition by allowing competing operators to contribute to the cost recovery of shared network assets on equivalent terms and maintains investment incentives as it allows Eircom to continue to recover its efficiently incurred cost plus a return on capital employed over the long-run.

740 For **Generic Access to ducts in the NBP IA** ComReg proposed that in order to maintain consistency with the cost sharing approach proposed for Generic Access to ducts in the Commercial Areas, that the existing per metre of sub-duct approach should also apply for Generic Access to ducts in the NBP IA.

741 ComReg invited the views of respondents (in Question 10 of the CEI Consultation) on the proposed cost sharing methodologies in order to determine the duct access price, including Sub-Duct Access, for Generic Access to ducts.

## 6.7.2 Respondents' Views and ComReg's Response

742 Eircom was the only Respondent to comment on the proposed cost sharing methodology for Generic Access to ducts.

743 Eircom submitted that in the case of duct cost sharing methodologies all operators (including NBI) should be charged for the full cost of blockage clearance and other remediation up-front, in both the NBP IA and in the Commercial Areas. Eircom also stated that "... *the remaining rental charge recovers a contribution to the historic investments by Eircom – including recent clearance of blockages and repair of manholes – and those charges should be set to reflect the share of benefit the operator derives from those investments.*" <sup>388</sup>

744 Taking into account Eircom's views above, ComReg considers that activities such as duct clearance (or blockage clearance) can continue to be of benefit to network operators who need to access those ducts to deploy new cables in the future. Therefore, ComReg considers that it is reasonable to treat the duct investments needed to make the network 'NGA ready' as a shared network cost to be recovered by way of a recurring duct / sub-duct access charge (as opposed to an upfront / one-off charge) from all operators that can potentially benefit from that investment in the long run. This is particularly relevant in the case of CEI, including duct/sub-duct access, in the Commercial Areas. This approach ensures that the cost sharing benefits of CEI access are spread out indiscriminately across all competitors that benefit from it.

745 ComReg recognises, however, that in the case of NBI's MIP in the NBP IA, almost all duct/sub-duct related expenditure in the NBP IA could be regarded as incremental to NBI's MIP as NBI will ultimately be the only operator that could benefit from this expenditure and there may be a case that Eircom could recover NBI's related CEI investment as a one-off fee, which is discussed further at Section 9.4 below.

### 6.7.3 ComReg's Final Position:

746 Having considered Eircom's point, and given that no other Respondents commented, ComReg remains of the view that the existing per metre (of duct or sub-duct) approach continues to be an appropriate cost sharing approach in the context of determining the recurring prices for Duct access / Direct Duct Access and Sub-Duct Access for Generic Access users for the reasons set out above.

## 6.8 Cost sharing methodology for NBI's MIP access to ducts

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<sup>388</sup> Paragraph 245 of Eircom's Non-Confidential Response dated 18 November 2020.

## in the Commercial Areas

### 6.8.1 Position set out in the Consultation:

747 For **NBI's MIP access to ducts in the Commercial Areas**, ComReg recognised that if an LRIC approach is adopted for NBI's transit access in the Commercial Areas then it is expected that there would be no shared network costs or common corporate costs to be allocated to NBI's MIP, as NBI cannot use its subsidised network outside the NBP IA to serve customers and compete with Eircom in the Commercial Areas. However, ComReg also made some observations on what an appropriate cost sharing approach for allocating any shared network costs and common corporate costs relevant to duct access by NBI for transit purposes in the Commercial Areas might be, should an alternative costing methodology (to LRIC) be adopted.

748 ComReg considered that the existing per metre of sub duct approach could result in excess cost recovery by Eircom with potentially distortive effects on competition. Under that approach, Eircom would likely recover a significant part of the shared network costs of ducts from NBI even though NBI cannot use its subsidised network to provide services outside the NBP IA so as to serve and compete for customers in the Commercial Areas. As Eircom suffers no wholesale or retail revenue losses from providing such transit access to NBI, such a contribution (to Eircom's shared network costs for ducts) from NBI could mean that Eircom may use this excess contribution as an opportunity to reduce the prices of wholesale access services where it is faced with competition from rival network operators.

749 A per customer approach for attributing shared network costs and common corporate costs for ducts in the context of NBI's transit access in the Commercial Areas could be seen as more consistent with the fact that NBI cannot compete for customers in the Commercial Areas. In particular, a per customer approach for NBI's MIP in the Commercial Areas would result in NBI's MIP being charged for duct access on an incremental costs basis,<sup>389</sup> without any contribution to shared network costs or common corporate costs as NBI has no customers to serve in this area. It should accordingly avoid any risk of over-recovery of costs by Eircom.

750 ComReg reached the preliminary view that were an approach other than LRIC costing chosen for NBI's MIP access to ducts in the Commercial Areas, the per customer approach may be seen as a reasonable alternative to the existing per

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<sup>389</sup> In the case of the NBI's MIP, for duct access in the Commercial Areas, incremental costs are modelled as being confined to the costs of sub-duct as it is assumed that other duct related costs such as trenching, duct installation, blockage clearance and surface reinstatement are part of the normal network maintenance costs for Eircom, given that it continues to use the network in perpetuity. Sub-duct is considered incremental as ComReg is of the preliminary view that capacity constraints are most likely to exist for sub-ducts.

metre of sub duct approach.

## 6.8.2 Respondents' Views and ComReg's Response:

751 NBI and Eircom were the only two Respondents to comment specifically on the cost sharing proposal for NBI's MIP access to ducts in the Commercial Areas.

752 NBI considered that the per customer cost sharing approach could be used for determining the duct/sub-duct access rental prices in the Commercial Area,<sup>390</sup> but the LRIC methodology was a reasonable approach to adopt.<sup>391</sup>

753 Eircom disagreed with the approach for determining the duct prices for NBI's MIP access in the Commercial Areas,<sup>392</sup> reiterating the concerns it raised earlier on the LRIC costing methodology, which ComReg has considered at subsection 5.6.2.

## 6.8.3 ComReg's Final Position

754 Having considered the Respondents' Submissions, the advice from Dot Econ and taking into account ComReg's decision to use the LRIC costing methodology for determining the duct access price for NBI's MIP in the Commercial Areas for the reasons set out in Section 5.6.2, ComReg concluded that there is no need for a cost sharing methodology as the shared network costs and common corporate costs are not part of the LRIC.

## 6.9 Cost sharing methodology for NBI's MIP access to ducts in the NBP IA

### 6.9.1 Position set out in the Consultation

755 For **NBI's MIP access to ducts in the NBP IA**, ComReg considered that two cost sharing approaches were appropriate, the per customer approach, and the existing cost sharing approach of a per metre of sub duct. ComReg believed that the per-customer approach would provide an appropriate allocation of shared network costs and common corporate costs between Eircom and NBI and it would mean that all of the incremental costs that are incurred by Eircom to support the provision of the duct access service to NBI's MIP would be recovered from NBI. The residual (shared network) costs, which likely include the legacy costs of duct related assets that Eircom has deployed in the past and which are not fully depreciated, as well as the costs that Eircom may continue to incur to enable the ongoing supply of access services to its declining customer base in the NBP IA, would be shared between Eircom and NBI's MIP in proportion to each operator's customer base in the NBP

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<sup>390</sup> Page 49 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>391</sup> Page 20 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>392</sup> Paragraph 240 of Eircom's Non-Confidential Response dated 18 November 2020.

## IA.

756 ComReg noted in Section 6 of the CEI Consultation that the NBV of Eircom's reusable duct assets in the NBP IA is close to zero and the only shared network costs that remain to be recovered from the operators sharing duct in the NBP IA are the costs that Eircom is likely to incur in remediating and repairing ducts to maintain its access network and support the appropriate service levels for its customer base. Unlike poles, which may have to be replaced as part of an ongoing maintenance programme, operators generally do not carry out routine maintenance on ducts unless it is necessary to resolve existing or recurring faults. The shared network costs associated with ducts in the NBP IA are accordingly not likely to be material.

757 ComReg noted in the CEI Consultation that Eircom has no plans to deploy fibre in the NBP IA and its copper network will gradually be replaced by NBI's fibre network. Eircom therefore is likely to have little incentive to invest in duct related assets on an ongoing basis in the NBP IA over and above that required to maintain appropriate service levels for its customers.<sup>393</sup> As Eircom's customer numbers are likely to decline as customers migrate to NBI's fibre services, duct maintenance will be limited. Absent a requirement to meet NBI's duct access requests, Eircom would likely sweat existing assets rather than invest in its duct network in the NBP IA. Therefore, ComReg stated that it would expect that the level of shared network costs that would be allocated between Sub-Duct Access users based on the existing **per metre of sub duct** approach is likely to be relatively small, and the most significant proportion of duct related costs in the NBP IA in the future should be the incremental costs that arise from Eircom's investments to support NBI's MIP. Indeed, almost all duct related expenditure in the NBP IA could be regarded as incremental to NBI's MIP as NBI will ultimately be the only operator that could benefit from this expenditure.

758 ComReg considered that this also means that the amount to be paid by NBI's MIP could be lower under the existing per metre of sub duct approach (where all duct shared network costs and incremental costs are allocated between operators based on a measure of the capacity of trench occupied by each operator), than under the per customer approach (where the totality of the incremental costs would be recovered from NBI's MIP and only the shared network costs would be allocated to duct users in proportion to relative customer numbers in each period). This could be the case if the proportion of incremental costs relative to shared network costs is significant.

759 In the CEI Consultation ComReg stated that given the economic characteristics of the NBP IA, it is unlikely that another Sub-Duct Access user will make significant use of the sub-ducts that are being installed by Eircom to support NBI's deployment

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<sup>393</sup> As set out in Section 3, Eircom is the designated USP. As a result, Eircom must adhere to a number of service availability targets.

of its fibre network. Therefore, the per customer approach could have merits as a cost sharing option compared to the per metre of sub duct approach as it ensures that cost recovery better aligns with the principles of both cost causation (the initial investment happens because of NBI's MIP demand for duct access in the NBP IA) and the distribution of benefits (NBI will be the primary beneficiary of this investment both in the short term and in the long term).

760 ComReg also considered that if and when Eircom retires its copper network in the NBP IA, NBI is expected to be the only operator present<sup>394</sup> in those segments of underground route, where duct (trench) occupancy becomes irrelevant as a basis for a cost sharing approach. In the Commercial Areas ComReg stated that it does not expect a similar situation, as Eircom is expected to continue to provide fixed line commercial services as well as continued replacement of copper cables with fibre cables in this area. Hence, the price for NBI's access in Commercial Areas should take into account the duct (trench) occupancy by both Eircom and NBI's cables (or indeed any other commercial operators), under the "per meter of cable" approach.

761 ComReg reached the preliminary view that for NBI's MIP access to ducts in the NBP IA a per customer approach should be used to allocate the shared network costs between NBI's MIP and Eircom, as a means to determining the duct access price, but if implementation of it were to be overly burdensome, maintaining the existing per metre of sub duct approach would be a reasonable alternative.

762 ComReg invited the views of respondents (in Question 10 of the CEI Consultation) on the proposed cost sharing methodologies in order to determine the duct access price, in particular Sub-Duct Access, for NBI's MIP in the NBP IA, as described in subsection 6.5 of the CEI Consultation and as summarised above at paragraphs 755-761.

### 6.9.2 Respondents' Views and ComReg's Response:

763 NBI, Eircom, BT and ALTO commented on the per customer cost sharing methodology for determining the recurring price for NBI's MIP access to Eircom's ducts in the NBP IA.

764 NBI agreed with ComReg's proposal of a per customer approach, but it reiterated its view (from the cost sharing approach for poles) that the per-customer formula should be set on the basis of NBI's projected number of fibre connections at copper switch-off.<sup>395</sup> Eircom disagreed with the per customer cost sharing methodology for

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<sup>394</sup> By "present" ComReg means "active", i.e., where cables are providing a service to a customer(s). Removing redundant copper cables can risk damaging other cables in the duct, so cables are not normally removed unless the perceived benefit outweighs that risk, e.g. freeing up capacity in the duct. Therefore, ComReg is of the view that the pricing approach for duct access in the NBP IA does not need to incentivise Eircom to remove redundant cables, given that duct capacity constraints are not likely to be a material concern in the NBP IA.

<sup>395</sup> Page 49 of NBI's Non-Confidential Response dated 18 November 2020.

determining the duct prices for NBI's MIP access in the NBP IA and in the Commercial Areas<sup>396</sup>, for the same reasons that is raised regarding the cost sharing approach for poles including that a per customer approach is difficult to implement as the relevant data is not available<sup>397</sup> and that it does not allow for 'optimal' migration from copper to fibre in the NBP IA<sup>398</sup>.

765BT<sup>399</sup> and ALTO<sup>400</sup> noted that if implementation of the per customer proved overly burdensome then the per metre of sub-duct approach would be an appropriate solution.

766ComReg's consideration of Respondents' Submissions and ComReg's position on the points raised are set out below.<sup>401</sup>

### **Implementation issues associated with per customer approach**

767Given the implementation issues raised by Eircom and NBI in relation to the proposed per customer cost sharing approach for CEI access, which ComReg has assessed at paragraphs 693-697, ComReg has decided that the per customer approach is impracticable, in the absence of reliable active customer line location information from Eircom.

768In the CEI Consultation ComReg recognised (at paragraph 557) that if implementation of the per customer approach in the context of duct access by NBI's MIP were to be overly burdensome, maintaining the existing per metre approach would be a reasonable alternative for allocating shared network costs for duct access / sub-duct access between NBI's MIP and Eircom. In the following paragraphs ComReg considers the alternative per metre cost sharing approach for allocating the shared network costs between NBI's MIP and Eircom in the context of access to ducts / sub-ducts in the NBP IA.

### **Alternative cost sharing approaches for duct access by NBI's MIP**

769In the case of duct access / sub-duct access in the NBP IA, ComReg considers that almost all duct related capital expenditure could be regarded as incremental to NBI's MIP as NBI will ultimately be the only operator that could benefit from this expenditure. As Eircom has no plans to deploy fibre in the NBP IA and its copper network will gradually be replaced by NBI's fibre network, Eircom is likely to have little incentive to invest in duct related assets on an ongoing basis in the NBP IA

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<sup>396</sup> Paragraph 240 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>397</sup> Paragraphs 231-235 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>398</sup> Paragraphs 222-229 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>399</sup> Page 10 of BT's Non-Confidential Response dated 18 November 2020.

<sup>400</sup> Pages 10-11 of ALTO's Non-Confidential Response dated 18 November 2020

<sup>401</sup> Given ComReg's decision not to proceed with the per customer cost sharing methodology for CEI access by NBI's MIP in the NBP IA, the proposal from the CEI Consultation (and related Question 12) to monitor and update the CEI models (PAM/DAM) for active customer line data is moot. Hence, ComReg has not summarised its position nor respondents views as these are superseded by the issues discussed in this Section 6.9. The overall monitoring of the CEI price control is discussed in Section 10.



over and above that required to maintain appropriate service levels for its customers.<sup>402</sup> Hence, the most significant proportion of duct / sub-duct related costs in the NBP IA in the future will be the incremental costs that arise from Eircom's investments to support NBI's MIP. Consequently, ComReg considers that in the NBP IA any incremental duct / sub-duct costs caused by NBI's MIP should be paid by NBI. Similarly, any incremental duct related costs caused by Eircom should be paid by Eircom.

770 This approach is similar to the per customer approach in that whatever costs are caused by NBI's MIP in terms of access to Eircom's ducts in the NBP IA are paid by NBI. Consequently, this approach ensures that Eircom has the incentive to invest in its duct network to ensure the network is 'NGA ready' while also ensuring that Eircom can recover its efficiently incurred costs from NBI's MIP. This approach also takes account of the general principles of pricing such as cost causation (the initial investment happens because of NBI's MIP demand for duct access in the NBP IA) and distribution of benefits (NBI will be the primary beneficiary of this investment both in the short term and in the long term).

771 Turning to the shared network costs, ComReg considers that maintaining the existing per metre approach seems a reasonable alternative. This is the approach that has been in place for setting the Sub-Duct Access price for Generic Access users since 2016 and so it is already understood by operators. In addition, ComReg would expect that the level of shared network costs to be allocated (or shared) between Eircom and NBI's MIP based on a per metre of duct / sub-duct in the NBP IA are likely to be relatively small. As noted in Section 6 of the CEI Consultation, the NBV of Eircom's reusable duct assets in the NBP IA is close to zero and the only duct shared network costs that remain to be recovered in the NBP IA are the costs Eircom is likely to incur in remediating and repairing ducts to maintain its access network and support the appropriate service levels for its customer base. The shared network costs associated with ducts / sub-ducts in the NBP IA are accordingly not likely to be material. Just to note, ComReg refers to this approach for NBI's MIP in the NBP IA as the '**per cable plus**' in the DAM model.

772 In Section 6.5.2 ComReg recognised that the cost sharing approach for pole access in the context of NBI's MIP in the NBP IA must encourage the removal of copper cables. However, in the case of duct access, and as recognised by ComReg in the CEI Consultation (paragraph 553 (footnote 118)), removing redundant copper cables can risk damaging other cables in the duct, so cables are not normally removed unless the perceived benefit outweighs that risk, e.g., by freeing up capacity in the duct. While copper cable removal from poles reduces the weight on poles and so should mean less wear and tear, copper cables remaining in the duct does not cause extra maintenance (indeed leaving them there may avoid causing

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<sup>402</sup> As set out in Section 3, Eircom is the designated USP. As a result, Eircom must adhere to a number of service availability targets.

damage). Therefore, ComReg remains of the view that the cost sharing or pricing approach for duct / sub-duct access in the NBP IA does not need to incentivise Eircom to remove redundant cables, given that duct capacity constraints are not likely to be a material concern in the NBP IA.

### 6.9.3 ComReg's Final Position

773 Having considered the Respondents' Submissions and the advice from Dot Econ, ComReg has decided that the per customer cost sharing approach for determining the duct access for NBI's MIP in the NBP IA is no longer appropriate for the reasons outlined above and instead NBI's MIP and Eircom should be obliged to pay any incremental duct related costs that it causes in the NBP IA while the shared network costs should be allocated between Eircom and NBI's MIP on the basis of a per metre of duct / sub-duct.

774 Hence, in the case of Duct Access / Direct Duct Access and Sub-Duct Access in the NBP IA, NBI's MIP and Eircom shall be obliged to pay the incremental costs they each cause and the shared network costs shall be allocated between NBI's MIP and Eircom based on a per metre of duct / sub-duct.<sup>403</sup> This approach is reflected in the prices set out in Section 9.

775 In summary, Table 9 below summarises ComReg's position on the cost sharing approach (for allocating shared network costs and common corporate costs between CEI users) that shall apply for Generic Access to CEI and for NBI's MIP access to CEI, as discussed above throughout Section 6.

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<sup>403</sup> NBI's MIP duct prices in the NBP IA are based on an average across the three surface types based on assumed weightings of the three surface types i.e., carriageway, footway and verge.

**Table 9: Cost sharing approach for CEI Access**

	Generic Access to CEI	NBI's MIP Access to CEI	
<i>Geographic Footprint</i>	<i>National</i>	<i>Commercial Areas</i>	<i>NBP IA</i>
<b>Cost sharing approach</b>  <b>(for shared network costs and common corporate costs)</b>	Per operator for poles i.e., based on no. of users present on the pole (i.e., with cables on the pole).  Per metre of duct / sub-duct length.	N/A*	For poles, a 'per operator plus' i.e., NBI and Eircom pay their incremental costs and the shared network costs are split 50:50 between Eircom and NBI.  For ducts, NBI and Eircom pay their incremental costs and the shared network costs are split on per metre of duct / sub-duct length.

\*LRIC does not include any shared network costs or common corporate costs and so a cost sharing methodology is not relevant

## 6.10 Duct prices by surface type for Generic Access

### 6.10.1 Position set out in the Consultation:

776 As set out in Section 6.6.3 of the CEI Consultation, ComReg noted that there are two factors that can influence the costs associated with duct access, namely the surface type in which the duct is deployed and the geographic area where that duct is deployed.

777 ComReg pointed out that current Sub-Duct Access prices are differentiated by surface type (verge, carriageway and footway) and by area (Dublin and Provincial).

778 ComReg proposed in the CEI Consultation that as the cost of trench excavation and surface re-instatement for Eircom continues to differ depending on the surface type, that the cost differentials between surface types should continue for Generic Access to duct as this reflects the way contractors typically charge customers, including Eircom, for their services.

779 In the case of NBI's MIP access to ducts, ComReg proposed that the cost / price for duct access is based on an average across the three surface types based on assumed weightings of the three surface types.

780 In terms of different charges between Dublin and Provincial areas, ComReg recognised that while the existing Sub-Duct Access prices reflected the fact that contractors charged Eircom higher rate for duct access works in Urban areas than in other areas, the situation has changed.

781 ComReg noted that recently agreed rates between Eircom and its contractors, show that the costs associated with duct access works are no longer differentiated between areas i.e., Dublin and Provincial, and are instead charged as one rate. Hence, ComReg reached the preliminary view in the CEI Consultation that it was no longer appropriate to differentiate duct access prices by Dublin / Provincial.

782 ComReg invited the views of respondents (in Question 13) on whether the duct access price for Generic Access to ducts should be differentiated by surface type.

### 6.10.2 Respondents' Views and ComReg's Response:

783 ComReg received a direct response to Question 13 from five Respondents, namely Eircom, BT, Virgin Media, Siro and ALTO. NBI<sup>404</sup> and Vodafone<sup>405</sup> stated that they had no comments and Sky did not address the issues raised in Question 13 in their general response.

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<sup>404</sup> Page 55 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>405</sup> Page 8 of Vodafone's Non-Confidential Response dated 18 November 2020.

784 All five Respondents i.e., Eircom, BT, Virgin Media, Siro and ALTO, agreed with ComReg's proposal that Generic Access to ducts should be differentiated by surface type.

### 6.10.3 ComReg's Final Position:

785 Taking into account the Respondents' Submissions and given there was no opposition to the broad approach of differentiating by surface type proposed by ComReg, ComReg considers that the prices for Generic Access to ducts should continue to be differentiated by surface type for the reasons set out previously in Section 6.6.3 of the CEI Consultation as summarised above. However, there is no longer justification to differentiate duct access prices by Dublin / Provincial as the contractor rates agreed between Eircom and its contractors are now charged as one rate (as opposed to being differentiated geographic rates) and a national duct price (by surface type) is justified.

786 Hence, the recurring prices for Generic Access to ducts shall be national and will continue to be differentiated between the various surface types i.e., carriageway, footway and verge.

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# 7 WACC for CEI access in the context of the NBP

## 7.1 Overview

787 In this section ComReg determines the appropriate weighted average cost of capital ('**WACC**') that should apply for setting prices for Eircom's CEI in the context of the NBP.

788 The purpose of the WACC is to estimate the expected rate of return to investors in a company (or investment), taking into account the company's sources of capital, including equity and debt. In broader terms, it provides a benchmark for returns for investing in a portfolio of companies, sectors or industries. ComReg uses the WACC methodology when setting regulated prices to allow for a reasonable return on capital employed in providing the associated regulated services.

789 For access to Eircom's CEI, NBI is required to pay Eircom regulated prices for duct and pole access, with one component of the price being a reasonable return on capital employed, which is calculated by the means of a WACC.

790 Separately, ComReg published its most recent decision on the WACC rate that should apply in relation to, amongst other things, fixed line telecoms services, in ComReg Decision D10/20 (the '**2020 WACC Decision**').<sup>406</sup> In the 2020 WACC Decision ComReg specified a WACC rate of 5.61% in relation to the provision of Eircom's fixed line telecoms services. This has been recently updated to 5.56%, as set out in Information Notice 21/68<sup>407</sup>.

791 In Section 3 of the 2020 WACC Decision ComReg outlined that its approach for determining the WACC is based on the Capital Asset Pricing Model ('**CAPM**') methodology for the cost of equity using the following parameters:

- (a) The gearing, which is the relative weighting of debt and equity in the overall capital structure of an operator;
- (b) The nominal risk-free rate, which is the rate at which investors can borrow and lend funds with zero risk;

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<sup>406</sup> ComReg Document No 20/96: Review of Weighted Average Cost of Capital (WACC) – Response to Consultation and Final Decision; Mobile Telecommunications, Fixed line Telecommunications, Broadcasting Transmission; dated 14 October 2020.

<sup>407</sup> Information Notice 'Weighted Average Cost of Capital – first annual update', dated 29 June 2021 <https://www.comreg.ie/publication/weighted-average-cost-of-capital-first-annual-update>

- (c) The cost of debt, which is equal to the risk-free rate plus any debt premium applied to the debt incurred by an operator;
- (d) The cost of equity, which is derived from the CAPM and is equal to the risk-free rate plus the product of the equity beta and the equity risk premium;
- (e) The equity risk premium ('**ERP**'), which is the additional return over the risk-free rate expected by investors for investing in the entire equity market;
- (f) The equity beta, which is a measure of a company stock's exposure to systematic risks. The equity beta indicates the sensitivity of the returns on the stock that is being examined to the entire equity market; and
- (g) The corporate tax rate.

792 ComReg, assisted by Europe Economics, determined in the 2020 WACC Decision a WACC for the fixed line telecoms services (of 5.61%). This WACC is set with reference to a combination of the approach taken by ComReg in its 2014 WACC assessment in ComReg Decision D15/14<sup>408</sup> (the '**2014 ComReg WACC Approach**') and the methodology set out by the European Commission on the calculation of the cost of capital for legacy (or copper) infrastructure<sup>409</sup> (the '**Commission's Notice Approach**').<sup>410</sup>

793 In the CEI Consultation ComReg proposed that a differentiated WACC rate (of 4.03%) should apply for access to Eircom's CEI by NBI's MIP in the NBP IA and for NBI's transit access in the Commercial Areas in order to reflect the factors set out in the CEI Consultation and as summarised below, while all other CEI users would continue to pay the fixed line telecoms WACC. ComReg also proposed in the CEI Consultation that the WACC for CEI should be subject to annual updates, consistent with the approach taken for the fixed line telecoms WACC in the 2020 WACC Decision.

794 ComReg invited the views of respondents (in Question 14 of the CEI Consultation) on the differentiated WACC rate of 4.03% for Eircom's CEI in the context of access

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<sup>408</sup> ComReg Document 14/136, Cost of Capital: Mobile Telecommunications – Fixed Line Telecommunications – Broadcasting (Market A and Market B) – Response to Consultation and Decision, dated 18 December 2014.

<sup>409</sup> Commission Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector, OJEU 2019/C 375/01, 6 November 2019. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1106\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1106(01)&from=EN)

<sup>410</sup> For the cost of debt, consideration was also given to recent Eircom bond issuances. See Section 5 of the 2020 WACC Decision for details on these methodologies.

by NBI's MIP NBP IA and for NBI's transit access in the Commercial Areas and on the proposal that WACC for CEI should be subject to annual updates.

795 In the remainder of this section of the document ComReg has summarised its preliminary position from the CEI Consultation, considered all the Respondents' Submissions and, having regard to these submissions, sets out its final position on the appropriate WACC rate for CEI access in the context of the NBP, under the following headings:

- (a) Assessment of risk for Eircom's CEI in context of NBP;
- (b) Asset beta parameter;
- (c) Gearing parameter;
- (d) Cost of debt parameter;
- (e) Annual review and other WACC issues.

796 In reaching ComReg's final position below, ComReg has taken into account the recommendations from Europe Economics, as set out in the Europe Economics Final Report at Annex: 3 of this Decision.

## **7.2 Assessment of risk for Eircom's CEI access in context of NBP**

### **7.2.1 Position set out in the Consultation:**

797 In the CEI Consultation ComReg identified two options in terms of the WACC rate that should apply to Eircom's CEI for NBI's MIP. These options included:

- (a) The existing WACC rate for fixed line telecoms;
- (b) A differentiated WACC specific to CEI to reflect the specific circumstances and the effect of the NBP contract.

798 ComReg considered that while some of the parameters used to determine the fixed line telecoms WACC in the 2020 WACC Decision were also relevant to a WACC that may apply to Eircom's CEI prices in the context of the NBP (or NBI's MIP), ComReg recognised that some specific WACC parameters could be amended when determining the WACC that is relevant to the regulated prices for Eircom's CEI access in the context of NBI's MIP.

799 In particular, ComReg considered that the provision of CEI access in the context of NBI's MIP presents a set of new and specific conditions which result from the combination of, on one hand, the large scale and the long-term duration of the



access by NBI's MIP and, on the other, the fact that the demand for Eircom's CEI is ultimately underpinned by the Irish State's commitment to the NBP through the "step-in rights". In this regard the NBP contractual agreement provides that the State (in this case the Minister for the Environment, Climate and Communications) can "step-in" (including stepping-in temporarily and/or temporarily assuming total or partial management and control of NBI) in the event that NBI fails to comply with the agreed terms and conditions of the contract.<sup>411</sup> Hence, ComReg considered that this provision reduces the risks involved for Eircom who is likely to become a significant provider of CEI in the NBP IA.

800 In considering whether a differentiated WACC should apply to CEI in the context of NBI's MIP, ComReg was of the preliminary view that the CAPM methodology was the appropriate approach for estimating the WACC. In addition, ComReg considered that a number of the parameters used to determine the fixed line telecoms WACC in the 2020 WACC Decision should be common / consistent across the fixed line telecoms and any differentiated WACC for CEI.

801 These generic WACC parameters included the inflation rate, real risk-free rate, tax rate and the ERP. The generic WACC parameters, which are set based on the modified Commission Notice Approach<sup>412</sup> are considered in ComReg's 2020 WACC Decision.<sup>413</sup> As noted by Europe Economics, the results for the cost of equity under the Commission's Notice Approach or the 2014 ComReg WACC Approach are very similar<sup>414</sup>, but choosing the modified Commission Notice Approach also allows for consistency with the approach adopted for the cost of debt as described below.<sup>415</sup>

802 ComReg noted that the generic WACC parameters used for fixed line telecoms were not part of the scope of this review, as they had already been determined and justified in the 2020 WACC Decision and were more recently assessed and updated as part of the annual review of the fixed line WACC which is discussed in Information Notice 21/68.

803 In the CEI Consultation ComReg considered that there were specific WACC parameters that should be amended from those used to calculate the fixed line telecoms WACC in order to reflect the distinct characteristics of NBI's MIP access to CEI. These included the following:

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<sup>411</sup> As set out in Clause 73 'Step In Rights' of the NBP contract.

<sup>412</sup> As determined in the 2020 WACC Decision this is based on the methodology set out in the European Commission Notice on WACC, modified to take account of circumstances specific to Ireland.

<sup>413</sup> Please see Sections 3-5 of Notified 2020 WACC Decision for the derivation of these parameters and their justification, in the context of fixed line telecoms WACC.

<sup>414</sup> Under the Commission's Notice Approach the cost of equity is 6.59% while under the 2014 WACC Approach the cost of equity is 6.75%. See paragraph 4.130 of the 2020 WACC Decision Document for the details.

<sup>415</sup> Footnote No.21 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

- (a) The cost of debt;
- (b) The gearing; and
- (c) The asset beta.

804 ComReg recognised that the terms and conditions associated with NBI's CEI access under the NBP contract means that the specific WACC parameters identified above could reflect the changed composition of the risks faced by Eircom.

805 As already set out earlier in Section 3, under its contract with the Irish State NBI is required to pass all premises in the NBP IA (i.e., 537,000 delivery points) and operate a fibre network for a minimum of 25 years. As a result, CEI access is likely to represent an increasingly significant share of Eircom's revenues in the NBP IA and the associated demand-side risks should be significantly reduced as these revenues will be stable and predictable. This means that Eircom's position as a significant and long-term provider of CEI in the NBP IA (and for NBI's transit access in the Commercial Areas) is close to that of a network utility such as an electricity network or a water utility, which tend to be regarded as textbook examples of natural monopolies.

806 The option of alternative CEI providers to Eircom cannot be entirely excluded. Indeed, as Europe Economics pointed out, CEI networks display similar technical characteristics to network utilities, which may allow for some degree of demand-side substitution.<sup>416</sup> This implies that there are relevant touch points between Eircom as a significant provider of CEI in the NBP IA and network utilities such as electricity or water networks, not least because CEI owned and operated by Ireland's electricity network, ESB Networks, could be complementary – and at the limit a substitute – to Eircom's network in meeting NBI's CEI requirements. In addition, Europe Economics argued that there may potentially also be a degree of supply-side substitutability, in as much as, for example, suppliers of telecoms ducts also supplying water ducts. This means that, in theory at least, suppliers of utilities infrastructure could switch to the supply of CEI.

807 ComReg considered that the possibility of a wide scale substitution in the future (or a change in the underlying broadband technology) was unlikely given that there is only one other ubiquitous CEI operator, namely ESB Networks. In particular, Eircom's access network follows the public road routes while the ESB's overhead routes in rural areas do not in many cases follow road routes but instead cross over privately-owned fields or other rural property. As a result, once NBI has deployed its cables using Eircom's CEI, it will have incurred significant sunk costs and the additional costs involved in re-routeing its cable network to use the ESB's

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<sup>416</sup> SIRO's use of the ESB's overhead and underground civil infrastructure illustrates this supply-side substitution. SIRO is a joint venture company between Vodafone and ESB (Ireland's electricity network utility), operating in Ireland as wholesale telecommunications provider. <https://siro.ie/about-us/>

infrastructure would be expected to be prohibitive. However, the question of substitution between telecoms specific CEI and other utility networks will be assessed in ComReg's upcoming market review for Physical Infrastructure Access ('PIA'), planned for public consultation in Q2 2022.

808 ComReg believed that the scale and duration of NBI's demand for Eircom's CEI is likely to be predictable and is ultimately underpinned by a NBP contract providing the Irish State with step-in rights. Therefore, there is significantly reduced risk that demand for Eircom's CEI to support NBI's MIP and the related revenue streams would be affected over the 25 year period. In light of these considerations, ComReg reached the preliminary view that it is appropriate to review the WACC specific parameters and determine their appropriate values taking into account the lower risks faced by Eircom when providing CEI access for the purpose of the NBP.

809 ComReg invited the views of interested parties (by way of Question 14) on the proposal to differentiate the WACC for Eircom's CEI in the context of access by NBI's MIP as well as undertaking an annual review of the CEI WACC.

## 7.2.2 Respondent's Views and ComReg's Response

810 ComReg received a direct response to Question 14 from six Respondents, namely NBI, Eircom, BT, Vodafone, Virgin Media and ALTO. Sky did not address the issues raised in Question 14 in their response and Siro stated that it had no comments.

811 NBI agreed with ComReg's proposal of a differentiated WACC for Eircom's CEI in the context of access by NBI's MIP<sup>417</sup> but it considered that the proposed CEI WACC rate (of 4.03%) should be lower (at 3.83%) if derived from an asset beta based on water utilities.<sup>418</sup>

812 Eircom disagreed with a differentiated WACC rate for Eircom's CEI in the context of access by NBI's MIP. Eircom's main concerns included the risk of substitution to other CEI providers and technologies and the increased risk<sup>419</sup>, that ComReg used an arbitrary midpoint range of water/electricity comparators for setting the asset beta<sup>420</sup>, that ComReg's approach on the cost of debt risks violating the fair bet principle<sup>421</sup> and that the per customer cost sharing approach increases risk<sup>422</sup>. Its advisors BRG Consultants suggested that the CEI WACC for NBI should be close to the WACC that has been estimated for the wider access business, i.e., 5.61%.<sup>423</sup>

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<sup>417</sup> Page 56 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>418</sup> Page 58 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>419</sup> Paragraphs 293-294 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>420</sup> Paragraphs 299-309 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>421</sup> Paragraphs 88-89 of BRG's Non-Confidential Report dated 18 November 2020.

<sup>422</sup> Paragraphs 293 & 295 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>423</sup> Paragraph 39 of BRG's Non-Confidential Report dated 18 November 2020.

813 Vodafone disagreed with ComReg's proposal stating that the WACC used across other wholesale regulated products should apply.<sup>424</sup> ALTO stated that given there are unlikely to be any competitors to Eircom's CEI investment in the NBP IA a lower WACC may be justified but there does not appear to be a compelling case for this and that ComReg should avoid discriminatory pricing approaches.<sup>425</sup> BT stated that lower WACC rate should apply to all CEI access users in both areas but that a "modest" discount (not a reduction in the WACC) could be applied to NBI's "transit" access.<sup>426</sup> Virgin Media stated that it had no comments on a differentiated WACC for CEI access by NBI's MIP.<sup>427</sup>

814 ComReg's position with regards to the specific points raised by Respondents are addressed below as well as the updates to the CEI WACC rate for NBI's MIP.

#### **Risk of substitution to other CEI providers and other technologies:**

815 Eircom submitted that the presence of NBI as a customer will not insulate its CEI business from the fundamental risks that it faces. According to Eircom, these are (a) the risks of substitution to other providers' CEI and (b) the risks of substitution to non-fixed-line technologies. Eircom noted that NBI is free to use alternative infrastructures e.g., from ESB or Waterways Ireland, for some portion of its NBP rollout and customers may abstain from fixed-line broadband (both copper and fibre) for LTE+, 5G mobile, 5G Fixed Wireless Access (FWA) and satellite broadband offerings.<sup>428</sup> BRG Consultants supported Eircom's arguments on the risk of substitution stating that the potential for leveraging alternative infrastructures is very real, referring to Vodafone and ESB's joint venture that leverages ESB's poles to offer fibre broadband, and that NBI may have the ability and incentive to substitute Eircom's CEI with alternative infrastructures to an appreciable and potentially significant degree.<sup>429</sup>

816 ComReg remains of the view that, although some demand-side substitution is plausible and indeed already occurs, wide scale substitution by NBI's MIP to another CEI provider in the future is unlikely. According to the Europe Economics Final Report:

*"...there may well be some potential scope for demand-side substitution – perhaps even slightly more than the modest amount we envisaged at the time of our 2020 CEI WACC Report... However, even if demand-side substitution were realistic it remains the case that substitution to competitors is a paradigmatically company-specific risk that should not affect the WACC because investors can diversify such*

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<sup>424</sup> Page 9 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>425</sup> Page 13 of ALTO's Non-Confidential Response dated 18 November 2020

<sup>426</sup> Page 13 of BT's Non-Confidential Response dated 18 November 2020.

<sup>427</sup> Page 5 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>428</sup> Paragraphs 293-294 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>429</sup> Paragraphs 66-68 of BRG Consultants Non-Confidential Report dated 18 November 2020.

*risks away.*"<sup>430</sup>

817 As noted in the CEI Consultation and as set out above at paragraph 807, there is only one other ubiquitous CEI operator, namely ESB Networks. Eircom's access network follows the public road routes while the ESB's overhead routes in rural areas do not in many cases follow road routes but instead cross over privately-owned fields or other rural property. As a result, once NBI deploys its cables using Eircom's CEI, it will have incurred significant sunk costs and the additional costs involved in re-routeing its cable network to use the ESB's infrastructure would be expected to be prohibitive.

818 ComReg recognises that the reuse of existing CEI is an essential aspect of encouraging efficient investment, as provided for in the 2013 EC Recommendation and in the State-aid Guidelines, and so it is unlikely that widescale substitution to an alternative CEI provider would in any case be economically justified.

819 This view is shared by NBI's advisors, Frontier Economics, who stated that there is "*...no material risk of NBI substituting its demand from Eircom, whether that be to alternative CEI providers (such as ESB) or through NBI deploying its own poles and ducts...the cost of switching CEI provider is likely to be prohibitively costly and time consuming.*"<sup>431</sup> Frontier Economics further stated that "*Switching would require significant labour time (for example to transfer cables from Eircom to the alternative provider's poles and ducts), and significant ancillary costs such as pathway / carriageway digging (in the case of ducts). ESB's overhead routes in rural areas also largely cross privately-owned fields and other rural property, rather than following the public road routes followed by the Eircom CEI, meaning NBI would need to re-route its cable network to use ESB's infrastructure.*"<sup>432</sup>

820 ComReg considers that the risk of widescale substitution to other (non-fixed line) technologies is also small. In fact, NBI's advisors, Frontier Economics, support this argument stating that "*Demand from NBI is also highly predictable even in the NBI network deployment phase, and Eircom bears no technology risk.*"<sup>433</sup> [emphasis added]. In addition, NBI is required, under the terms and conditions of the NBP contract, to pass all premises in the NBP regardless of whether a connection is forthcoming and so NBI's demand for Eircom's CEI is largely fixed.<sup>434</sup> Consequently, the risk of technology substitution is primarily being transferred from Eircom to NBI.

821 According to the Europe Economics Final Report:

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<sup>430</sup> Section 3.1.2 of Europe Economics Final Report at Annex 3.

<sup>431</sup> Page 31 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>432</sup> Page 31 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>433</sup> Page 31 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>434</sup> Page 56 of NBI's Non-Confidential Response dated 18 November 2020.

*“...the risks of technology substitution, though non-zero, are relatively low. As we noted in our 2020 CEI WACC Report, it is not fanciful that a future communications network might use no CEI. For example, Google and Elon Musk have both proposed schemes for providing broadband access in various less developed countries on the basis of drones. Eircom itself noted (in its submission to a previous round of the consultation process) that “the awarded company could change the technology from a fibre solution to a future wireless solution provided that it achieves the same level of service as fibre”.<sup>435</sup> However, we do believe it is reasonable to assume that for Ireland a technological change that rendered CEI obsolete is unlikely within the timeframe of the NBP. If anything, exposure of copper to technology substitutes is likely to be higher than of broadband (since it is an older technology). So the NBP is more likely to reduce Eircom's exposure to technology risk in the IA than to increase it.”<sup>436</sup>*

822 ComReg acknowledges that there may be some migration of customers from fixed line technology to alternative technologies in the NBP IA or that NBI may choose an alternative deployment to its FTTH network. However, even if there is some migration of customers from fixed to alternative technologies it should not materially affect NBI's demand for CEI as this depends on NBI's network footprint (IA premises passed) rather than active customers on the network. Consequently, under a per operator plus approach, FTTH demand in the NBP IA will have no material impact on revenues that Eircom will receive for NBI's MIP as NBI will continue to pay its incremental costs and 50% of the shared network costs until copper removal when it will pay for all of the pole costs.

823 BRG Consultants claimed that technology substitution possibilities creates direct and indirect risks for Eircom's ability to recover its CEI costs.<sup>437</sup>

824 However, ComReg considers that NBI's FTTH service should be more resilient than copper services to competition from alternative technologies which should increase the overall level of fixed line broadband demand in the NBP IA, which means that, even under the per customer approach, NBI's presence should always increase Eircom's ability to recover CEI shared network costs from both copper and fibre customers in the NBP IA. Notwithstanding this, it should be noted that the demand-side risk faced by Eircom on its copper-based services as a result of NBI's presence and/or that arising from potential alternative technologies in the NBP IA is not fundamentally different from that in Commercial Areas where it equally faces competition from alternative network providers.

825 Hence, for the period that Eircom continues to provide copper-based fixed line services in the NBP IA, regardless of whether it shares its CEI or not, any

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<sup>435</sup> Eircom, “Response to Consultation and Draft Decision 19/54”, paragraph 191.

<sup>436</sup> Section 3.1.2 of Europe Economics Final Report in Annex 3.

<sup>437</sup> Paragraph 69 of BRG Consultants Non-Confidential Report dated 18 November 2020.

assessment of the cost of these services and their implicit consumption of CEI will be based on the higher fixed line WACC set in the 2020 WACC Decision. Therefore, ComReg disagrees with BRG Consultants when it states that ComReg “...ignore the fact that as long as a significant portion of the shared network costs are recovered from copper customers, the demand risks faced by the copper network (from substitution to non-fixed-line technologies) are relevant to the overall risk assessment.”<sup>438</sup>

## 7.3 Asset beta parameter

### 7.3.1 Position set out in the Consultation:

826 For the **Asset Beta**, ComReg described it as a measure of the exposure of a company's assets to systematic, non-diversifiable risks, without the impact of debt. ComReg proposed that the beta for CEI access should be close to that of a network utility and that, similar to the approach in relation to gearing, these provide a reasonable comparator group for CEI betas.

827 As Europe Economics stated in the Europe Economics Draft Report:

*“Indeed, as we have noted above, in the case of the NBP some of the CEI might potentially literally be the assets of an electricity network.<sup>439</sup> Similarly, water ducts have clear (albeit imperfect) similarities to communications ducts. Indeed, some duct providers sell both water and communications ducts.<sup>440</sup> That implies there may be supply-side substitutability between water-duct-production and communications-duct-production assets.<sup>441</sup> High supply-side substitutability would mean water and communications ducts belong to the same market, implying that they have the same, or very similar, cost-side risks affecting WACCs.”<sup>442</sup>*

828 Europe Economics considered the range of betas provided by the Irish utilities regulator, the Commission for Regulation of Utilities (**‘CRU’**) (previously the Commissioner for Energy Regulation (**‘CER’**)), for both the electricity and water networks in recent consultations. Europe Economics proposed that a mid-point of this range should be applied as an asset Beta for CEI in the context of NBI's MIP access. The Europe Economics Draft Report stated that:

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<sup>438</sup> Paragraph 72 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>439</sup> Indeed, Eircom itself states in its response to ComReg Consultation 19/54: “eir is not the only supplier of network infrastructure within the NBP intervention area and the awarded company for the NBP may engage in negotiations with the ESB, eNet and other infrastructure owners in the area.” *op cit.* para 190.

<sup>440</sup> eg see <https://www.drainagepipe.co.uk/ducting/top-tips-for-using-underground-ducting/>

<sup>441</sup> A further example of such supply-side substitutability in the telecommunications sector would be SIRO, a joint venture between ESB and Vodafone Ireland. SIRO's network uses ESB's electricity distribution network to carry fibres through ducts and on poles.

<sup>442</sup> Section 2.4 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

*“As regards electricity networks, at PR4 CER determined that the asset beta was 0.4 in 2015.<sup>443</sup> For RC3, CRU is consulting on a proposed asset beta range of 0.28-0.36, with a mid-point of 0.32 (down from 0.45 in 2016, reflecting a large movement in market betas that should also be expected to be reflected to some extent in electricity sector betas).<sup>444</sup>”<sup>445</sup>*

829 Hence, ComReg recognised that if it uses the full range of 0.28 to 0.4 as the asset beta for CEI in the context of NBI's MIP, that has a mid-point of 0.34. ComReg reached the preliminary view that a reasonable estimate for the asset beta for CEI access is 0.34

### 7.3.2 Respondents' Views and ComReg's Response:

830 Eircom, and BRG Consultants, as well as NBI, and Frontier Economics, did not agree with the approach taken to determine the asset beta parameter for the CEI WACC.

#### Water and electricity comparators:

831 Eircom stated that the comparators (water and electricity) chosen were not relevant and that there is systematic risk associated with Eircom's CEI infrastructure, both from a technology advancement perspective and overall product demand perspective, that is not evident in the asset betas for either Irish Water or the asset beta for Eirgrid or ESB Networks.<sup>446</sup> Furthermore, there is a lack of significant substitution possibilities in the context of water and electricity distribution networks and so Eircom's CEI is on a different footing to water and electricity networks and it faces a different (i.e., higher) demand risk than those types of network.<sup>447</sup>

832 In response, ComReg notes Eircom and BRG Consultants concerns on the risk of substitution to other providers of CEI and to non-fixed line technologies, which ComReg considers do not require any changes to the asset beta parameter, for the reasons already set out at paragraphs 815-823 of this Decision.

833 Eircom also claimed that ComReg imposed an arbitrary selected mid-point range between the asset beta for the water sector and the electricity sector.<sup>448</sup> Eircom's advisors, BRG Consultants, referred to asset betas (in Table 5 of its report) used in other recent WACC regulatory decisions and it suggested that an asset beta based on selected Telecoms regulated companies (at an average of 0.59)<sup>449</sup> or at least

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<sup>443</sup> See Table 7.1 of <https://www.cru.ie/wp-content/uploads/2015/07/CER15296-Decision-on-TSO-and-TAO-Transmission-Revenue-for-2016-to-2020-1.pdf>

<sup>444</sup> <https://www.cru.ie/wp-content/uploads/2019/07/CRU19091e-Europe-Economics-RC3-WACC-Report.pdf>

<sup>445</sup> Section 3.3 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

<sup>446</sup> Paragraphs 301-302 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>447</sup> Paragraph 304 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>448</sup> Paragraph 299 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>449</sup> Paragraphs 95-96 and Table 5 of BRG's Non-Confidential Report dated 18 November 2020.



reflecting an average value across utility and telecoms regulated businesses (at a value of 0.47) would better reflect the risk faced by Eircom in relation to the CEI business.<sup>450</sup>

834 On the other hand, NBI submitted that an asset beta at the mid-point of the range estimated in CRU's RC3 Water consultation (of 0.28 to 0.36) would be more appropriate.<sup>451</sup> Frontier Economics supported NBI's position, stating that the WACC used should give high weight to water utilities as comparators, which have a low asset beta and the ability to be highly-leveraged.<sup>452</sup>

835 Having considered the submissions made by Eircom (and BRG Consultants) as well as NBI (and Frontier Economics) ComReg remains of the view that water and electricity utilities are reasonable comparators for setting the asset beta for CEI in the context of the NBP.

836 As noted in the Europe Economics Final Report, given "*...the modest scope for demand-side substitution to ESB assets and the at-least-theoretical scope for supply-side substitution of water assets, the most relevant comparators for NBP-related CEI were network electricity assets and water assets.*"<sup>453</sup>

837 Furthermore, the Europe Economics Final Report states that:

*"... the mid-point between water and electricity was chosen because there was not a strong reason to favour either. This is very standard reasoning in regulation."*<sup>454</sup>

838 Europe Economics also recognised that "*... a WACC mid-way between a utility and fixed line might be persuasive for some general PIA analyses...*" but it concluded that for the reasons already outlined in the CEI Consultation i.e., step-in rights from the State as well as the guaranteed revenue stream to Eircom over a 25 year period, that the CEI WACC in the context of the NBP would be expected to have lower risk compared with other Generic Access users of CEI (which are charged the fixed line WACC).<sup>455</sup>

839 ComReg continues to agree with Europe Economics that a mid-point range between the asset beta of water utilities and the asset beta of electricity utilities remains a reasonable basis for determining the asset beta for the CEI WACC for the NBP.

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<sup>450</sup> Paragraph 98 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>451</sup> Page 57 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>452</sup> Pages 32-33 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>453</sup> Section 3.1.2 of the Europe Economics Final Report at Annex 3.

<sup>454</sup> Section 3.1.2 of the Europe Economics Final Report at Annex 3.

<sup>455</sup> Section 3.1.2 of the Europe Economics Final Report at Annex 3.

### Updated asset beta comparator data:

840 Since the CEI Consultation Europe Economics has updated the underlying data used in the asset beta parameter for the CEI WACC for NBI's MIP, in order to take account of the most recent asset beta determinations from the CRU for water and electricity.

841 For the electricity asset beta, the Europe Economics Final Report<sup>456</sup> sets out that while the CRU reported its PR5 Final Determination Paper in December 2020 it does not provide an explicit determined value for the asset beta. Europe Economics stated that "... we can infer such a value. The CRU determination gives a range for the asset beta for the TAO<sup>457</sup> of 0.30-0.37.<sup>458</sup> The CRU determined a value for its WACC at the 67<sup>th</sup> percentile. Hence the implied determined value for the asset beta lies at the 67<sup>th</sup> percentile of the 0.30-0.37 range – ie 0.347."<sup>459</sup>

842 For the asset beta for water, Europe Economics, in the Europe Economics Final Report, referred to the CRU's 2019 RC3 Decision which sets the asset beta for Water at 0.30.<sup>460</sup> In order to reflect the updated CRU values, Europe Economics takes the mid-point of these two values i.e., 0.324, as the updated asset beta figure.<sup>461</sup>

843 Taking into account the updates to the underlying data from Europe Economics, ComReg agrees that the asset beta value in the CEI WACC for NBI's MIP should be updated from 0.34 to 0.324 to reflect the updated CRU information noted at paragraphs 841-842.

844 Accordingly, having considered the Respondents' Submissions and the advice from Europe Economics, ComReg has updated the asset beta for NBI's MIP access to CEI to a value of 0.324.

## 7.4 Gearing parameter

### 7.4.1 Position set out in the Consultation

845 ComReg described gearing as the ratio of a company's fixed financing to its total financing, or the ratio of the value of its debt to the sum of its debts and equity.

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<sup>456</sup> Section 3.1.3 of the Europe Economics Final Report at Annex 3.

<sup>457</sup> Transmission Asset Owner. Specifically, ESB.

<sup>458</sup> See <https://www.cru.ie/wp-content/uploads/2020/12/CRU20152-TSO-and-TAO-Transmission-Revenue-2021-20252.pdf>, Table 29, page 84.

<sup>459</sup> Section 3.1.3 of the Europe Economics Final Report at Annex 3.

<sup>460</sup> According to Europe Economics, see page 125 where the equity beta is set at 0.6 and page 130 where gearing is set at 50 per cent. Note that although the RC3 Decision involves some considerations about where within a fairly wide range of potential equity beta values the Decision should lie, that uncertainty arose from broad methodological issues that did not affect the beta.

<sup>461</sup> Section 3.1.3 of the Europe Economics Final Report at Annex 3.

846 Europe Economics advised that the optimal gearing for Eircom as a significant CEI provider may be higher than that of a fixed line telecoms provider. The Europe Economics Draft Report stated that the reason:

*“...the CEI provider’s natural gearing might be higher than that of a fixed line services provider is that, in the event the CEI provider became bankrupt, it is likely that the CEI would be able to be sold, since it is rather unlikely that bankruptcy would be associated with the absence of a need for CEI in the future. By contrast, bankruptcy of a fixed line provider might be associated with technological change or business model change that would render a larger portion of the fibre or other technical components in the fixed line network obsolete and unrecoverable. One of the standard theories of optimal gearing is that it will be higher when the costs of bankruptcy are lower, implying that we should expect higher gearing for a CEI provider than a fixed line wholesale access provider.”<sup>462</sup>*

847 Given the step-in rights in the NBP contract, there is a significantly reduced risk that demand for Eircom’s CEI to support NBI’s MIP and the related revenue streams would be affected over the 25 year period, allowing it to optimise its debt and gear up its equity.

848 The Europe Economics Draft Report also noted that:

*“It is common for assets with reasonably predictable streams of future revenue flows to be securitised. One hypothesis is that the government contract to lease passive infrastructure from Eircom would allow the CEI provider to treat the flow of revenue from this passive infrastructure as a ‘quasi-securitised asset’. With very stable revenue, the CEI provider is likely to be able to sustain a higher optimal gearing — i.e. its proportion of debt may be higher than would be the case for a fixed-line business.”<sup>463</sup>*

849 Europe Economics advocated that a reasonable comparator group for CEI access gearing is that of network utilities.

850 The Europe Economics Draft Report described that:

*“...gearing for CEI should more closely resemble the gearing of a utility firm such as a water or electricity network company than a fixed line provider — indeed, in the case of some CEI it might literally be electricity network assets, whilst there are clear (albeit imperfect) similarities between water ducts and communications ducts — indeed, some duct providers sell both water and communications ducts. Typical determined gearing levels for utility networks are of the order of 50-60 per cent. For example:*

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<sup>462</sup> Section 3.2 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

<sup>463</sup> Section 3.2 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

- *The PR4 electricity sector gearing was 55 per cent<sup>464</sup>;*
- *The CRU RC3 consultation is on a gearing of 50 per cent<sup>465</sup>;*
- *the Ofwat provisional view for PR19 was 60 per cent<sup>466</sup>;*
- *the Ofgem December 2018 RIIO-2 Sector Specific Methodology was 60 per cent<sup>467</sup>; and*
- *the NERL 2018 WACC consultation gearing assumption for NERL was 60 per cent<sup>468</sup>.*

851 Europe Economics proposed adopting a gearing of 55% for CEI access by placing more weight upon the PR4 electricity sector comparator based upon the drawn similarities between CEI access (for the NBP) and the electricity provider in Ireland.

852 As a result, ComReg reached the preliminary view that a point estimate for gearing of 55% for the WACC for CEI for NBI's MIP, instead of 40% in the 2020 WACC Decision for fixed line telecoms, was an appropriate estimate.

## 7.4.2 Respondents' Views and ComReg's Response:

853 Eircom's advisors, BRG Consultants, and NBI, along with Frontier Economics, commented on the gearing parameter for the CEI WACC.

854 BRG Consultants submitted that it did not expect demand risk to be drastically different to that faced by CEI providers in other jurisdictions noting that Ofcom has considered the lower risks faced by "passive" or CEI-like businesses, and it incorporated this lower risk into elements of its WACC calculation by using averages of utility and telecom sectors.<sup>469</sup>

855 BRG Consultants concluded in Table 7 of its report that ComReg should use an average of Utilities gearing (at 55%) and Telecoms gearing (at 40%), deriving a value of 47.5% as the gearing appropriate to Eircom's CEI WACC for the NBP.<sup>470</sup>

856 NBI and Frontier Economics suggested that the gearing rate should reflect that of a water utility at 50%<sup>471</sup> following on from their position that a water utility is a more reasonable comparator.<sup>472</sup>

<sup>464</sup> <https://www.cru.ie/wp-content/uploads/2015/07/CER15296-Decision-on-TSO-and-TAO-Transmission-Revenue-for-2016-to-2020-1.pdf>

<sup>465</sup> <https://www.cru.ie/wp-content/uploads/2019/07/CRU19091e-Europe-Economics-RC3-WACC-Report.pdf>

<sup>466</sup> See Ofwat (Dec 2017): "Delivering Water 2020: Our final methodology for the 2019 price review", and the accompanying "Appendix 12: Aligning risk and return".

<sup>467</sup> See Ofgem (Dec 2018): "RIIO-2 Sector Specific Methodology", and the accompanying RIIO-2 Finance Annex.

<sup>468</sup> Section 3.2 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

<sup>469</sup> Paragraph 92 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>470</sup> Paragraph 103, page 40 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>471</sup> Page 58 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>472</sup> Page 58 of NBI's Non-Confidential Response dated 18 November 2020.

857 Further to Respondents' Submissions at paragraphs 853-856, ComReg considers that the general principle in play in relation to the gearing is that, having concluded that the NBP CEI access has a utility-like characteristic in the asset beta analysis (at section 7.3.2), the gearing assumption should be consistent with this conclusion.

858 As set out in the Europe Economics Final Report:

*"...the gearing is the natural pair of the asset beta. Insofar as arguments are convincing that NBP CEI will have a utility-like character as regards the asset beta, one should assume it will, likewise, be utility-like in respect of gearing."*<sup>473</sup>

859 In addition, the Europe Economics Final Report states:

*"These arguments [at section 7.4.1 above], in combination with the argument that the systematic risk of NBP-related CEI might be more akin to that of water and electricity assets than fixed line assets ..., led us to use utility sector gearings as our benchmark..."*<sup>474</sup>

860 ComReg continues to agree with Europe Economics that the gearing comparator for the CEI WACC in the context of the NBP should be consistent with that of other network utilities like water and electricity.

861 Furthermore, with the step-in rights in the NBP contract there is a reduced risk that demand for Eircom's CEI to support NBI's MIP and the related revenue streams would be affected over the 25 year period. With very stable revenue, the CEI provider, Eircom, is likely to be able to sustain a higher optimal gearing — i.e., its proportion of debt may be higher than would be the case for a fixed-line business, therefore allowing Eircom to optimise its debt and gear up its equity. NBI's advisors, Frontier Economics, has referred to these considerations in its report stating that *"There is a sub-contractor agreement in place between NBI and Eircom for the use of Eircom's CEI infrastructure to serve the IA over the length of the NBP contract period of 25 years. As a result, demand for Eircom's CEI in the IA is almost guaranteed over the duration of the NBP contract"*<sup>475</sup>

862 The Europe Economics Final Report concluded that:

*"... gearing levels for utilities in Ireland and the UK have lain in the 50-60 per cent range, and used the CRU-determined PR4 electricity sector gearing of 55 per cent as our proposed value."*<sup>476</sup>

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<sup>473</sup> Section 2.1.1 of the Europe Economics Final Report at Annex 3.

<sup>474</sup> Section 2 of the Europe Economics Final Report at Annex 3.

<sup>475</sup> Page 30-31 of Frontier Economics Non-Confidential Report dated November 2020.

<sup>476</sup> Section 2 of Europe Economics Final Report at Annex 3.

863 Accordingly, having considered the Respondents' Submissions and the advice from Europe Economics, ComReg remains of the view that a gearing level of 55% is appropriate.

## 7.5 Cost of debt parameter

### 7.5.1 Position set out in the Consultation

864 In the CEI Consultation, ComReg explained that the **Cost of Debt** reflects the combination of interest rates paid to banks and of returns paid to corporate bond holders (or other debt instruments), by a company. It is usually formulated as the sum of a risk-free component and a company-specific risk premium.

865 ComReg considered that the cost of debt could be very close to a risk-free investment as a result of the very low demand-side risks for Eircom, as a result of the step-in rights. Given the step-in rights in the NBP contract, ComReg considered (along with Europe Economics) that there is a significantly reduced risk that demand for Eircom's CEI to support NBI's MIP and the related revenue streams would be affected over the 25 year period.

866 The Europe Economics Draft Report, stated that:

*"Residual demand risk arises only from the upside risk that NBI may ultimately demand additional CEI, along with the remote "triple failure" risk that the Irish government might default upon its undertakings in a situation in which NBI had defaulted and the Irish government had been unable to source an alternative NBP implementer."<sup>477</sup>*

867 ComReg and Europe Economics considered that the cost of debt for a CEI asset should be very close to that of a state-owned utility asset, or perhaps a risk-free asset with some allowance for issuance costs.<sup>478</sup> Europe Economics proposed an estimate of 1.44% for nominal cost of debt, justified as the bottom end of the range for cost of debt for the communications sector. The bottom end of the range for the communications sector cost of debt corresponded to the Commission's Notice Approach for the cost of debt.

868 The Europe Economics Draft Report, also stated that:<sup>479</sup>

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<sup>477</sup> Section 2.4.1 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

<sup>478</sup> Issuance costs are the costs incurred in issuing debt and include administrative costs, such as legal and accounting costs, and underwriting costs.

<sup>479</sup> Section 3.4 of the Europe Economics Draft Report at Annex 3 of the CEI Consultation.

*“As per our generic parameters, a risk-free asset would have a nominal return of 0.824 per cent. Allowing 10 bps above that for issuance costs<sup>480</sup> would imply a nominal cost of debt of 0.924 per cent. In its current consultation<sup>481</sup>, CRU estimates a real cost of debt of 1.0 to 2.6 per cent, with a point estimate of 2.0 per cent. However, as noted in our latest ComReg report<sup>482</sup> the cost of debt has fallen markedly since the data window used in that CRU report. The cost of debt we recommended in our latest ComReg report is 2.6 per cent in nominal terms, equating roughly to the very top of the CRU range. However, that figure includes what we refer to as an “Eircom premium” relative to the European Commission Notice approach value of 1.44 per cent. Reflecting our argument above that the cost of debt for a CEI asset should be close to risk-free, we adopt a value at the very bottom end of the range we recommended for Fixed Line debt, namely 1.44 per cent (nominal) (in line with the European Commission Notice Approach) as our estimate of the CEI cost of debt”<sup>483</sup>*

869 As a result, ComReg reached the preliminary view in the CEI Consultation that the cost of debt should be based on a point estimate for nominal cost of debt of 1.44% for the WACC for CEI for NBI's MIP, instead of 2.60% in the 2020 WACC Decision for fixed line telecoms.

## 7.5.2 Respondents' Views and ComReg's Response:

870 Eircom, along with BRG Consultants, was the only Respondent to comment on the cost of debt parameter for the CEI WACC.

871 Eircom and BRG Consultants disagreed with the proposed cost of debt parameter used in the CEI WACC for the NBP.

### Cost of debt comparator for CEI for NBP

872 Eircom stated that as it is a privately owned telecommunications company it cannot raise finances for any part of its business “close to risk-free” from bondholders.

873 Eircom's advisors, BRG Consultants, compared the proposed cost of debt for the CEI WACC of 1.44% to the average cost of debt used by other regulated Telecoms companies and Utilities. In Table 3 of its report BRG illustrated that the average cost of debt based on three recent WACC determinations for the Telecoms sector

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<sup>480</sup> <https://www.cru.ie/wp-content/uploads/2019/07/CRU19091e-Europe-Economics-RC3-WACC-Report.pdf>, page 55.

<sup>481</sup> [https://www.cru.ie/document\\_group/irish-water-revenue-control-2020-2024/](https://www.cru.ie/document_group/irish-water-revenue-control-2020-2024/)

<sup>482</sup> Europe Economics, “The Cost of Capital for the Irish Communications Sector — Final Report”, May 2020.

<sup>483</sup> The 1.44% is the sum of the nominal risk-free rate value of 0.824 per cent and the debt premium value of 0.62 per cent, based on a 5-year average spread of European telecom operators' bonds. Please see paragraphs 5.23-5.27 of the WACC draft response document provided as part of the Notified 2020 WACC Decision.

was 3.18%<sup>484</sup> and 3.72%<sup>485</sup> for Utilities and as a result it concluded that an average cost of debt across those sample of Telecoms and Utilities sectors at 3.45%<sup>486</sup> should apply for the CEI WACC for the NBP.

874 As noted in the Europe Economics Final Report:

*"...CEI debt is not risk-free. That is why our proposed cost of debt included a debt premium instead of being at the risk-free rate of return."*<sup>487</sup>

875 Eircom accepts that the "step-in" rights imply a reduction in the risks of debt, submitting that *"...the Irish State's "step in" rights merely reduce the risk of default ..."*<sup>488</sup>

876 Europe Economics reasoning for the choice of 1.44% for the cost of debt associated with NBI's CEI access is that, given the large scale and the long-term duration of access by NBI's MIP as well as the fact that the demand for Eircom's CEI is ultimately underpinned by the Irish State's commitment to the NBP through the "step-in" rights, it seems likely that the cost of debt associated with CEI access in the case of NBI would be very low amongst communications sector debt. Thus, the cost of debt rate at 1.44% is at the bottom end of the telecommunications sector range for the cost of debt so as to reflect the reduced risks that comes from NBP contract, including the "step-in" rights as acknowledged by Eircom. ComReg agrees with Europe Economics views.

877 It is also worth noting that the cost of debt proposed by BRG Consultants (of 3.45%) is in fact higher than the cost of debt that Eircom is paying as per its investor relations report, as discussed at paragraph 7.90 of the 2020 WACC Decision.

878 Furthermore, BRG Consultants, submitted that the cost of debt of 1.44% for CEI supplied to NBI is actually the same cost of debt produced by applying the European Commission notice to the wider ComReg fixed line business. According to BRG, this exclusive reliance on one approach i.e., European Commission Notice Approach does not match ComReg's practice in its broader 2020 WACC Decision and that exclusive reliance on the European Commission Notice approach increases the weight given to recent data, and it risks violating the "fair bet" principle embedded in UK and Irish regulation.<sup>489</sup>

879 To clarify, the cost of debt for CEI is at the bottom end of the estimated communications sector debt range, which just so happens to be consistent with the cost of debt produced by applying the Commission's Notice Approach. Separately,

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<sup>484</sup> This is based on BT, Telefonica and MEO, as per Table 3 of BRG's report.

<sup>485</sup> This is based on CRU, RII02 and Ofwat as set out in Table 3 of BRG's report.

<sup>486</sup> Table 7 of BRG's Non-Confidential Report dated 18 November 2020.

<sup>487</sup> Section 4.1.1 of the Europe Economics Final Report in Annex 3.

<sup>488</sup> Paragraph 296 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>489</sup> Paragraphs 88-89 of BRG's Non-Confidential Report dated 18 November 2020.



the 'fair bet' is principally about assessing risk and allows an investor to decide if the investment risk is worth taking. ComReg considers that the cost of debt rate at 1.44% is at the bottom end of the telecommunications sector range for the cost of debt so as to reflect the reduced risks that comes from the NBP contract, which ComReg considers should not violate the 'fair bet' principle.

880 Having considered the submissions from Eircom and BRG Consultants and the advice from Europe Economics, ComReg remains of the view that a point estimate for nominal cost of debt set with reference to the lower end of the communications sector range for cost of debt is a reasonable basis for the cost of debt for the CEI WACC in the context of the NBP.

881 Since the CEI Consultation Europe Economics has updated the comparator group data used for determining the cost of debt for the CEI WACC in the context of the NBP. Since the bottom end of the communications sectors cost of debt corresponds to the Commission's Notice Approach for the cost of debt, the update in the bottom end of the cost of debt range involves updating for the Commission's Notice Approach cost of debt. Applying that approach, Europe Economics calculates the updated cost of debt value as 1.19%. ComReg agrees with this approach and so the cost of debt value for the CEI WACC for NBI's MIP has been updated from 1.44% to 1.19%.

#### Other cost of debt issues:

882 According to Eircom, ComReg takes no account of the cost of Eircom's embedded debt i.e., the debt which Eircom has already raised. Eircom stated that ComReg's approach ignores the fact that Eircom has to fund the cost of its existing debt, which is significantly different from the forward-looking cost of debt that ComReg proposes for Eircom's "CEI business".<sup>490</sup>

883 In response to Eircom, ComReg would point out that it has not previously taken an embedded debt approach to the cost of debt nor any other approach that implied that the allowed rate of return in later periods had to be constrained by the expected rate of return in earlier periods.

884 As noted in the Europe Economics Final Report:

*"...use of a 2.6 estimate for the cost of debt for fixed line debt was not the adopting of a cost of actual debt methodology and certainly not a switch to an embedded debt approach. Furthermore, embedded debt is not ideal in regulation and often not used in the communications sector."*<sup>491</sup>

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<sup>490</sup> Paragraphs 311-314 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>491</sup> Section 4.1.1 of the Europe Economics Final Report at Annex 3.

## 7.6 Annual WACC updates and other WACC related issues

### Annual WACC updates

885 NBI and Virgin Media were the only Respondents to comment on ComReg's proposal of an annual update to the CEI WACC, in response to Question 14 which is summarised at paragraph 810 of this Decision. NBI agreed that the CEI WACC should be subject to annual updates.<sup>492</sup> Virgin Media commented that it supports a general principle that all WACCs should be subject to regular updates and there should not be a differentiated approach to the review or annual updating of factors that influence the price of access to any access seeker.<sup>493</sup>

886 ComReg considers that the annual WACC updates ensure the CEI WACC for NBI's MIP adequately reflects current underlying economic and financial conditions at that time (including forecasts). In addition, ComReg considers that the annual updating of the three specific WACC parameters (asset beta, cost of debt and gearing) takes away the need for aiming up<sup>494</sup> as any mismatch of the WACC value will be apparent. Hence, ComReg remains of the view that annual CEI WACC updates are reasonable and appropriate. This approach is also consistent with the fact that the fixed line WACC parameters (which includes a review of the generic WACC parameters that are common to both the fixed line telecoms WACC and the CEI WACC) are also subject to annual updates, as determined in the 2020 WACC Decision. Going forward the annual CEI WACC review will be conducted at the same time and in the same manner as the annual WACC review process for fixed line, broadcasting and mobile as set out in the 2020 WACC Decision.

### Per customer approach increases risk

887 While ComReg had proposed in the CEI Consultation that a per customer cost sharing approach was the preferred approach for determining the shared CEI network costs to be allocated between NBI's MIP and Eircom in the NBP IA, further to the responses to the CEI Consultation ComReg has decided (in Section 6.5) to revise its position and to use an alternative approach (the 'per operator plus'). While the per customer approach is no longer being used as the cost sharing mechanism in the NBP IA, ComReg does not accept Eircom's argument that it would in any event create additional risk for Eircom for the reasons set out below.

888 Eircom claimed that under the per customer cost sharing approach the flow of revenues from NBI to Eircom is only as stable and predictable as NBI's ability to acquire end-user customers and so in Eircom's view until and unless NBI's network is successful in gaining significant end-user acceptance, Eircom will rely on its

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<sup>492</sup> Page 56 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>493</sup> Page 5 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>494</sup> The purpose of aiming up is to reflect the asymmetry of consequences between setting the WACC too low and setting it too high. Where WACCs are set for several years there is a risk that the WACC in general will increase or decrease over that time period. In such a case prudence would suggest using aiming up to mitigate the consequences of the WACC increasing.

legacy copper products to cover its CEI costs.<sup>495</sup> Eircom's advisors, BRG Consultants, submitted that even if the flow of payments from NBI is predictable, Eircom's copper business faces demand-side risk, and this residual demand-side risk has to be factored into the determination of the cost of capital for Eircom's CEI.<sup>496</sup> According to BRG Consultants the per customer approach has the effect of a "reallocation of risk"<sup>497</sup> from NBI to Eircom when compared to the alternative and existing per operator approach.

889A different view was submitted by NBI's advisors, Frontier Economics, who stated that any uncertainty around the rate of migration to NBI's network "...is mitigated to a large degree by the ability of Eircom to recover costs from its existing customer base, so a slower migration to NBI and hence lower payments from NBI will be offset by greater margins from its own customers. As the number of customers on the Eircom network falls toward zero and Eircom, via CEI charges paid by NBI, recovers the majority of the costs, then the variability will reduce toward zero."<sup>498</sup>

890 In response to the issues raised by Respondents in paragraphs 888-889, ComReg considers that the risk of unrecovered CEI costs from a lower than expected uptake of NBI's FTTH services is limited, and that, to the extent cash-flow risk changes in the ways Frontier Economics identifies, the impact on the WACC should be expected to be negligible.

891 ComReg considers that any lower than expected fibre uptake would effectively correspond to a slower migration of Eircom's copper customers and as a result be offset by higher copper revenues, similar to the view presented by Frontier Economics at paragraph 889, for which Eircom is being remunerated based on the fixed line telecoms WACC.

892 In broad terms, any downside demand-side risks from NBI customers would be no different from the demand-side risks Eircom would face if it solely relied on its copper-based customers to recover its CEI costs. However, it would be expected that NBI's FTTH customer base should be more resilient than copper customers to competition from alternative technologies. ComReg would also expect a significant upside risk from suppressed demand that currently exists in the NBP IA for fibre-based fixed line services.

893 It is also important to note that under the proposed per customer cost sharing approach it was the relative share of active customers i.e., Eircom's active copper customers versus NBI's active fibre customers, and not NBI's absolute number of customers that would drive the payments from NBI to Eircom and therefore to a large degree it is how fibre and copper demand are each impacted by systematic

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<sup>495</sup> Paragraphs 293 & 295 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>496</sup> Paragraphs 70-71 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>497</sup> Paragraph 74 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>498</sup> Page 42 of Frontier Economics Non-Confidential Report dated November 2020.

risk. According to Europe Economics, the risk in question may be to a material extent counter-cyclical (since copper revenues would be higher as a consequence of fibre broadband take-up being lower and may correspond to a weak general macroeconomic environment and vice versa).

894 In addition, BRG Consultants fail to acknowledge the fact that under the proposed per customer approach the costs specific or incremental to NBI's MIP would not be shared but would in fact be charged in full to NBI's MIP irrespective of NBI's customer uptake. This means that CEI access for NBI's MIP is providing Eircom with a revenue stream to recover costs it already has incurred that is in addition to the revenue it would get in the counterfactual of having to rely solely on its copper-based services to end-users. In any event, ComReg has decided to adopt the 'per operator plus' cost sharing approach for poles and for ducts NBI will pay its incremental costs in the NBP IA and the shared duct related costs are allocated according to the per metre of duct / sub-duct length.

#### Other WACC related issues

895 Eircom claimed that in order for an operator to earn a reasonable rate of return on capital employed the relevant costs incurred year-on-year must be anchored to the relevant WACC for that investment and should not be adjusted over time as this provides no investment certainty or return for operators relative to the investment decisions they made on foot of a ComReg build/buy signal.<sup>499</sup>

896 ComReg does not agree.

897 The WACC reflects the return that investors expect to achieve in financial markets at the same level of risk as in the undertaking seeking funding. It reflects the returns investors expect rather than compensating them for historical investment decisions. It is important that regulated returns reflect the risks that companies face in making investments and that the relevant WACC encourages future efficient investment in telecommunications infrastructure in Ireland. It is therefore important to take into account current market conditions and also any potential developments over the period of the review. However, it should be noted that ComReg does not have an obligation to ensure financeability. It is for Eircom to manage its risks, including the risks associated with expected rates of return evolving over time. It is precisely because Eircom's rate of return is uncertain (and because that uncertainty is systematic) that Eircom's regulated WACC is above the risk-free rate. This point was addressed in paragraph 1.7 of the 2020 WACC Decision.

898 BRG Consultants submitted that Eircom's "NBI-facing CEI business" in the NBP IA is reliant on a single customer, whereas the other fixed line businesses (or their passive infrastructure divisions) have more options to diversify away from this customer risk. BRG Consultants referred to the point made by Europe Economics

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<sup>499</sup> Paragraph 312 of Eircom's Non-Confidential Response dated 18 November 2020

that NBI further reduces the risk for Eircom's CEI business, because absent NBI, the assets would become obsolete faster. BRG Consultants claimed that in reality, and in the absence of a replacement technology, Eircom would utilise the copper network assets for longer, and relative to this scenario, there may be more risk for its ability to recover costs related to the copper network if it also faces competition from NBI's fibre network.<sup>500</sup>

899 ComReg considers that BRG's argument seems to ignore the fact that this "competition" arises because of the NBP and would in fact be present even if NBI did not use Eircom's CEI, e.g., if the NBP used ESB's CEI network. The fact that NBI opts to use Eircom's CEI should actually reduce the risk that Eircom will not be able to recover the legacy CEI costs associated with its copper network as these assets would be stranded if the NBP provider had opted to use the ESB's pole network.

900 BRG Consultants, also considered that there is increased regulatory risk from the "potentially several" pricing reviews occurring over a prolonged time horizon associated with the cost recovery of CEI assets and these risks are amplified by the cost modelling undertaken by ComReg.<sup>501</sup>

901 ComReg disagrees with these assertions. The annual review (and update) of the cost models used to set NBI's MIP prices are intended to mitigate forecasting risks which are – as BRG Consultants admitted – inherent to any cost model.<sup>502</sup> The annual reviews allow for an assessment of the differences between what was forecasted / assumed in the PAM and DAM against the actual outcomes and whether any changes are required to the CEI access prices for NBI's MIP in order to ensure Eircom is compliant with its cost orientation obligation. It also ensures that Eircom can recoup the costs of any investments that it makes in CEI over the price control period. Therefore, ComReg disagrees that regular pricing reviews introduce increased risks for Eircom.

902 Eircom raised the point that ComReg must consider "company specific financing". Eircom submitted that for the revised WACC to be appropriate it needs to be adjusted to take into account the additional premium investors' demand for investing in private companies (referred to as the "illiquidity premium").<sup>503</sup>

903 To clarify, there is no "illiquidity premium" in the CAPM model. The CAPM approach followed by ComReg (as prescribed by Europe Economics) uses an equity risk premium ('ERP') and a debt premium so any general private sector "illiquidity

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<sup>500</sup> Paragraph 101 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>501</sup> Paragraph 77 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>502</sup> Paragraph 80 of BRG Consultants Non-Confidential Report dated 18 November 2020.

<sup>503</sup> Paragraphs 319-320 of Eircom's Non-Confidential Response dated 18 November 2020.

premium" would be automatically reflected there rather than in the returns for individual firms. Hence, no adjustments are required.

904 NBI made suggestions on establishing the inflation rate for the CEI WACC.<sup>504</sup>

However, for the reasons noted at paragraphs 800-804, ComReg has not assessed those generic parameters (like inflation) that are common to both the fixed line WACC and the CEI WACC for NBI, as those parameters have been assessed as part of the separate review of the fixed line WACC, and so inflation is outside the scope of this review. In this review ComReg has focused on those parameters (the asset beta, the gearing and cost of debt parameters) that should be amended from those used to calculate the fixed line telecoms WACC in order to reflect the distinct characteristics of NBI's MIP access to CEI.

905 Having taken into account all of the Respondents' Submissions and the advice from Europe Economics, ComReg remains of the view that a differentiated WACC should apply for NBI's MIP access to CEI in the NBP IA and for transit access in the Commercial Areas for the reasons discussed throughout Section 7 and previously in Section 7 of the CEI Consultation. In addition, ComReg considers that the CEI WACC rate should be subject to annual updates, which will be conducted at the same time and in the same manner as the annual WACC review process set out in the 2020 WACC Decision.

906 Table 10 below sets out the updated CEI WACC rate of 3.76% for NBI's MIP access to CEI, based on the changes to the asset beta and cost of debt parameters discussed above. All of the other input values to the CEI WACC are dependent on the generic parameters used for the fixed line WACC, which are discussed in the 2020 WACC Decision and which have been recently updated in Information Notice 21/68.

907 It is important to note that all other access users i.e., Generic Access to CEI users, will pay the fixed line WACC rate of 5.56%, the details of which are set out in Information Notice 21/68.

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<sup>504</sup> Pages 59-60 of NBI's Non-Confidential Response dated 18 November 2020.

**Table 10: CEI WACC rate for NBI's MIP**

<b>WACC parameters</b>	<b>Final CEI WACC for NBI's MIP 2021</b>	<b>CEI Consultation Proposed CEI WACC for NBI's MIP 2020</b>	<b>Fixed Line Telecoms WACC 2021</b>
<b>Nominal Risk-free rate</b>	0.523%	0.824%	
<b>Nominal ERP</b>	7.66%	7.21%	
<b>Asset beta</b>	0.324	0.34	
<b>Gearing</b>	55%	55%	
<b>Equity beta at notional gearing</b>	0.72	0.76	
<b>Nominal cost of debt</b>	1.19%	1.44%	2.35%
<b>Nominal cost of equity</b>	6.04%	6.30%	6.74%
<b>Tax</b>	12.5%	12.50%	12.50%
<b>Nominal pre-tax cost of equity</b>	6.90%	7.20%	7.70%
<b>Nominal pre-tax WACC</b>	<b>3.76%</b>	4.03%	<b>5.56%*</b>

\*The fixed line WACC applies to Generic Access users of Eircom's CEI

### 7.6.1 ComReg's Final Position:

908A differentiated WACC for CEI access by NBI's MIP shall apply in the NBP IA and for transit access in the Commercial Areas.

909 Eircom shall recover a WACC of no more than 3.76% for NBI's MIP access to Eircom's CEI in the NBP IA and for NBI's transit access in the Commercial Areas.

910 The CEI WACC rate associated with NBI's MIP access shall be subject to annual updates, which will be conducted at the same time and in the same manner as the annual WACC review process set out in the 2020 WACC Decision.

## 8 Other related / one-off CEI access costs

### 8.1 Overview

911 In this section ComReg sets out how related services and / or one-off incremental costs associated with Eircom's CEI services should be recovered.

912 Eircom is subject, under Section 12.2 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision, to an obligation of cost orientation in respect of prices charged for Access to, among others, CEI. Under a cost orientation obligation, Eircom is required to ensure that it recovers no more than the actual costs incurred adjusted for efficiency plus a reasonable rate of return.

913 The CEI prices set out in this Decision (in Section 9) are calculated on the basis that they are to recover all costs associated with access to Eircom's ducts and poles. Section 9 includes the details of what costs are included in the price for Generic Access for CEI and in the prices for NBI's MIP access to Eircom's CEI.

914 In the CEI Consultation ComReg invited submissions from Eircom in particular as regards any other costs which it must incur in order for another operator to access Eircom's ducts, sub ducts and chambers.

915 There are two possible other CEI related activities, namely, replacing a pole with pole furniture and tree trimming activities, that Eircom may need to recoup separately through a one-off charge, where Eircom can demonstrate that the relevant costs associated with these activities are not already recovered as part of the ongoing CEI charges.

916 In the remainder of this section of the document ComReg has summarised its preliminary position from the CEI Consultation, considered all of the Respondents' Submissions and, having regard to those submissions, sets out its final position on how tree trimming costs and the costs associated with replacing a pole with pole furniture on it should be recovered. The rest of this section is discussed under the following headings:

- (a) Pole furniture costs; and
- (b) Tree trimming costs.



## 8.2 Pole furniture costs

### 8.2.1 Position set out in the Consultation:

917 In Section 8.2.1 of the CEI Consultation ComReg considered two options in terms of how the costs associated with other operator's furniture placed on Eircom's poles should be recovered.<sup>505</sup> The two options were as follows:

- (a) Option 1: Pole furniture costs should be recovered as part of the recurring pole access price; or
- (b) Option 2: Pole furniture costs should be recovered in an upfront or one-off pole furniture price.

918 In terms of **Option 1** ComReg stated that deriving a cost oriented charge for pole furniture (without over-or-under recovery of costs) would require consideration of a number of factors, some of which are uncertain, including not just the additional costs that arise when Eircom replaces a pole with furniture, but also the probability that when an operator locates its furniture on a pole it will subsequently be replaced while the furniture is still located on the pole. ComReg gave the example of an operator locating its furniture on an Eircom pole for 10 years and removing that furniture before the pole needs to be replaced: in that case there would be additional furniture related cost to be incurred whenever the pole is eventually replaced.

919 ComReg also considered that the longer time frame associated with NBI's MIP access requirements suggests that the probability that a pole with NBI's furniture on it is replaced could be higher than for Generic Access users. Therefore, recovering the additional costs of replacing poles with furniture by means of a recurring access charge could penalise those Generic Access users that rent poles for shorter durations, and which do not impact the costs Eircom incurs as a result of their access.

920 In the CEI Consultation ComReg recognised that a recurring charge for pole furniture may also need to take account of the period over which the incremental cost associated with replacing a pole which has pole furniture should be depreciated. Other factors that would require consideration include an NPV assessment, the appropriate WACC rate and any cost trends that would impact on future costs. Hence, ComReg considered that the uncertainty associated with the various relevant parameters (i.e., the probability of pole replacement occurring when the furniture is in-situ, the timing of that replacement and the period over which the estimated costs are to be annualised), makes it difficult to set an accurate recurring pole charge which would include these costs.

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<sup>505</sup> An example of pole furniture could be equipment associated with distribution points for overhead drop wires, cable management systems or closures for splices.

921 In terms of **Option 2** ComReg considered in the CEI Consultation whether there is an additional (or higher) cost to Eircom for replacing a pole with furniture compared to the cost of replacing a pole without furniture. ComReg recognised that there may be an additional cost of pole replacement to Eircom where there is already operator furniture on the pole, arising from the potential increased effort and complexity involved when a pole with furniture is replaced. In particular, the operator's furniture would need to be removed from the old pole and then relocated onto the new pole without compromising the service that the furniture supports.

922 ComReg also considered that requiring an operator to bear the cost associated with deploying its pole furniture on a pole would enhance efficiencies. The fact that an operator incurs an additional charge for deploying pole furniture on a pole should incentivise the operator to deploy its furniture in the most efficient way ('productive efficiency') thereby reducing the overall level of cost (or pole furniture charge) it incurred. In addition, as the operator deploying the furniture is the only operator to benefit from its deployment then it seems appropriate that the pole furniture charge for any additional costs to Eircom should be recovered solely from the operator with the furniture on the pole. ComReg noted that these considerations take account of the general principles of pricing such as cost causation, distribution of benefits and encouraging efficiency.

923 ComReg noted that recovering the additional cost of replacing a pole with furniture as a one-off charge may be a more proportionate and practical solution. A one-off charge would only be levied on the operator at the time the pole is actually replaced and would be based on the additional incremental costs as they are incurred.

924 ComReg recognised that a one-off charge may encourage efficiencies in that it may incentivise an operator to minimise the amount of pole furniture it deploys on Eircom's poles (similar to the point made in relation to the additional recurring charge) but this option (2) may also reduce the incidence of pole furniture replacement overall. This is because each operator is likely to face an additional charge for deploying furniture on a pole when that specific pole is replaced. Consequently, if one compared the one-off charge with Option (1) (of an ongoing charge), the one-off charge means that operators would be incentivised to deploy their furniture on newer poles or poles in relatively good condition, as the incidence of pole replacement increases depending on the age and condition of the pole. Also, in the case where the furniture has become redundant, ComReg considered that a one-off charge provides the operator with the incentive to remove the furniture from the pole in advance of pole replacement so the additional costs of replacing the furniture on the pole can be avoided. This incentive does not exist if the operator has already paid for the costs of replacing the furniture through an ongoing charge.

925 Hence, ComReg reached the preliminary view that Eircom should recover any additional costs associated with replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced. ComReg also

proposed that Eircom should comply with the pricing notification procedures specified in the transparency obligations set out in the 2018 WLA / WCA Market Review Decision, unless otherwise determined by ComReg.

926 In addition, ComReg proposed that Eircom should not capitalise the additional cost of pole furniture removal and replacement against a pole asset but should instead capitalise it against the asset that the furniture is associated with, e.g., against a copper cable asset if it is associated with copper cables or a fibre cable asset if it is associated with fibre cables, in its cost accounting systems.

927 ComReg invited the views of respondents (in Question 15 of the CEI Consultation) on (1) the proposal that Eircom should recover any additional costs associated with replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced and (2) the cost of pole furniture removal and replacement being capitalised against the asset that the furniture is associated with, in Eircom's cost accounting systems.

## 8.2.2 Respondents' Views and ComReg's Response

928 ComReg received a direct response to Question 15 from five Respondents, namely, Eircom, NBI, BT, ALTO and Siro. Virgin Media<sup>506</sup> and Vodafone<sup>507</sup> stated that they had no comments and Sky did not address the issues raised in Question 15 in their general response.

929 NBI<sup>508</sup>, BT<sup>509</sup> and Siro<sup>510</sup> agreed with ComReg's proposal to recover any additional costs associated with replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced. NBI also commented on the occurrence and level of any such pole furniture charge(s) levied on it.<sup>511</sup> Eircom considered that a pole furniture charge is not necessary, but ComReg may wish to consider the merits that an appropriate pole furniture charge may have in terms of providing an efficient network deployment signal.<sup>512</sup>

930 NBI and BT were the only Respondents to comment on ComReg's proposal that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with. NBI agreed with ComReg while BT questioned how the capitalisation will work as the other operator's pole furniture remains in the ownership of the other operator.<sup>513</sup>

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<sup>506</sup> Page 5 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>507</sup> Page 9 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>508</sup> Page 62 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>509</sup> Page 14 of BT's Non-Confidential Response dated 18 November 2020.

<sup>510</sup> Page 7 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>511</sup> Pages 62-63 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>512</sup> Paragraphs 326 & 328 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>513</sup> Page 14 of BT's Non-Confidential Response dated 18 November 2020.

### One-off charge for cost of replacing a pole with pole furniture

931 Eircom submitted that *"The rate card agreed recently with our Contractor for future pole replacements has [REDACTED]*

*] As [REDACTED]*

*] eir does not have a cost basis for a separate charge for pole furniture."<sup>514</sup> Eircom further added that *"Given the recent commercial agreement entered into with our contractors, there is [REDACTED]**

*] <sup>515</sup>*

932 Eircom also stated that *"Notwithstanding this, ComReg may wish to consider the merits of an efficient network deployment signal an appropriate pole furniture charge may encourage. In addition, such a charge may ensure that future re-negotiated pole contractor rates are not increased as a result of increased (then) historical pole furniture deployment."<sup>516</sup>*

933 ComReg remains of the view that the costs of moving pole furniture should be charged directly to the operator that owns the furniture. ComReg continues to consider that requiring an operator to bear the cost associated with deploying its pole furniture on a pole enhances efficiencies. The additional charge for deploying pole furniture on a pole should incentivise the operator to deploy its furniture in the most efficient way thereby reducing the overall level of cost (or pole furniture charge) it incurred. In addition, as the operator deploying the furniture is the only operator to benefit from its deployment then it seems appropriate that the pole furniture charge for any additional costs to Eircom should be recovered solely from the operator with the furniture on the pole.

934 As discussed in Section 5.11 on the cost models, ComReg has identified the additional capital cost i.e., subcontractor labour of pole replacement related to pole furniture (DP enclosures) as an incremental cost to the access seeker, and it has excluded it from the recurring pole access charge for the reasons discussed at paragraphs 921-925 of this Decision. Instead, this cost has been allocated to the fixed line services in the ANM Decision.

935 NBI noted that Eircom had been seeking to levy a recurring "pole furniture charge" on NBI in the form of a surcharge on the annual pole rental charge (of €5.69 per pole) but that it is satisfied that, in light of the discussion in the CEI Consultation,

<sup>514</sup> Paragraph 169 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>515</sup> Paragraph 327 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>516</sup> Paragraph 328 of Eircom's Non-Confidential Response dated 18 November 2020

that the notion of a recurring pole furniture charge may now be dispensed with.<sup>517</sup>

936 ComReg in this regard reiterates that a recurring charge for replacing a pole with pole furniture is not appropriate for the reasons set out at paragraphs 918-920 of this Decision, and any additional costs associated with replacing a pole with furniture located on it should be by means of a one-off charge levied at the time the pole is replaced. The imposition of such one-off charges is subject to the notification and publication requirements which are further specified in Section 6 of the Decision Instrument at Annex 1 of this Decision, which ensures the transparency (and non-discrimination) of all CEI related prices charged by Eircom.

### Other issues

937 NBI commented that the NPV of the future relocation of pole furniture will approximate to present day costs and in these circumstances even where pole replacement occurs earlier than otherwise required due to the NBI deployment, the charge levied on NBI should only be the incremental cost as the costs associated with Eircom's furniture rearrangements have simply been brought forward at a constant NPV.<sup>518</sup>

938 ComReg considers that in the NBP IA there is a possibility that, in the absence of NBI's MIP access, Eircom may have avoided replacing a pole in anticipation of copper switch-off, and in such cases, it could be argued that the pole furniture cost is incremental to NBI's MIP. However, this could only be determined on a case by case basis as it is possible that Eircom's copper network benefits from being deployed on a more stable and safer pole network as newer poles are likely to be more resilient to storm damage, which reduces the severity of damage to both the pole and overhead cable network during storm events.

939 In terms of how the capitalisation policy will work as the other operator's pole furniture remains in the ownership of the other operator,<sup>519</sup> to clarify, the capitalisation relates to the cost of managing Eircom's furniture during the replacement, as opposed to the cost of the furniture itself. In this case, Eircom should capitalise the additional cost of removal and replacement of its pole furniture against the asset that the furniture is associated with, e.g., against a copper cable asset if it is associated with copper cables or a fibre cable asset if it is associated with fibre cables, in its cost accounting systems. This is to ensure that the associated cost is not treated as a pole related cost that could be included as part of a future pole access charge. In those instances where the furniture belongs to an OAO, the costs should not be capitalised by Eircom, but instead should be treated as an operating cost in a similar way to the Repayable Works Order process used to

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<sup>517</sup> Page 63 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>518</sup> Page 63 of Eircom

<sup>519</sup> Page 14 of BT's Non-Confidential Response dated 18 November 2020.

capture the costs associated with moving poles and infrastructure for third parties such as local authorities.

### 8.2.3 ComReg's Final Position

940 Having considered the Respondents' Submissions, ComReg remains of the view that any additional costs associated with replacing a pole with pole furniture located on it should be charged by means of a one-off charge levied on the specific operator at the time the pole is replaced. Any additional costs associated with replacing a pole with pole furniture shall be subject to Eircom's notification and publication requirements as set out in Section 6 of the Decision Instrument in Annex 1 of this Decision.

941 Accordingly, Eircom shall capitalise the additional cost of pole furniture removal and replacement against the asset that the furniture is associated with in its cost accounting systems.

## 8.3 Tree trimming costs

### 8.3.1 Position set out in the Consultation:

942 In Section 8.3.1 of the CEI Consultation ComReg recognised that tree trimming is generally undertaken by Eircom as part of a preventative maintenance programme to reduce the potential for damage to aerial cables from overhanging tree branches along a pole route. In this regard ComReg considered that it seemed reasonable that all operators who have cables along the route and who therefore benefit from it should contribute to the recovery of the associated costs. However, ComReg noted that it does not appear that Eircom carries out tree trimming on a systematic basis and that the costs of tree trimming undertaken as part of preventative maintenance programmes appear to vary significantly year on year.

943 ComReg considered that other operators could also be charged for the tree trimming costs incurred by Eircom to facilitate the deployment of that operator's cables along an Eircom pole route. As such, tree trimming costs could be considered to be incremental to a specific operator's access. ComReg noted that this may be particularly relevant in the case of NBI's MIP access in the NBP IA where the prospect of other operators benefiting from that same investment in tree trimming in the future is limited.

944 ComReg also pointed out in the CEI Consultation that NBI's MIP is likely to become the sole operator in the NBP IA providing access services and therefore, the only operator with cables deployed along a route in the NBP IA. In that case it may be more efficient that NBI streamlines activities such as tree trimming to coincide with other cable maintenance activities that it undertakes on its network. If this were to be the case, ComReg would expect that the associated costs would be a direct cost

to NBI's MIP and so would not form part of a one-off CEI charge.

945 In the CEI Consultation ComReg reached the preliminary view that tree trimming associated with pole replacement should be recovered as part of the recurring pole access charge. All tree trimming costs to prepare aerial cable routes in advance of cable deployment (or indeed for any request from operators to tree trim specific pole routes outside of Eircom's preventative maintenance programme) should be recovered from operators as a one-off charge on an as-needs basis. ComReg also noted that any one-off charges for tree trimming activities would be subject to notification and publication requirements under the 2018 WLA / WCA Market Review Decision.<sup>520</sup>

946 ComReg invited the views of respondents (in Question 16 of the CEI Consultation) on the proposal that tree trimming costs to prepare aerial cable routes in advance of cable deployment should generally be recovered by means of a one-off charge and that in the case of tree trimming associated with pole replacement, that such costs should be recovered as part of the recurring pole access charge.

### 8.3.2 Respondents' Views and ComReg's Response

947 ComReg received a response to Question 16 from five Respondents, namely, Eircom, NBI, BT, ALTO and Siro. Virgin Media<sup>521</sup> and Vodafone<sup>522</sup> stated that they had no comments and Sky did not address the issues raised in Question 16 in its general response.

948 Eircom<sup>523</sup>, NBI<sup>524</sup> and BT<sup>525</sup> agreed that tree trimming costs to prepare aerial cable routes in advance of cable deployment should generally be recovered by means of a one-off charge and that tree trimming costs associated with pole replacement should be recovered as part of the recurring pole access charge, but each operator raised some issues. Eircom raised concerns that the proportionality of cost / benefit associated with route maintenance is misaligned under the per customer approach.<sup>526</sup> NBI claimed that any one-off charges levied by Eircom on the preparation of cable routes should be discounted to take account of maintenance savings to Eircom.<sup>527</sup> While Siro agreed that tree trimming costs associated with pole replacement should be recovered as part of the pole rental charge, it stated that it is Eircom's responsibility to maintain the pole route and that no additional cost

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<sup>520</sup> Please see Section 10.12 and 10.13 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision.

<sup>521</sup> Page 6 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>522</sup> Page 9 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>523</sup> Paragraphs 329-330 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>524</sup> Page 64 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>525</sup> Page 15 of BT's Non-Confidential Response dated 18 November 2020.

<sup>526</sup> Paragraph 331 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>527</sup> Page 64 of NBI's Non-Confidential Response dated 18 November 2020.

should be imposed on the renting operator seeking access to a pole route.<sup>528</sup>

949 BT sought clarity from ComReg that the wholesale provider should benefit from recovering the tree trimming costs for deployment of the network to the customers premises in the wholesale rental costs.<sup>529</sup> ALTO made similar comments suggesting that overhead drop wires to customers premises should be capitalised by Eircom as it will benefit from the recovery of its costs and a mark-up over the years.<sup>530</sup> However, these points are related to connection costs/charges (rather than one-off tree trimming charges or recurring pole access charges) which are discussed in the ANM Decision.

950 NBI stated that where tree trimming is required to facilitate cable deployment this will have the effect of reducing the need for Eircom to carry out preventative maintenance related trimming activities. NBI noted that it is likely that trimming associated with route preparation will also reduce in-life cable damage thereby improving Eircom's Mean Time Between Failure (MTBF) and reducing its overall maintenance costs. NBI maintained that given the scale of the NBI uptake of CEI in the IA the savings are likely to be non-trivial and therefore, any one-off charges levied by Eircom and agreed to by NBI related to the preparation of cable routes should be discounted to take account of these maintenance savings to Eircom.<sup>531</sup>

951 ComReg has considered NBI's submission but it remains of the view that tree trimming costs considered to be incremental to a specific operator's access, where the prospect of other operators benefiting from that same investment in tree trimming in the future is limited, should not be recovered as part of the ongoing access charges. Where NBI's MIP is likely to become the sole operator in the NBP IA providing access services to end-users in the NBP IA and may be the only operator with cables deployed along a route in the NBP IA, ComReg remains of the view that it is reasonable to consider that the associated costs would be a direct cost to NBI's MIP and would not form part of recurring CEI charges.

952 Eircom raised concerns that the proportionality of the cost / benefit associated with route maintenance is misaligned under the per customer approach, where the fixed common cost is shared according to the number of customers on each network.<sup>532</sup>

953 In response to Eircom, ComReg would point out that it has revised its position on the approach for allocating shared network costs for CEI in the NBP IA and has decided that a per customer approach is no longer appropriate for the reasons set out in Section 6.5. However, ComReg considers that the fact the primary purpose of an access cable network is to provide services to end-users suggests that

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<sup>528</sup> Page 7 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>529</sup> Page 15 of BT's Non-Confidential Response dated 18 November 2020.

<sup>530</sup> Page 15 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>531</sup> Page 64 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>532</sup> Paragraph 331 of Eircom's Non-Confidential Response dated 18 November 2020.



measuring the relative benefits in terms of the relative number of customers served by each network would not be an unreasonable basis.

### 8.3.3 ComReg's Final Position

954 Having considered all of the Respondents' Submissions, ComReg remains of the view that all tree trimming costs to prepare aerial cable routes in advance of cable deployment are considered incremental costs outside the normal business as usual activities and so shall be recovered by Eircom from operators as a one-off charge on an as-needs basis. Any tree trimming charges shall be subject to Eircom's notification and publication requirements, which have been further specified in Section 6 of the Decision Instrument in Annex 1 of this Decision.

955 Tree trimming costs associated with the normal business as usual pole replacement are recovered as part of the recurring pole access charge. ComReg has included a contribution towards these tree trimming costs in the prices set out in Section 9 of this Decision.

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## 9 CEI access prices

### 9.1 Overview

956 In this section ComReg sets out the annual prices for access to Eircom's CEI services (duct and pole access), based on the costing / pricing methodologies determined in Sections 5 and 6, the WACC rate set in Section 7 as well as the position taken by ComReg in Section 8 on other CEI related costs. ComReg has derived the CEI access prices from the PAM and the DAM, as described in Section 5.

957 ComReg has also set out the main changes/updates to the draft CEI prices since the CEI Consultation, at Section 9.2 below.

958 This section also considers the option of Eircom recovering the incremental CEI (duct and pole) investment associated with NBI's MIP as an upfront fee levied on NBI's MIP rather than as a recurring annual charge at Section 9.4 below.

### 9.2 Updates to CEI access prices since CEI Consultation:

959 As discussed in Sections 5, 6 and 7, there have been updates / changes to the CEI models (PAM and DAM), following the consultation process.

960 In the tables below ComReg has set out the main changes between the draft average CEI prices in the CEI Consultation and the revised final average CEI prices set in this Decision.

#### 9.2.1 Changes to prices for Generic Access to CEI

**Table 11: Changes to average price for Generic Access to poles**

Description	€	Paragraph References
<b>Draft avg. price for Generic Access to poles</b>	20.15	
<i>Deaveraging of costs and CEI uplift applied</i>	2.08	568-569
<i>IFN data from Eircom</i>	(2.70)	552-561
<i>WACC Implementation</i>	0.39	589-591
<i>Common cost mark-up</i>	1.38	570

<i>Other</i>	0.05	
<b>Final avg. price for Generic Access to poles</b>	21.35	

Table 12: Changes to average price for Generic Access to sub-ducts

Description	€	Paragraph References
<b>Draft avg. price for Generic Access to sub-duct</b>	0.63	
<i>Deaveraging of costs and CEI uplift applied</i>	0.08	568-569
<i>IFN data from Eircom</i>	0.02	552-561
<i>WACC implementation</i>	0.01	589-591
<i>Common cost mark-up</i>	0.02	570
<i>Other</i>	(0.09)	
<b>Final avg. price for Generic Access to sub-duct</b>	0.67	

### 9.2.2 Changes to prices for NBI's MIP access to CEI

Table 13: Changes to average price for NBI's access to poles

Description	€	Paragraph References
<b>Draft avg. price for NBI's access to poles in IA</b>	13.11	
<i>WACC Implementation</i>	0.29	589-591
<i>Revised cost sharing approach</i>	0.19	699-717, 577-584
<i>Respecification of common overhead costs</i>	0.71	562-567

<i>Change in WACC rate</i>	(0.39)	Section 7 (Table 10)
<i>Other</i>	0.40	581-584, 589-590
<b>Final avg. price for NBI's access to poles in IA</b>	14.31	

Table 14: Changes to average price for NBI's access to sub-duct

Description	€	Paragraph References
<b>Draft avg. price for NBI's access to sub-duct in IA</b>	0.43	
<i>WACC Implementation</i>	-	589-591
<i>Revised cost sharing approach</i>	0.01	699-717, 577-584
<i>Respecification of common overhead costs</i>	-	562-567
<i>Change in WACC rate</i>	(0.02)	Section 7 (Table 10)
<i>Other</i>	0.15	556
<b>Final avg. price for NBI's access to sub-duct in IA</b>	0.57	

### 9.3 Final CEI access prices:

961 ComReg has determined the maximum annual prices for access to Eircom's CEI services in Table 15- Table 20 below, for both Generic Access to CEI and for NBI's MIP access.

### 9.3.1 Generic Access to CEI prices

962 For Generic Access users of CEI, the annual access prices set out in this Decision (at Table 15, Table 16 and Table 17) are calculated on the basis that these charge(s) recover all costs associated with an operator obtaining access to Eircom's poles and ducts, including process related costs and ongoing wholesale costs such as product management, billing and account management.

963 The Generic Access CEI prices includes a rate of return based on the current fixed line telecoms WACC of 5.56% as set out in Information Notice 21/68.

964 For the avoidance of doubt, no other charges (other than those set out in Table 15, Table 16 and Table 17) may be levied by Eircom to recover the costs that the prices derived by the PAM and DAM are designed to recover, except for the one-off charges discussed in Section 8, which require Eircom to demonstrate in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the cost orientation of its CEI prices and which are subject to Eircom's transparency obligations (i.e., pre-notification and publication requirements) as set out in Section 6 of the Decision Instrument at Annex 1.

965 For **Generic Access users of poles**, in accordance with the per operator approach, when the pole is shared with another Generic Access user then the cost is shared based on the number of Generic Access users on the pole (i.e., that have cables on the pole), including Eircom itself.

**Table 15: Maximum annual prices for Generic Access to poles**

Generic access users of poles	1 [month] 2022 – 30 June 2022	1 July 2022 – 30 June 2023	1 July 2023 – 30 June 2024	1 July 2024 – 30 June 2025	1 July 2025 – 30 June 2026
	€	€	€	€	€
<b>National pole price*</b>	20.39	21.47	22.71	22.94	23.13

*\*This is the total price of a pole and so the annual rental price may vary depending on the number of generic access users seeking access to the pole*

966 In the particular case of **Generic Access to duct** ComReg has set the prices for the following access products:

- Duct Access / Direct Duct Access in Table 16;
- Sub-Duct Access in Table 17.

967 While the CEI Consultation only provided the annual proposed prices for the

provision of Sub-Duct Access (which was referred to more generally as “duct access” in the CEI Consultation), there has been developments since then regarding Eircom's sub-duct self-install product, which is discussed in ComReg Document 21/60.<sup>533</sup>

968 The DAM that was consulted on already includes all of the costs related to each of the duct access products listed above and so it seems appropriate to provide clarity and transparency to industry in this Decision on the different variants of duct access and their related prices, which is also consistent with the duct access products specified in the 2018 WLA/WCA Market Review Decision.<sup>534</sup>

969 **Duct Access** is access to Eircom's duct, without the use of sub-duct. The prices set in Table 16 include all of the costs associated with accessing the duct i.e., including a contribution to the costs of trenches, ducts and chambers and clearing duct blockages but excluding the costs associated with sub-duct (namely, the costs of rod, rope and test and sub duct deployment). The maximum annual prices (in Table 16) are based on a per metre of duct.

970 **Direct Duct Access** is direct access to Eircom's ducts for the installation of cables without the use of sub-duct. Direct duct access is costed in the same manner as duct access and so the prices in Table 16 apply. The prices include all of the costs associated with accessing the duct i.e., it includes a contribution to the costs of trenches, ducts and chambers and clearing duct blockages but excluding the costs associated with sub-duct. The maximum annual prices (in Table 16) are based on a per metre of duct

971 **Sub-Duct Access** is access to Eircom's sub duct, which means the tube or tubes inserted in a duct through which a cable is installed. The sub duct annual prices at Table 17 includes a contribution to the costs of trenches, ducts and chambers and all of the costs associated with installing sub duct i.e., clearing duct blockages and the cost of rod, rope and test. The maximum annual prices (in Table 17) are based on a per metre of sub duct.

972 For the avoidance of doubt, in the various duct prices set out below, the cost modelling associated with any duct remediation activities such as clearing duct blockages is assumed to be carried out by Eircom and recovered by Eircom in the annual recurring charges.

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<sup>533</sup> [ComReg2160.pdf](#)

<sup>534</sup> Section 7.2 of the Decision Instrument at Appendix 20 of the 2018 WLA/WCA Market Review Decision.

**Table 16: Maximum annual prices for Generic Access users of Duct Access / Direct Duct Access by surface types**

<b>Generic Access</b>	<b>1 [month] 2022 – 30 June 2022</b>	<b>1 July 2022 – 30 June 2023</b>	<b>1 July 2023 – 30 June 2024</b>	<b>1 July 2024 – 30 June 2025</b>	<b>1 July 2025 – 30 June 2026</b>
<b>Per metre of duct</b>	<b>€</b>	<b>€</b>	<b>€</b>	<b>€</b>	<b>€</b>
<b>National duct access price for Carriageway</b>	0.82	0.72	0.66	0.66	0.70
<b>National duct access price for Footway</b>	0.67	0.59	0.54	0.54	0.58
<b>National duct access price for Verge</b>	0.49	0.43	0.40	0.40	0.42

**Table 17: Maximum annual prices for Generic Access users of Sub-Duct Access by surface types**

<b>Generic Access</b>	<b>1 [month] 2022 – 30 June 2022</b>	<b>1 July 2022 – 30 June 2023</b>	<b>1 July 2023 – 30 June 2024</b>	<b>1 July 2024 – 30 June 2025</b>	<b>1 July 2025 – 30 June 2026</b>
<b>Per metre of sub-duct</b>	<b>€</b>	<b>€</b>	<b>€</b>	<b>€</b>	<b>€</b>
<b>National sub-duct price for Carriageway</b>	0.89	0.79	0.73	0.73	0.77
<b>National sub-duct price for Footway</b>	0.74	0.66	0.61	0.62	0.65
<b>National sub-duct price for Verge</b>	0.56	0.50	0.47	0.47	0.49

### 9.3.2 NBI's MIP CEI prices

973 For NBI's MIP access to CEI, the prices set in this Decision (at Table 18, Table 19 and Table 20) are calculated based on the relevant assumed costs associated with the NBP IA and the Commercial Areas, as derived from the PAM and DAM models over the next 5 years.

974 The ongoing CEI access charges for NBI's MIP (at Table 18, Table 19 and Table 20) do not include the process related cost, which are charged as one-off payments. If there are one-off costs associated with tree trimming activities and the cost of replacing a pole with pole furniture, Eircom may recoup these costs outside of the ongoing CEI annual access charges for NBI's MIP described above, which is discussed at Section 8.

975 The CEI annual prices for NBI's MIP in the NBP IA and in the Commercial Areas includes a rate of return based on the WACC for CEI of 3.76% (as set out in Section 7).

976 For the avoidance of doubt, and with the exception of process charges (which are charged upfront), the one-off charges discussed in Section 8 and where Eircom and NBI may agree to an alternative arrangement as provided for at Section 9.4, Eircom shall charge NBI no other prices other than the prices determined in Table 18, Table 19 and Table 20 for the period from 1 [month] 2022 to 31 December 2023. The prices thereafter, from 1 January 2024, shall be determined by the annual review process described in Section 10 of this Decision.

977 The **annual pole access charges for NBI's MIP in the NBP IA** (at Table 18) includes the incremental capital costs of accelerated pole replacement during the FTTH rollout. In addition, the pole access charges for NBI's MIP in the NBP IA includes a contribution (as discussed in Section 6) towards the shared pole network costs, as well as the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.

978 The **annual pole access charges for NBI's MIP in the Commercial Areas** (at Table 18), includes the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management only. ComReg has not identified any capital costs for poles that would be considered incremental to NBI's transit access in the Commercial Areas and which should be recovered in the annual pole charge.

979 Table 18 presents the maximum annual rental prices for poles based on the total annual cost per pole and taking into account the modelled (or forecasted) mix of pole volumes consumed by NBI's MIP as a shared pole user and as a single pole user in the relevant period.



**Table 18: Maximum annual prices for pole access by NBI**

<b>NBI Pole Access</b>	<b>1 [month] 2022 – 31 December 2022</b>	<b>1 January 2023 – 31 December 2023</b>	<b>1 January 2024 – 31 December 2024</b>	<b>1 January 2025 – 31 December 2025</b>	<b>1 January 2026 – 31 December 2026</b>
	€	€	€	€	€
<b>NBP IA</b>	8.96	9.37	9.73	10.26	10.88
<b>Commercial Areas</b>	0.07	0.07	0.07	0.07	0.07

980 The **annual Sub-Duct Access charges for NBI's MIP in the NBP IA** (at Table 19) includes the capital costs relating to the deployment of sub-duct<sup>535</sup>, the cost of clearing duct blockages<sup>536</sup> and the remaining costs of duct remediation during the FTTH rollout. In addition, the charges for NBI's MIP in the NBP IA include a contribution (as discussed in Section 6) towards the shared duct network costs, as well as the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.

981 The **annual Sub-Duct Access charges for NBI's MIP in the Commercial Areas** (at Table 19) includes the cost of sub-duct as the only capital cost that is incremental to NBI's MIP and in addition the price includes the incremental operating costs associated with ongoing wholesale costs such as product management, billing and account management.

982 Table 19 presents the maximum annual prices for sub-duct based on the total annual cost of a metre of duct (trench) and taking into account the modelled (or forecasted) mix of metres of duct (trench) consumed by NBI's MIP as a shared duct user or as a single duct user in the relevant period.

<sup>535</sup> This includes the costs of rod, rope & test of sub-duct.

<sup>536</sup> Since the CEI Consultation ComReg updated the costs associated with the sub-duct to reflect the mix of sub-ducts deployed by Eircom for its own consumption in the IFN and updated the per metre cost for sub-duct installation (including rod, rope and test) labour costs to exclude the estimated element of one duct blockage clearance. Accordingly, ComReg increased the number of DFE duct blockage clearances from two duct clearances per kilometre of underground route in the DAM to three duct clearances in the final DAM in all three footprints.

**Table 19: Maximum annual prices for Sub-Duct Access by NBI**

<b>NBI Sub Duct Access</b>	<b>1 [month] 2022 – 31 December 2022</b>	<b>1 January 2023 – 31 December 2023</b>	<b>1 January 2024 – 31 December 2024</b>	<b>1 January 2025 – 31 December 2025</b>	<b>1 January 2026 – 31 December 2026</b>
Per metre of sub duct	€	€	€	€	€
<b>NBP IA</b>	0.63	0.63	0.62	0.62	0.62
<b>Commercial Areas</b>	0.09	0.09	0.09	0.09	0.09

983 Consistent with the approach for Generic Access, ComReg has provided in Table 20 the equivalent Duct Access / Direct Duct Access prices that would apply should NBI decide to install its own sub-duct. However, ComReg may need to consider any variations to the price depending on the type of sub-duct self-install product that NBI may request.<sup>537</sup>

**Table 20: Maximum annual prices for Duct Access / Direct Duct Access by NBI**

<b>NBI Duct Access / Direct Duct Access</b>	<b>1 [month] 2022 – 31 December 2022</b>	<b>1 January 2023 – 31 December 2023</b>	<b>1 January 2024 – 31 December 2024</b>	<b>1 January 2025 – 31 December 2025</b>	<b>1 January 2026 – 31 December 2026</b>
Per metre of duct	€	€	€	€	€
<b>NBP IA</b>	0.56	0.56	0.55	0.55	0.55
<b>Commercial Areas</b>	0.02	0.02	0.02	0.02	0.02

<sup>537</sup> The approach described here would also apply if Eircom and NBI decide to opt for upfront payment of incremental costs, as discussed at Section 9.4.

## 9.4 Billing for NBI's MIP access to CEI

### 9.4.1 Position set out in the Consultation:

984 In Section 9.3 of the CEI Consultation ComReg proposed that given the unique characteristics of NBI's MIP access to Eircom's CEI, it is possible that Eircom and NBI may prefer an arrangement whereby Eircom's incremental investments in respect of NBI's access is recovered as a fee levied upfront rather than in the recurring annual rental charge. If there is no prospect of another operator benefiting from the investment even in the medium to long term, then the recovery by Eircom of NBI related CEI investment as a one-off fee does not appear to raise any issues. Any shared network costs that exist would still be recovered between both pole / duct access users in proportion to relative customer numbers that each pole / duct user serves in the NBP IA but NBI would pay for all the incremental investment once the poles / ducts are available for use.

985 This could benefit both Eircom and NBI. For Eircom, the benefits of certainty and the timing of cash flows could be attractive. For NBI there are also benefits. The total payments by NBI could be lower over the lifetime of that contract if it was able to fund / recover the investment at a lower interest rate than the regulated WACC (i.e., the return that Eircom would recover as part of the annualised CEI charge), as long as there is equivalence between the two approaches taking into account the time value of money / inflation.

986 ComReg proposed that any such pricing arrangements (that diverge from the proposed CEI annual charges set out in this Consultation) should be pre-notified to ComReg.

987 ComReg invited the views of respondents (in Question 17 of the CEI Consultation) on the option of Eircom recovering the incremental CEI (duct and pole) investment associated with NBI's MIP as an upfront fee levied on NBI's MIP rather than as a recurring annual charge, as set out in Section 9.3 of the CEI Consultation and as summarised at paragraphs 984-986 above.

### 9.4.2 Respondents' Views and ComReg's Response

988 ComReg received a direct response to Question 17 from four Respondents, namely, Eircom, NBI, BT and ALTO. Vodafone<sup>538</sup>, Virgin Media<sup>539</sup> and Siro<sup>540</sup> stated that they had no comments and Sky did not address the issues raised in Question 17 in their general response.

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<sup>538</sup> Page 9 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>539</sup> Page 6 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>540</sup> Page 7 of Siro's Non-Confidential Response dated 18 November 2020.

989 Eircom suggested that for ducts, trenches, and manholes, it would charge NBI up-front for engineering works required but that for poles Eircom would fund the investment in pole replacement in the IA and for any transit poles that need to be replaced through the ongoing annual charge.<sup>541</sup> Eircom also commented that such upfront charges for duct access should not need to be pre-approved by ComReg.<sup>542</sup> On the other hand, NBI stated that it does not envisage entering into such an arrangement with Eircom at any stage in the immediate future but that it is an option that might be used at some point, and if that were the case then all three parties (Eircom, NBI and DECC) would have to agree to it.<sup>543</sup>

990 ALTO agreed that Eircom and NBI should be given the opportunity to find the most pragmatic approach, subject to informing ComReg and that the approach is compliant.<sup>544</sup> BT questioned that if Eircom is earning an income for its duct and pole network today with its own services, has the upkeep of the duct and pole network not already been paid for in the existing pricing? BT noted that if the duct and pole network is to be improved for NBI then an agreement should be attempted between NBI and Eircom.<sup>545</sup>

### Upfront charges and recurring charges for NBI's MIP

991 According to Eircom, investment in underground assets is driven entirely by NBI requirements and so it is appropriate to recover all duct remediation associated costs up-front.<sup>546</sup> Furthermore, Eircom stated (in response to Question 4) that recovery of the full cost of duct blockage clearance and other remediation up-front is reasonable as NBI is the only operator to benefit from this investment. Eircom also proposed that an alternative to the above is to set all duct costs in the Commercial Areas on a Current Cost Approach (CCA) basis, to reflect the forward looking cost of duct replacement and reinstatement and provide the correct build-buy signal to other operators in respect to NGA deployment without resulting in paying for the required remediation up-front.<sup>547</sup>

992 In response to Eircom's submission ComReg considers that it is reasonable to treat the CEI investments needed to make the network 'NGA ready' as a shared network cost to be recovered from all operators that can potentially benefit from that investment in the long run. Hence, where a number of operators benefit from any such investment (particularly in the case of Generic Access to CEI in the Commercial Areas) then the costs should be amortised across all access seekers as part of a recurring CEI access charges, rather than charged as a one-off cost.

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<sup>541</sup> Paragraphs 334-339 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>542</sup> Paragraph 115 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>543</sup> Page 65 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>544</sup> Page 15 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>545</sup> Pages 15-16 of BT's Non-Confidential Response dated 18 November 2020.

<sup>546</sup> Paragraphs 334-336 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>547</sup> Paragraphs 115-120 of Eircom's Non-Confidential Response dated 18 November 2020.

993 In the case of duct access by NBI's MIP in the Commercial Areas the incremental costs are confined to the costs of sub-duct as it is assumed that other duct related costs are part of the normal network maintenance costs for Eircom, given that it continues to use the network in perpetuity. In the NBP IA, almost all duct related expenditure could be regarded as incremental to NBI's MIP as NBI will ultimately be the only operator that could benefit from this expenditure. In addition, ComReg would expect that the level of shared network costs that would be allocated between duct access users based on the per metre of sub duct approach is likely to be relatively small, and the most significant proportion of duct related costs in the NBP IA in the future should be the incremental costs that arise from Eircom's investments to support NBI's MIP.

994 With regard to pole access by NBI's MIP, Eircom's pole replacement in the Commercial Areas is not expected to be incremental to NBI's MIP access as, even without NBI's MIP, Eircom would still need to replace poles in the Commercial Areas to support its own cable network as it continues to be a network operator in these areas and is likely to continue to be the main user of these assets. However, in the case of the NBP IA, Eircom is expected to replace a significant number of its poles in advance of NBI's fibre deployment. As much of this pole replacement only arises because NBI's MIP is seeking access to Eircom's poles in the NBP IA the associated investment is considered to be incremental to NBI's MIP access in the NBP IA. In addition, there will be shared network costs to be allocated between Eircom and NBI based on a 50/50 split, determined by the per operator plus cost sharing approach.

995 Hence, in the case where the incremental CEI costs are caused directly by NBI's MIP and where no other operator benefits for that investment, ComReg is open to the option of allowing such incremental costs to be paid upfront so long as NBI and Eircom agree to such an arrangement and that it is pre-notified to ComReg. Any remaining shared network costs that exist in the NBP IA would still be recovered from NBI through a reduced recurring charge, based on the number of pole users in the case of poles or based on a per metre of sub-duct or duct in the case of ducts, in the NBP IA. This can be assessed as part of the annual review process discussed in Section 10, when the forecasted information is compared to the actual outturns.

996 Eircom is subject to a transparency obligation pursuant to the 2018 WLA / WCA Market Review Decision<sup>548</sup>, which has been further specified in Section 6 of the Decision Instrument at Annex 1 of this Decision. Hence, Eircom must ensure that any proposed changes to the pricing structure (and prices) for CEI access services by NBI's MIP set out in this Decision are pre-notified to ComReg so that it complies with its pricing notification procedures and obligation of cost orientation. Pre-notification of any such changes ensures that there is transparency (and non-

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<sup>548</sup> Please see Section 10.12 and 10.13 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision.

discrimination) regarding the CEI related prices that Eircom proposes to charge operators for any related CEI activities, as well as allowing for an assessment of compliance with Eircom's cost orientation obligation for CEI access.

997 Separately and in response to Question 7 (on the payment of process costs upfront) NBI sought clarity on the recovery of costs for duct blockages. NBI stated that its arrangement with Eircom is that it compensates Eircom for the cost of clearing all duct blockages but, on the assumption that these costs are catered for within the regulated duct access charge. NBI called on ComReg to satisfy itself that NBI is not paying twice for this same activity and that it would welcome clarification from ComReg on this point and how it proposes to address it within the new price control.<sup>549</sup>

998 In addition, NBI noted that Eircom introduced a price change for duct access charges from 1 July 2020. NBI stated that it took the form of differential discounting based on whether or not duct access was for new build or in-situ sub-duct, where the pricing for in-situ duct had to be less than that offered for new-build sub-duct because it had incurred different costs for each. NBI questioned to what extent this differential duct access pricing is aligned with ComReg's position that the cost of duct access is assumed to include the cost of clearing duct blockages and whether this differential pricing for duct access under its MIP agreement was notified to or approved by ComReg before it took effect on 1 July 2020.<sup>550</sup>

999 This Decision looks only at the CEI pricing regime going forward, and so ComReg has not considered in this Decision any issues raised regarding the existing duct access charges. In addition, the ongoing duct access charges for NBI's MIP set by this Decision (in Section 9.3.2 ) includes the cost of clearing duct blockages as an incremental cost to NBI, and so if NBI pays Eircom upfront for these costs then the ongoing duct access charge should be revised to ensure no double recovery of costs.

### Other issues

1000 BT queried whether the upkeep of the duct and pole network is not already being paid for in the existing prices.

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<sup>549</sup> Page 36 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>550</sup> Pages 36-37 of NBI's Non-Confidential Response dated 18 November 2020.

1001 To clarify, currently WLR is the predominant service sold in the NBP IA and the charges for WLR are largely based on the investments that Eircom has actually incurred. Therefore, the costs of remediating poles and ducts for NBI's CEI access are not included in the existing WLR charges. Other wholesale access charges, such as FTTC based VUA, also include an allowance for the recovery of costs associated with the upkeep of the duct and pole network and these are derived using the same RAB approach as is used to derive the CEI charges for Generic Access users.

### 9.4.3 ComReg's Final Position:

1002 Having considered all of the Respondents' Submissions, ComReg remains of the view that Eircom should have the option to recover the incremental CEI (duct and pole) investment associated with NBI's MIP as an upfront fee levied on NBI's MIP rather than as a recurring annual charge so long as NBI and Eircom agree to such an arrangement and that any such pricing arrangement is pre-notified to ComReg before it enters into force, for the reasons set out above and previously in Section 9.3 of the CEI Consultation.

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# 10 Price control monitoring and implementation

## 10.1 Overview

1003 In this section ComReg sets a number of requirements regarding Eircom's obligation of cost accounting and accounting separation in the context of CEI. In addition, ComReg determines the appropriate price control period for the access prices for Generic Access to CEI and for NBI's MIP access to CEI as well as the annual review process.

1004 In the remainder of this section of the Decision ComReg summarises its preliminary position from the CEI Consultation, considers all Respondents' Submissions and, having regard to these submissions, sets out its final position on the appropriate price control and cost accounting obligations, under the following headings:

- (a) Cost accounting and accounting separation obligations;
- (b) Annual CEI statement;
- (c) Price control period; and
- (d) Annual review process.

## 10.2 Cost accounting and accounting separation obligations

### 10.2.1 Position set out in the Consultation:

1005 In Section 10.1.1 of the CEI Consultation ComReg set out Eircom's existing obligations from the 2018 WLA / WCA Market Review Decision i.e., the obligation to maintain appropriate cost accounting systems<sup>551</sup> and the obligation of accounting separation on Eircom in the WLA Market<sup>552</sup>, the detailed nature of which is set by reference to ComReg Decision D08/10 (the '**2010 Accounting Separation Decision**').<sup>553</sup>

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<sup>551</sup> Section 12.1 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision.

<sup>552</sup> Section 11 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision.

<sup>553</sup> Response to Consultation, and Final Decision: Accounting Separation and Cost Accounting Review of Eircom Limited, ComReg Document 10/67, dated 31 August 2010.



- 1006 In the CEI Consultation ComReg recognised that obligations to maintain appropriate cost accounting systems generally support price control obligations (as well as accounting separation) and can also assist ComReg in monitoring compliance with the obligation of non-discrimination.<sup>554</sup>
- 1007 ComReg considered that Eircom's application of its cost accounting obligation and accounting separation obligation in respect of specific CEI costs should be discussed between ComReg and Eircom as part of the annual review process for Eircom's HCAs.<sup>555</sup> ComReg recognised that the expected increase in the uptake of CEI services (by NBI's MIP) from Eircom may require some revisions to how Eircom reports CEI costs and revenues as part of Eircom's HCAs (or Separated Accounts).
- 1008 In particular, the expected scale of CEI access required as part of NBI's MIP could, in future years, result in the majority of Eircom's pole network and a significant proportion of its underground duct network being used primarily to support CEI access for NBI's MIP service (especially in the NBP IA). Consequently, ComReg considered in the CEI Consultation that it is necessary to report ducts and poles as separate network elements within the Statement of Network Costs in Eircom's HCAs. ComReg believed that this should provide greater transparency in the HCAs and in particular give visibility on whether there is a non-discriminatory allocation of the associated CEI costs to the appropriate markets and services. Hence, ComReg proposed that Eircom should separately identify CEI costs incurred for the purposes of NBI's MIP both in the Commercial Areas and in the NBP IA, separate to the costs incurred in facilitating Generic Access to CEI in the same areas, in its cost accounting systems.
- 1009 ComReg also considered in the CEI Consultation that, as CEI take-up increases, Eircom should develop a separate Income Statement and Statement of Capital Employed for CEI and that ComReg would intend to engage with Eircom on the approaches to cost allocation and reporting that should support the preparation and audit of such statements. Given that NBI's MIP is expected to give rise to significant demand for CEI access for the duration of the NBI contract and beyond, it should be possible for Eircom to establish processes that will facilitate the harvesting, analysis and reporting of the necessary data to comply with the necessary reporting obligations without imposing an undue burden on Eircom.
- 1010 In the case where pole furniture is charged as a one-off charge, ComReg proposed in the CEI Consultation that Eircom should separately identify the costs associated with pole furniture from other pole related costs in its cost accounting systems.

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<sup>554</sup> As further explained in paragraphs 7.1393 and 7.1394 of the 2018 WLA / WCA Market Review Decision.

<sup>555</sup> Please see paragraph 7.1347 of the 2018 WLA / WCA Market Review Decision.

1011 ComReg also noted that if Eircom and NBI agreed that some elements of duct remediation and clearance that is undertaken to support NBI's MIP cable deployments in the NBP IA be paid for on an upfront basis rather than as part of an ongoing duct charge, that Eircom would need to account for the associated expenditure as an 'operating cost', possibly under a "Repayable Works Order" rather than capitalising it against a duct asset class. This would facilitate the reporting of these types of costs against the appropriate revenue stream and also minimise any potential risk of double recovery in the future. Even if the costs are to be capitalised and recovered as part of the duct charge to NBI's MIP, ComReg was of the view that consideration should be given to the determination of a separate duct asset class for NBI's MIP specific costs.

1012 ComReg invited the views of respondents (in Question 18 of the CEI Consultation) on the proposal that Eircom should develop its cost accounting systems and its HCAs so that CEI costs can be reported in a transparent and meaningful way and that Eircom should separately identify the costs associated with pole furniture from other pole related costs in its cost accounting systems.

### 10.2.2 Respondents' Views and ComReg's Response:

1013 ComReg received a direct response to Question 18 from seven Respondents, namely, Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. Sky did not address the issues raised in Question 18 in its general response.

1014 NBI<sup>556</sup>, BT<sup>557</sup>, Vodafone<sup>558</sup>, Virgin Media<sup>559</sup>, Siro<sup>560</sup> and ALTO<sup>561</sup> agreed that Eircom should develop its cost accounting systems and its HCAs so that CEI costs can be reported in a transparent and meaningful way, although NBI claimed that ComReg's proposals are not sufficient enough to enable the costs and returns relating to Eircom's CEI to be reported in a meaningful way.<sup>562</sup>

1015 Eircom suggested discussing the relevant requirements with ComReg<sup>563</sup> and it claimed that "significant off-line calculations and manipulation of data" will be required to provide a geographically split Income Statement<sup>564</sup> and that the data may be better reported as an AFI rather than in the HCAs<sup>565</sup>.

1016 On ComReg's proposal to separately identify the costs associated with pole furniture from other pole related costs in its cost accounting systems, Eircom,

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<sup>556</sup> Page 66 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>557</sup> Page 16 of BT's Non-Confidential Response dated 18 November 2020.

<sup>558</sup> Page 9 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>559</sup> Page 6 of Virgin Med

<sup>560</sup> Page 8 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>561</sup> Page 16 of ALTO's Non-Confidential Response dated 18 November 2020

<sup>562</sup> Page 66 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>563</sup> Paragraph 340 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>564</sup> Paragraph 345 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>565</sup> Paragraph 347 of Eircom's Non-Confidential Response dated 18 November 2020

Vodafone, BT, ALTO and Siro provided comments. Vodafone<sup>566</sup>, BT<sup>567</sup>, ALTO<sup>568</sup> and Siro<sup>569</sup> agreed with ComReg while Eircom referred to its position at Question 15 (on pole furniture) where it considered that a one-off pole furniture charge to recover the cost of the removal and replacement of pole furniture is not necessary. BT commented that it assumed the pole furniture costs are the costs associated with Eircom's work on these assets during pole replacement and that those are the costs that ComReg is seeking to isolate within the cost accounting system<sup>570</sup>, which ComReg can confirm is accurate.

### Granularity of CEI information

- 1017 Eircom claimed that it may be possible to categorise CEI according to costs in Commercial Areas and NBP IA but that the national costs in the cost models would need to be examined further and significant off-line calculations and manipulation of data would be required which they claim will take a large amount of man-hours.<sup>571</sup> Furthermore, Eircom submitted that this would be on a best efforts basis and it would have to meet the relevant audit standard, which has yet to be determined.<sup>572</sup> Eircom also submitted that ComReg must ensure that its regulatory decisions are proportionate and they do not result in undue regulatory burden, which it claims that it cannot comment further on in the absence of discussing and understanding this issue further with ComReg.<sup>573</sup>
- 1018 NBI suggested that the information within Eircom's Financial Statements relating to CEI should separately identify revenue, operating cost, return, percentage return on turnover, mean capital employed, and ROCE at a summary level and volume, average revenue, FAC unit cost and the ratio average revenue / cost for each product.<sup>574</sup>
- 1019 In response, ComReg considers that it is premature to specifically set out in detail the application of the cost accounting obligation and accounting separation obligation in respect of specific CEI costs. Instead, ComReg considers that this should be dealt with by ComReg and Eircom as part of the HCA annual review process referred to paragraph 1007.
- 1020 However, at a minimum ComReg considers that given the expected increase in the uptake of CEI services by NBI's MIP, Eircom should separately identify CEI costs incurred for the purposes of NBI's MIP both in the Commercial Areas and in the NBP IA, separate to the costs incurred in facilitating Generic Access to CEI in

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<sup>566</sup> Page 9 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>567</sup> Page 16 of BT's Non-Confidential Response dated 18 November 2020.

<sup>568</sup> Page 16 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>569</sup> Page 8 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>570</sup> Page 16 of BT's Non-Confidential Response dated 18 November 2020.

<sup>571</sup> Paragraph 345 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>572</sup> Paragraph 346 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>573</sup> Paragraph 348 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>574</sup> Page 66 of NBI's Non-Confidential Response dated 18 November 2020.

the same areas, in its cost accounting systems. In addition, Eircom should develop a separate Income Statement and Statement of Capital Employed for CEI. ComReg will engage with Eircom on the approaches to cost allocation and reporting that should support the preparation and audit of such statements. These statements will be assessed as part of the annual review discussions between ComReg and Eircom on the HCAs. Given that NBI's MIP is expected to give rise to significant demand for CEI access for the duration of the NBI contract and beyond, it should be possible for Eircom to establish processes that will facilitate the harvesting, analysis and reporting of the necessary data to comply with the necessary reporting obligations without imposing an undue burden on Eircom.

1021 The cost accounting information also needs to reflect the structure of CEI charges and how cost allocations need to evolve as the level of CEI Access grows and copper-based services are migrated onto FTTH in advance of copper switch-off. ComReg has highlighted the need to separately identify the costs associated with pole furniture from other pole related costs in its cost accounting systems, but other sub-sets of CEI may also need to be isolated. For example, ComReg are aware that Eircom already isolate the costs of sub duct in the cost accounting analysis it uses to prepare the HCA Separated Accounts, in recognition of the fact that sub duct is used for fibre cables and is therefore not relevant to copper access. Similarly, the cost of other CEI related network elements, such as street side cabinets that are only used by Eircom's copper-based services and are not relevant to the costs of duct access, may also warrant further analysis depending on the materiality of the residual costs. Therefore, ComReg intend to explore this issue further with Eircom and its auditors as part of the tripartite engagements that support the preparation and production of the HCAs (also referred to as the Separated Accounts).

### Providing CEI costing information as part of Eircom's HCAs

1022 Eircom suggested that "...the information may be better reported to ComReg as part of an AFI and not form part of the HCAs." Eircom stated that "...it does not consider it appropriate that this level of granular information is made public. As CEI is based on a combination of future and historic cost inputs a public Income Statement for CEI serves no purpose from a transparency, pricing or non-discrimination perspective and will only add to existing confusion". Eircom suggested that "...before agreeing to its inclusion in the HCA, eir will also need to engage with its Auditor to ascertain whether the proposed network studies and cost allocations are sufficiently robust and sufficiently accurate to achieve a fairly presents audit opinion as per D08 / 10."<sup>575</sup>

1023 ComReg does not agree with Eircom. ComReg considers that publication of the CEI information in the HCAs, is justified and proportionate given the significant investment in CEI signalled by Eircom, particularly for NBI's MIP access in the NBP

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<sup>575</sup> Paragraph 347 of Eircom's Non-Confidential Response dated 18 November 2020.

IA, and the need to facilitate transparency and help monitor cost recovery across services including by providing visibility on whether there is a non-discriminatory allocation of the associated CEI costs to the appropriate markets and services.

### 10.2.3 ComReg's Final Position:

1024 Having considered the Respondents' Submissions, and for the reasons set out above and previously in Section 10.1.1. ComReg remains of the view that Eircom should develop its cost accounting systems and HCAs so that CEI costs can be reported in a transparent and meaningful way, including the provision of poles and ducts as separate network elements in the Statement of Network Costs in Eircom's HCAs. In addition, Eircom should ensure that the CEI costs incurred are identified for the purposes of NBI's MIP both in the Commercial Areas and in the NBP IA, and separately the costs incurred in facilitating Generic Access to CEI in the same areas, in its cost accounting systems. In addition, Eircom should develop a separate Income Statement and Statement of Capital Employed for CEI. The details should be determined as part of the current annual review process (between Eircom and ComReg) pursuant to the 2010 Accounting Separation Decision.<sup>576</sup>

1025 Publication of the CEI information in the HCAs is justified and proportionate given the significant investment in CEI likely by Eircom, particularly for NBI's MIP access in the NBP IA, and the need to facilitate transparency and help monitor cost recovery across services.

1026 In addition, given that ComReg concluded in Section 8 that the cost of removal and replacement of a pole with pole furniture should be charged upfront, ComReg considers that Eircom should identify the costs associated with pole furniture separately from other pole related costs in its cost accounting systems. Accordingly, Eircom shall separately identify the costs associated with pole furniture from other pole related costs in its cost accounting systems.

## 10.3 Annual CEI statement

### 10.3.1 Position set out in the Consultation:

1027 In the CEI Consultation ComReg noted the obligation from the 2018 WLA / WCA Market Review Decision which requires Eircom to provide ComReg with an annual poles statement on its investment in poles no later than seven months after its financial year end.<sup>577</sup>

1028 In the CEI Consultation ComReg proposed that Eircom should continue to provide an annual statement for pole investments but that this process should also

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<sup>576</sup> As noted at paragraph 7.1347 of the 2018 WLA / WCA Market Review Decision.

<sup>577</sup> Section 12.8 of the Decision Instrument at Appendix 20 of the 2018 WLA / WCA Market Review Decision.

be extended to include duct investment by Eircom. In addition, ComReg proposed that, as Eircom is expected to carry out significant investment in poles and ducts in the NBP IA in order to make its network 'NGA ready', the annual CEI statement should make a distinction between pole and duct investment in the NBP IA compared to investment in poles and ducts in the Commercial Areas.<sup>578</sup>

1029 In the case of poles and ducts, ComReg proposed in the CEI Consultation that Eircom should submit annually to ComReg, and at the same time publish on its website, a statement including:

- (a) The actual number of poles and duct deployed and the corresponding capital expenditure for each during the respective financial year, disaggregated between the NBP IA and the Commercial Areas, in line with the templates set out in Annex 5 and Annex 6 of the CEI Consultation.
- (b) Confirmation on whether the forecasted number of poles and ducts for subsequent years remains appropriate, in line with the template set out in Annex 5 and Annex 6 of the CEI Consultation.

1030 ComReg also proposed that the annual statements for poles and ducts should be provided in accordance with the existing procedures which govern the provision of Additional Financial Information ('AFI') contained in the Decision Instrument annexed to the 2010 Accounting Separation Decision and should be provided no later than seven months after the end of Eircom's financial year. ComReg also proposed that the annual statement should be published on Eircom's website, in order to provide transparency to other interested parties.

1031 ComReg invited the views of respondents (in Question 19 of the CEI Consultation) on the proposal that Eircom should provide ComReg with an annual statement of the actual and forecasted investment in ducts and poles for both the NBP IA and the Commercial Areas, in line with the templates contained in Annex 5 and Annex 6 of the CEI Consultation and that Eircom should publish them on its website.

### 10.3.2 Respondents' Views and ComReg's Response

1032 ComReg received a direct response to Question 19 from seven Respondents, namely, Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. Sky did not address the issues raised in Question 19 in its general response.

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<sup>578</sup> The requirement to disclose the poles and duct broken down by the NBP IA and Commercial Areas seems sufficient to allow for visibility of NBI's MIP investments. Eircom should always ensure that the information related specifically to NBI's MIP is visible in the poles and ducts annual statements.

1033 The majority of Respondents, including Eircom<sup>579</sup>, NBI<sup>580</sup>, BT<sup>581</sup>, ALTO<sup>582</sup>, Virgin Media<sup>583</sup> and Siro<sup>584</sup>, agreed that Eircom should provide the annual statements of CEI investment to ComReg. However, Eircom and NBI raised concerns on the level of detail to be provided in the statements and NBI also took issue with provision of the data in the form of an AFI, as discussed further below.

1034 On the proposal to publish the annual statements on Eircom's website, Eircom, NBI, Siro and Vodafone provided a response. Siro<sup>585</sup> and Vodafone<sup>586</sup> agreed with ComReg while NBI<sup>587</sup> and Eircom<sup>588</sup> disagreed.

### Content of the CEI annual statements

1035 Eircom claimed that duct information is more difficult to project with accuracy in the IA. Eircom commented that it is not clear why a separate category for "...remediated for other network operational reasons" is required in both Annex 5 and Annex 6 of the CEI Consultation, as the replacement of the CEI is captured under the first heading "*Replacement of poles for Pole access*" (in the case of poles) and under "*Remediation of ducts for Sub duct access*" (in the case of ducts). Eircom requested ComReg to identify the nature of the problem it is trying to address by this reporting information.<sup>589</sup>

1036 Eircom also considered that where the CEI remediation in respect to ducts is being paid in advance by NBI, it is unclear whether this level of detail is actually required for the IA. Eircom suggested that "*Additional regulatory oversight is not required and it is questionable what benefit undue regulatory reporting of such investment brings to the regulatory price path*", and that "*Any reporting obligations that NBI has with the Irish Government as part of its contract are matters for it to discharge and cannot be delegated through SMP remedies on air.*"<sup>590</sup>

1037 In response to Eircom's submission, ComReg recognises that Eircom currently does not have complete data on its duct infrastructure, but ComReg considers that Eircom is now in a position to capture more accurate and complete data as it deploys its own fibre access network and it addresses the duct access requirements from other operators such as NBI. ComReg also acknowledges Eircom's point that the future charges for duct in the NBP IA will not be material if NBI is charged upfront for the cost of duct remediation in the NBP IA, as Eircom will have already recovered

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<sup>579</sup> Paragraph 350 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>580</sup> Page 68 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>581</sup> Page 17 of BT's Non-Confidential Response dated 18 November 2020.

<sup>582</sup> Page 16 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>583</sup> Page 6 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>584</sup> Page 8 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>585</sup> Page 8 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>586</sup> Page 10 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>587</sup> Page 69 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>588</sup> Paragraph 353 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>589</sup> Paragraphs 350-351 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>590</sup> Paragraph 352 of Eircom's Non-Confidential Response dated 18 November 2020.

all of its incurred duct investments. In such an event, there may be limited benefit to stakeholders in publishing details of the costs and revenues associated with NBIs MIP access for duct in Eircom's HCAs, but the cost accounting process should still allow ComReg to monitor Eircom's obligations and ensure that the associated expenditures and revenues are being recorded correctly and reported in the correct statements.

1038 However, ComReg considers that the revenues and costs associated with pole access charges in the NBP IA are expected to be material for the duration of the contract, and so an accurate view of the associated inventory, costs and revenues can provide assurance to interested parties of the scale of the project and that there is no over or under-recovery of costs. In addition, the obligation on Eircom to provide CEI annual statements helps ComReg to monitor Eircom's cost orientation obligation for CEI, while also supporting continued investment by Eircom in its existing access network. ComReg does not intend to publish any information that is commercially sensitive or confidential and will follow its guidelines on the treatment of confidential information set out in ComReg Document 05/24.

1039 NBI claimed that the information in the templates (at Annex 5 and Annex 6 of the CEI Consultation) is not sufficient to provide the "*...level of transparency that is required on the returns Eircom makes from the CEI access products it makes available.*"<sup>591</sup> NBI also suggested that statements at Annex 5 and 6 should include data for the current and prior accounting year so that large movements can be highlighted and that the three-year forecast data should be presented alongside the current year and prior year.<sup>592</sup>

1040 ComReg considers that the current practice of providing prior year comparisons in the HCAs should be maintained for the CEI annual statements, as this allows an assessment of year on year trends and can also indicate the impact that any changes in the cost allocation methods that were introduced in the current year would have had on the prior year results. However, ComReg does not consider that it is appropriate to include forecasts in the HCAs.

### **Publication of the CEI annual statements**

1041 Eircom submitted that ComReg must take into account that there are other infrastructure-based operators in the market. As the relevant contractor rates associated with these investments are largely based on external negotiated commercial contracts, it would be wholly inappropriate from a commercial law perspective to make such information public.<sup>593</sup> Eircom stated that it agrees to continue to provide information bilaterally to ComReg but that ComReg must take into account that some compromise may be required as to the level of information

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<sup>591</sup> Page 68 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>592</sup> Page 69 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>593</sup> Paragraph 353 of Eircom's Non-Confidential Response dated 18 November 2020.



it can provide.<sup>594</sup>

1042 NBI also questioned why this information should be published on Eircom's website and suggested it may be more appropriate that this information is shared with both ComReg and with the users of Eircom's CEI rather than being placed in the public domain before either ComReg or users of regulated access services can see it.<sup>595</sup>

1043 ComReg accepts that Eircom's contractor rates constitute confidential sensitive information, in light of the level of aggregation (or accumulation) of the information specified in Annex: 4 and Annex: 5 no issue arises from publication as the contractor rates would not be identifiable. ComReg considers that the requirement to publish the CEI annual statements is justified on the basis that given the substantial nature of the investments required in CEI, particularly in the NBP IA, it is important that there is sufficient transparency on the spend by Eircom on CEI so as to provide assurances that there is no over-recovery of costs, to all relevant stakeholders.

### Other issues

1044 NBI commented that ComReg has not set out a clear rationale as to why the information it is proposing to seek from Eircom should be supplied by way of AFI or why this information should be provided by way of an unaudited statement. NBI suggested that it may be more appropriate to have this information audited to a defined standard prior to its submission to ComReg.<sup>596</sup>

1045 To clarify, the existing annual statement for Eircom's pole investments has been provided by Eircom to ComReg by way of an AFI since the 2016 Access Pricing Decision. The AFI procedure, as set out in paragraph 3.68 of the 2010 Accounting Separation Decision, allows for a further level of disaggregation of information, beyond what is provided in the published HCAs.

1046 Eircom's AFI is not subject to an audit and the fact that the AFI can include forecast information means that there can be issues in terms of what audit opinion might apply to some elements of the AFI. Nonetheless, ComReg may require Eircom on an ad hoc basis to obtain an appropriate audit opinion (e.g., "properly prepared in accordance with" audit opinion) on certain services and products.<sup>597</sup> However, presently ComReg does not consider that this is appropriate or justified at this point given that a large part of those investments in CEI has yet to take place and Eircom has yet to harvest, analyse and report the necessary CEI data. Instead, ComReg will as part of the annual review process between ComReg and Eircom decide if and when an audit opinion might be required on certain aspects of Eircom's

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<sup>594</sup> Paragraph 355 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>595</sup> Page 69 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>596</sup> Pages 68-69 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>597</sup> Please see paragraphs 4.73-4.75 of the 2010 Accounting Separation Decision.

HCAAs.

### 10.3.3 ComReg's Final Position

1047 Having considered all of the Respondents' Submissions and taking into account the 2010 Accounting Separation Decision, ComReg considers that Eircom should provide ComReg with the annual CEI investment statements for the reasons set out above and previously at Section 10.1.2 of the CEI Consultation. In addition, Eircom should publish the CEI annual statements on its website.

1048 In the case of poles and ducts, Eircom shall submit to ComReg, and at the same time publish on its website, a statement including:

- (a) The actual number of poles and length of duct (in kilometres) deployed and the corresponding capital expenditure for each during the respective financial period, disaggregated between the NBP IA and the Commercial Areas, in line with the templates set out in Annex: 4 and Annex: 5 of this Decision. This information will allow ComReg to compare the pole investment assumptions in the PAM and the duct investments in the DAM with the actual investments being made by Eircom.
- (b) Confirmation on whether the forecasted number of poles and length of duct (in kilometres) for subsequent years remains appropriate, in line with the template set out in Annex: 4 and Annex: 5 of this Decision. Where this is not the case, Eircom shall provide an update on the revised forecasts as part of the annual duct and pole statements.

1049 The annual statements for poles and ducts shall be provided in accordance with the existing procedures which govern the provision of AFI contained in the Decision Instrument annexed to the 2010 Accounting Separation Decision and shall be provided no later than seven months after the end of Eircom's financial period. Please refer to Annex: 4 for the template of the annual pole statement and Annex: 5 for the template of the annual duct statement, to be provided by Eircom to ComReg as part of the annual AFI statements.

## 10.4 Price control period

### 10.4.1 Position set out in the Consultation

1050 ComReg proposed that the prices for Generic Access to CEI calculated on the basis of the PAM and DAM at the date of ComReg's final decision be fixed per year for a period of five years, subject to Eircom's obligation of cost orientation continuing for that period. ComReg also considered that if there were any significant changes to CEI costs and/or to the WACC during that time, ComReg would rely on Regulation 13(4) of the Access Regulations to assess adjustments required and

issue directions to Eircom as and if required. On the expiry of the five year period, again subject to Eircom's obligation of cost orientation continuing, ComReg proposed that Eircom would be required to derive cost oriented prices on the basis of the PAM and DAM.

1051 ComReg invited the views of respondents (in Question 20 of the CEI Consultation) on the proposal that the prices for Generic Access to CEI should be directed for five years.

#### 10.4.2 Respondents' Views and ComReg's Response:

1052 ComReg received a direct response to Question 20 from six Respondents, namely, Eircom, NBI, BT, Virgin Media, Siro and ALTO. Vodafone stated that they had no comments<sup>598</sup> and Sky did not address the issues raised in Question 20 in its general response.

1053 NBI<sup>599</sup>, BT<sup>600</sup>, ALTO<sup>601</sup> and Siro<sup>602</sup> agreed with ComReg's proposal that the prices for Generic Access to CEI should be directed for five years. Virgin Media considered that the prices could be set for five years but they should be reviewed annually similar to the review process for NBI's MIP prices.<sup>603</sup> Eircom disagreed with ComReg on the basis that the directed prices go beyond the market review period or current price control period.

#### Directing prices beyond the Market Review

1054 Eircom considered that directing prices for Generic Access to CEI beyond the market review period or current price control period is neither proportionate nor justified. However, it did acknowledge that "*...some certainty is required regarding the long-term pricing of CEI.*"<sup>604</sup> Eircom also commented that "*... all recent Market Review Decisions in the last 10 years have been delayed where the pricing remedies have been imposed in perpetuity or where the regulatory price path is beyond the market review period*" and that it is concerned that the specification of the prices for CEI access beyond the market review and price control period will result in similar delays with regard to the upcoming review of the WLA/WCA markets.<sup>605</sup>

1055 ComReg has determined in this decision (at Section 9) the prices for Generic Access to CEI for each year for a period of five years, but this is predicated on Eircom's obligation of cost orientation continuing for that period. Hence, this

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<sup>598</sup> Page 10 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>599</sup> Page 70 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>600</sup> Page 17 of BT's Non-Confidential Response dated 18 November 2020.

<sup>601</sup> Page 17 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>602</sup> Page 8 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>603</sup> Page 6 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>604</sup> Paragraph 357 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>605</sup> Paragraph 358 of Eircom's Non-Confidential Response dated 18 November 2020.

decision provides certainty to the industry on the prices for Generic Access to CEI prices over the next five years but it also recognises that any changes to Eircom's regulatory obligations as a result of the outcome of any related market review process during that period would be fully taken into account by ComReg. ComReg has considered Eircom's general point on the need for a new market review at Section 3.

### Annual review of prices for Generic Access to CEI

1056 Virgin Media suggested that a review of the prices for Generic Access to CEI should occur annually and the prices should be updated immediately once a decision is made.<sup>606</sup>

1057 ComReg is mindful that predictability of pricing is an important aspect of creating the right environment for all operators to make investment decisions. Consequently, ComReg will generally avoid intervening within a price control period where it has mandated specific prices unless circumstances are materially different from those envisaged at the time of the pricing decision or exceptional circumstances have otherwise arisen. In the case of Generic Access to CEI it is not expected that there will be significant changes to CEI costs for Generic Access. However, in comparison, an annual review of NBI's MIP prices is necessary given the significant investments required and the associated uncertainties with it and so there could be material differences between actual and forecasted costs that need to be reflected by way of updated prices.

1058 In the case of Generic Access to CEI, if there is evidence of a sufficiently material change in modelled costs as a result of changes to the model or changes to inputs such as costs and/or volumes or the WACC itself or other exceptional circumstances, ComReg may, in accordance with Regulation 13(4) of the Access Regulations, request Eircom to review the basis for the existing prices and determine whether any changes to the prices are required.

### 10.4.3 ComReg's Final Position

1059 Having considered all of the Respondents' Submissions for the reasons set out above and at Section 10.2.1 of the CEI Consultation, ComReg remains of the view that the prices charged by Eircom for Generic Access to CEI shall be set based on the PAM and DAM and fixed per year for a period of five years, subject to Eircom's obligation of cost orientation continuing for that period. Were there any significant changes to CEI costs and/or to the WACC during that time resulting in a material impact on costs, ComReg may rely on Regulation 13(4) of the Access Regulations to assess adjustments required and issue directions to Eircom as and if required.

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<sup>606</sup> Page 6 of Virgin Media's Non-Confidential Response dated 18 November 2020.

## 10.5 Annual review process for NBI's MIP CEI prices

### 10.5.1 Position set out in the Consultation

1060 In the CEI Consultation ComReg proposed that on an annual basis Eircom should review the [Draft] PAM and [Draft] DAM, as a means of ensuring Eircom's compliance with its cost orientation obligation in relation to the CEI prices for NBI's MIP. ComReg noted that given the significance of NBI's access to Eircom's CEI and the magnitude of the investment required in CEI by Eircom to facilitate that access, especially in the NBP IA, it is important that the costs, assumptions and parameters used in the [Draft] PAM and [Draft] DAM are reviewed by Eircom on an annual basis to ensure that the CEI prices for NBI's MIP appropriately reflect the actual level of expenditure that takes place by Eircom. The draft NBI MIP prices are dependent on a number of key assumptions including the level of pole replacement or duct renewal undertaken by Eircom and the associated cost, the customer take-up of NBI's fibre service in the IA, including the timing of the eventual withdrawal of Eircom's copper network. As part of Eircom's annual review process, ComReg proposed that the key assumptions used to derive the indicative MIP prices in the PAM and DAM should be compared to the actual outcomes, by Eircom.

1061 ComReg considered that this review would include assessment of the actual expenditure incurred by Eircom in the context of NBI's MIP access consistent with the details provided in the annual duct and pole statements as well as an update for the most recent WACC rate applicable to CEI access services. ComReg also considered in the CEI Consultation that if Eircom's actual costing / volumes information for poles and ducts for NBI's MIP is significantly different to the assumptions and forecasts in the [Draft] PAM and ducts provisioned in the [Draft] DAM, then such differences need to be reflected and updated in the [Draft] PAM and [Draft] DAM as part of Eircom's annual review. Such updates to the [Draft] PAM and [Draft] DAM, which form the basis for the calculation of the annual ongoing charges, may result in changes to prices for NBI's MIP access to CEI going forward. However, ComReg pointed out that where material differences are noted by way of the review of the [Draft] PAM and [Draft] DAM, a more detailed assessment may be necessary to assess historic data and forecasted data on expenditure and CEI take-up.

1062 In addition, ComReg proposed that Eircom should provide a 'CEI Statement of Compliance' demonstrating Eircom's compliance with its cost orientation obligation for its CEI annual charges relating to NBI's MIP. ComReg considered that the CEI Statement of Compliance should consider the contents of the annual statements for poles and duct as well as the review of the [Draft] PAM and [Draft] DAM and demonstrate Eircom's compliance with its cost orientation obligation regarding its CEI annual charges to NBI's MIP. ComReg proposed that the CEI Statement of Compliance should include the following:

- (a) The details of Eircom's review of the [Draft] PAM and [Draft] DAM and what changes have been made to the inputs and variables, including where appropriate an explanation for any material variances;
- (b) Confirmation of whether changes are required to the annual CEI prices for NBI's MIP and a proposal on what these new revised prices should be; and
- (c) Any other information that Eircom considered relevant to its demonstration of compliance with its cost orientation obligation.

1063 ComReg proposed that Eircom should submit the updated [Draft] PAM and [Draft] DAM and the CEI Statement of Compliance to ComReg, no later than seven months after the end of its financial period. ComReg proposed that it would review the CEI Statement of Compliance provided by Eircom (with the annual statements for poles and ducts and any updates to the [Draft] PAM and [Draft] DAM). ComReg proposed that it would assess the information and the materiality of any proposed changes by Eircom in relation to the CEI annual charges for NBI's MIP.

1064 ComReg considered that where changes to prices are justified in order to ensure compliance with Eircom's cost orientation obligation, then any changes should be implemented by Eircom, Eircom having published the prices in accordance with the requirements set out in Section 6 of the Decision Instrument in Annex 1 of this Decision whereby any price changes to existing or new CEI products, services or facilities require publication on Eircom's public website at least two months in advance of those prices becoming effective. ComReg also recognised in the CEI Consultation that given the time lag in obtaining actual accounting information, any changes to prices relating to NBI's MIP would not be reflected in the prices before the start of financial year 3 of NBI's MIP. For that reason, ComReg proposed that the prices for Year 1 and Year 2 of the price control would be the prices as produced by the PAM and DAM at the date of the Decision, with any adjustments required materialising in respectively Year 3 and Year 4 prices.

1065 ComReg was of the view in the CEI Consultation that the proposed measures were proportionate given the significant volume of CEI that Eircom will provide to NBI's MIP, particularly in the NBP IA. ComReg noted that the annual review process should also provide certainty to Eircom in terms of its cost recovery expectations as Eircom can expect that if it invests in CEI in an efficient manner then the CEI annual prices will take account of this investment to allow it to recover the investments actually made in CEI (including expenditure on the associated cost accounting obligations), while other stakeholders can be assured that there is no over-recovery of such investments.

1066 ComReg invited the views of respondents (in Question 21 of the CEI Consultation) on the proposed price control application and the annual review

process, regarding CEI access by NBI's MIP.

### 10.5.2 Respondents' Views and ComReg's Response:

1067 ComReg received a direct response to Question 21 from five Respondents, namely, Eircom, NBI, BT, Virgin Media and ALTO. Siro and Vodafone stated that they had no comments and Sky did not address the issues raised in Question 21 in its general response.

1068 NBI<sup>607</sup>, BT<sup>608</sup> and ALTO<sup>609</sup> agreed with the proposed price control application and the annual review process for NBI's MIP prices for CEI access, although NBI considered that the updates to the PAM and DAM models should be undertaken by ComReg and NBI suggested that it should be involved in the annual review process. Eircom agreed in part with the price control application<sup>610</sup> but raised concerns around the use of Regulation 13(4) of the Access Regulations to direct prices without following consultation procedures<sup>611</sup>, the need to realign prices every three years<sup>612</sup> and their view that the administrative burden and regulatory process for updating regulated service prices is higher under the per customer approach<sup>613</sup>. Virgin Media commented that the annual review should cover both the CEI prices for NBI's MIP and for Generic Access users<sup>614</sup>, which ComReg has addressed at paragraph 1057.

#### Annual review process

1069 NBI submitted that the updates to the PAM and DAM models should be undertaken by ComReg, and not by Eircom, and that NBI should be involved in the annual review process.<sup>615</sup> ComReg also noted NBI's submission to Question 12 (on active customer lines) where it commented that any data provided by NBI through a Section 13D request would only be deliverable to ComReg and should not be disclosed to Eircom as part of updates to the CEI models.<sup>616</sup>

1070 In response to NBI's point, ComReg remains of the view that Eircom should carry out the annual review of the PAM and DAM. The obligation of cost orientation resides with Eircom and as the SMP operator it is best placed to assess its actual financial information against the forecasts and assumptions used in the PAM / DAM. Given the significance of NBI's MIP access to Eircom's CEI and the magnitude of the investments required in CEI by Eircom to facilitate that access, especially in the

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<sup>607</sup> Page 71 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>608</sup> Page 18 of BT's Non-Confidential Response dated 18 November 2020.

<sup>609</sup> Page 17 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>610</sup> Paragraph 363 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>611</sup> Paragraph 365 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>612</sup> Paragraphs 366-367 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>613</sup> Paragraphs 369-371 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>614</sup> Page 7 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>615</sup> Page 71 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>616</sup> Pages 53-54 of NBI's Non-Confidential Response dated 18 November 2020.

NBP IA, it is important that the costs, assumptions and parameters used in the PAM and DAM are reviewed by Eircom annually to ensure that the CEI prices for NBI's MIP appropriately reflect the actual level of expenditure that takes place by Eircom. ComReg considers that this approach ensures that Eircom continues to assess its ongoing cost orientation obligation for its CEI access services, pursuant to the 2018 WLA / WCA Market Review Decision and as further specified in this Decision. This review process also coincides with Eircom's requirement to provide a statement of compliance to ComReg to demonstrate its compliance with its cost orientation obligation for CEI.

- 1071 Eircom's review should include assessment of the key assumptions in the PAM / DAM, including the level of pole replacement or duct renewal undertaken by Eircom and the associated costs as well as the timing of the eventual withdrawal of Eircom's copper network, against the actual outcomes. Eircom's review should also include assessment of the actual CEI expenditure incurred by Eircom in the context of NBI's MIP access consistent with the details provided in the annual duct and pole statements as well as an update for the most recent WACC rate applicable to CEI access services. The review should include an assessment of the actual year to date capital records from Eircom's FAR for the asset classes relevant to CEI access, the operating costs incurred with respect to management and maintenance activities, updates to labour and material costs for pole replacements or duct renewal capital activities.
- 1072 ComReg acknowledges that it may be beneficial to gather certain information from NBI's MIP as part of the annual review process. As noted by NBI, NBI could provide information such as pole replacement rates and the amount of ducts cleared, which could be used to cross-check against information supplied by Eircom. ComReg will consider as part of the annual review process what relevant information could be provided by NBI.
- 1073 In addition, ComReg expect, at least in the initial years of the annual review process, to engage with Eircom so as to ensure that the PAM/DAM models are appropriately updated with their latest information and to address any queries that may arise as part of the process.
- 1074 ComReg's role in the annual review process is to assess and review the information provided by Eircom in its annual submission i.e., the updated PAM and DAM and the CEI Statement of Compliance and to determine whether changes proposed by Eircom are justified based on the information provided and in light of Eircom's obligation of cost orientation for CEI. In the future, ComReg may also consider whether certain CEI financial information provided by Eircom as part of its cost accounting obligations should be part of the scope of the annual audit so as to provide a level of assurance on the actual spend by Eircom on CEI, particularly in the context of the NBP. Please see further discussion at paragraph 1046.



1075 Furthermore, ComReg considers that the annual review measures set out are reasonable given the magnitude of CEI investment required by Eircom for NBI's MIP over the coming years. The annual review process should also provide certainty to Eircom in terms of its cost recovery expectations, as Eircom can expect to recover any investments that it makes in CEI through the CEI access prices, while other stakeholders can be assured that there is no over-recovery of such investments.

### Possible price adjustments

1076 While Eircom agreed with the proposal that CEI price adjustments for NBI's MIP would not occur before Year 3, it submitted that a re-alignment of prices is required every three years.

1077 However, that is not ComReg's intention. A realignment of NBI's CEI prices every three years would not be appropriate or justified given the significance of NBI's MIP access to Eircom's CEI and the magnitude of the investments required in CEI by Eircom to facilitate that access, especially in the NBP IA. Hence, ComReg remains of the view that NBI's CEI prices should be reviewed annually to ensure that the CEI prices for NBI's MIP appropriately reflect the actual level of expenditure that takes place by Eircom.

1078 Since the CEI Consultation, Eircom has announced that it will change its financial period from July-June to January-December. Taking this into account and in order to facilitate the practical implementation of the annual review process for **NBI's prices** to Eircom's new financial period, ComReg has decided that the prices set by the PAM and DAM models in this Decision will apply from 1 [month] 2022 until 31 December 2022 in respect of the period ending 31 December 2022 and from 1 January 2023 to 31 December 2023, in respect of the period ending 31 December 2023.

1079 Eircom's HCAs for the financial period ending 31 December will be available no later than five months after the year end (i.e., by 31 May) and the AFIs will be available to ComReg no later than seven months after the year end (i.e., by 31 July). The information from Eircom's HCAs (and other data from its underlying financial and other systems) will be used as part of the annual review process described at paragraphs 1069-1075. From 1 January 2024, and in January each year thereafter for the duration of the price control, the applicable prices will be the prices derived from the forecasted information in the PAM and DAM reconciled and adjusted accordingly to account for any discrepancies between forecasts and actual costs year on year. This revised approach coincides with Eircom's new financial period.

1080 For the first annual review in 2023, information from Eircom's HCAs (and other data from its underlying financial and other systems) from 1 July 2019 until the financial period ending 31 December 2022 are relevant to the annual process for

determining NBI's prices from 1 January 2024. This coincides with the fact that the PAM and DAM are based on HCA information up until 30 June 2019, as described at paragraph 518. For the annual review thereafter, the relevant financial data from Eircom's HCAs (and other data from its underlying financial and other systems) for each respective financial period thereafter will be used.

1081 Eircom commented that ComReg cannot issue directions under Regulation 13(4) of the Access Regulations without following consultation procedures under Articles 6 and 7 of the Framework Directive.<sup>617</sup>

1082 However, this is not the case. In accordance with Regulation 13(4) of the Access Regulations, any SMP operator that is subject to a cost-orientation price control, must ensure that its prices reflect its costs and a reasonable rate of return and ComReg may require full justification for prices and may require, where appropriate, prices to be adjusted. No consultation is required. Were ComReg's annual review to find that Eircom's actual financial / costing information relating to NBI's MIP investments in CEI is materially at odds with the forecasted (or indicative) information used to set NBI's MIP prices in the PAM and/or DAM models then ComReg may direct Eircom to make adjustments to its prices, to ensure the prices are cost oriented.

1083 NBI's advisors, Frontier Economics, sought clarity on whether the BU-LRAIC forecasted expenditure should be replaced by actual expenditure data when it becomes available, or whether the forecasts should be used to set prices on a forward looking basis with prices only reset periodically to take account of the latest available information.<sup>618</sup>

1084 To clarify, the process is more akin to the latter scenario whereby the models are populated with forecasted data and some actual information in order to set the CEI access prices for NBI's MIP at the time of this Decision. Subsequently, on an annual basis Eircom will assess whether there are material differences between the forecasted data / assumptions used in the PAM and DAM, compared to the actual financial data or costs incurred by Eircom, which forms the basis for calculation of the annual charges. This allows Eircom in the first instance to assess whether these differences are significant and if revisions are required to NBI's MIP prices going forward. ComReg would subsequently assess Eircom's annual submission and ComReg may on review of Eircom's notification direct adjustments to the prices if ComReg is not satisfied that the updated prices are cost-oriented, based on Regulation 13(4) of the Access Regulations.

### Other issues

1085 According to Eircom under the per operator and 'per operator plus' cost sharing

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<sup>617</sup> Paragraph 365 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>618</sup> Page 19 of Frontier Economics Non-Confidential Report dated November 2020.

approaches the statement of compliance requirement would be minimal and may not justify the regulatory burden of its completion. In this regard, Eircom noted that the level of CEI required by NBI will be known each year with a high degree of accuracy and the replacement of CEI year on year will over the medium-to-long term will "self-correct" without the need for CEI price adjustments, compared with the higher level of uncertainty associated with the per customer cost sharing approach.<sup>619</sup>

1086 Further to Eircom's submission and as set out in Section 6.5, ComReg has revised the cost sharing approach for pole access by NBI's MIP in the NBP IA to a per operator plus approach. However, ComReg considers that a statement of compliance is still required by Eircom. The statement of compliance is a means of ensuring Eircom can demonstrate compliance with its cost orientation obligation for CEI, in this case by means of the PAM and DAM. NBI's MIP prices are dependent on a number of key assumptions including the level of pole replacement or duct renewal undertaken by Eircom and the associated cost as well as the timing of the eventual withdrawal of Eircom's copper network. It is necessary for Eircom to confirm to ComReg, as part of its statement of compliance, what inputs and parameters in the PAM / DAM have changed and what proposed changes are required to the annual prices for NBI's MIP. Given the substantial level of CEI investment required in the context of NBI's MIP, a statement of compliance is considered justified and proportionate in order to ensure Eircom's prices remain cost oriented.

1087 ComReg would also point out that where changes to CEI prices for NBI's MIP are justified, then any changes shall be implemented by Eircom, Eircom having published the prices on Eircom's publicly available wholesale website in advance of the changes coming into effect, as set out in Section 6 of the Decision Instrument at Annex 1 of this Decision. In this Decision ComReg has further specified (or varied) the transparency obligations in Sections 10.12(i) and (ii) of the WLA Decision Instrument in ComReg Decision D10/18 for the purposes of pre-notification of changes to Eircom's CEI prices. As a result, a change to the price of an existing or new CEI product, service or facility, shall be made publicly available and published on Eircom's publicly available wholesale website at least two (2) months in advance of the changes coming into effect for Generic Access users and for NBI the publication of any changes to existing or to new CEI prices by Eircom will be at least one (1) month in advance of the price coming into effect. Please see Section 6 of the Decision Instrument at Annex 1 of this Decision. ComReg considers that the different notification periods for NBI and other Generic Access users are justified given that NBI's business decisions are independent of any price changes for CEI access (given the purpose of its access is to fulfil its roll as NBP provider by means of a State subsidy) whereas Generic Access users are directly impacted by

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<sup>619</sup> Paragraph 369 of Eircom's Non-Confidential Response dated 18 November 2020.

such changes and they would need additional notice to adjust budgets and business plans.

1088 In addition, and as part of the annual review process, and in the interests of transparency to NBI, Eircom shall publish the NBI CEI prices to apply each year in the subsequent five years, on its publicly available wholesale website, as specified in Section 3 of the Decision Instrument at Annex 1 of this Decision.

### 10.5.3 ComReg's Final Position

1089 Having considered the Respondents' Submissions and in particular the concerns raised by Eircom and NBI, ComReg remains of the view that CEI access prices for NBI's MIP should be subject to an annual review.

1090 For the period from 1 [month] 2022 until 31 December 2023 Eircom shall charge NBI the prices set by the PAM and DAM models as specified in Section 9 of this Decision.

1091 From 1 January 2024, and in January each year thereafter for the duration of the price control period, the applicable prices will be the prices derived from the forecasted information in the PAM and DAM reconciled and adjusted accordingly to account for any discrepancies between forecasts and actual costs (from Eircom's HCAs and other data from underlying financial and other systems) year on year. This coincides with Eircom's new financial period (from 1 January).

1092 As part of the annual review, Eircom shall review the PAM and DAM, to assess the key inputs, assumptions and variables of the models. Eircom's review shall include an assessment of the actual expenditure incurred by Eircom in the context of NBI's MIP access consistent with the details provided in the annual duct and pole statements described at paragraph 1071. In addition, Eircom's review shall include the level of pole replacement or duct renewal undertaken by Eircom, the associated cost as well as the timing of the retirement (or removal of copper in the case of poles) of Eircom's copper network, the actual year to date capital records from Eircom's FAR for the asset classes relevant to CEI access, the operating costs incurred with respect to management and maintenance activities, updates to labour and material costs for pole replacements and duct renewal capital activities.

1093 If Eircom's actual costing / volumes information for poles and ducts for NBI's MIP is significantly different to the assumptions and forecasts in the PAM and in the DAM, then such differences shall be reflected and updated in the PAM and DAM as part of Eircom's annual review.

1094 Eircom shall also provide the CEI Statement of Compliance demonstrating Eircom's compliance with its cost orientation obligation for its CEI annual charges relating to NBI's MIP, in line with the following information:

- (a) The details of Eircom's review of the PAM and DAM and what changes have been made to the inputs and variables, including where appropriate an explanation for any material variances;
- (b) Confirmation of whether changes are required to the annual prices for NBI's MIP and a proposal on what these new revised prices should be; and
- (c) Any other information that Eircom considered relevant to its demonstration of compliance with its cost orientation obligation.

1095 As part of the annual review Eircom shall submit the updated PAM and DAM and the CEI Statement of Compliance to ComReg, no later than seven months after its financial period.

1096 Where changes to existing CEI prices (or new CEI prices) for NBI's MIP are justified, then any changes shall be implemented by Eircom, Eircom having published the prices on Eircom's publicly available wholesale website at least one (1) month in advance of the price coming into effect, as further specified in Section 6 of the Decision Instrument at Annex 1 of this Decision.

1097 In addition, and in the interests of transparency, Eircom shall publish the NBI CEI prices to apply each year in the subsequent five years, on its publicly available wholesale website, as specified in Section 3 of the Decision Instrument at Annex 1 of this Decision.

# 11 Regulatory Impact Assessment (RIA)

## 11.1 Overview

1098 A Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options and should establish whether the proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy and analyses the impact of regulatory options on various stakeholders.

1099 ComReg's approach to the RIA is set out in the RIA Guidelines published in August 2007 in ComReg Document No. 07/56 and 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines<sup>620</sup>, issued by the Department of An Taoiseach in June 2009 under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002 (as amended) requires ComReg to comply with Ministerial Policy Directions. The Policy Direction of February 2003<sup>621</sup> requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adapted under the Government's "Better Regulation" programme.

1100 In conducting the RIA, ComReg has regard to the RIA Guidelines. ComReg's ultimate aim in conducting a RIA is to ensure that all measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. In fact, the entire Decision document constitutes an impact assessment of the various regulatory options considered by ComReg as well as our final position on the appropriate price control for CEI access. Hence, the entire document should be considered part of the RIA.

1101 In the context of this Decision, while ComReg is not changing the underlying price control obligation for CEI access i.e., the obligation of cost orientation, ComReg is further specifying it in the context of the costing / pricing methodology used to determine Eircom's CEI access prices for the purposes of CEI access for the NBP.

1102 For Generic Access to CEI ComReg has decided to maintain the existing

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<sup>620</sup> See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005 and revised in 2009 - see <https://www.djei.ie/en/What-We-Do/Business-Sectoral-Initiatives/Reducing-Administrative-Burdens/Responsibility-for-Better-Regulation-in-Ireland/>

<sup>621</sup> Ministerial Policy Direction made by the Minister for Communications, Marine and Natural Resources on 21 February 2003.

costing approach, although the costing information has been updated as discussed in Section 5.5 of this Decision, so ComReg does not consider this further as part of the current RIA.

1103 In Sections 5, 6, 7 and 8 of the CEI Consultation ComReg considered the various regulatory options available to it in determining the appropriate costing / pricing methodology for CEI access and the appropriate WACC, particularly in the context of access to Eircom's CEI by the NBP. Our analysis focuses on why an alternative pricing approach (to the status quo) is justified and proportionate in the context of CEI access for the purposes of the NBP. Since the CEI Consultation ComReg has assessed the Respondents' Submissions, and in some cases ComReg has refined (or changed) its approach. The reasoning behind any changes to ComReg's position has been discussed throughout this Decision document.

1104 The rest of this Section summarises the RIA approach in the CEI Consultation, it sets out the Respondents' Submissions on the RIA and ComReg's assessment of them. Finally, an updated RIA is presented, which explains the evolution of ComReg's position, taking account of Respondents' Submissions.

### 11.1.1 Position set out in the Consultation:

1105 In chapter 11 of the CEI Consultation ComReg set out the steps taken in its approach to the RIA, as follows:

- Step 1: describe the policy issue and identify the objectives;
- Step 2: identify and describe the regulatory options;
- Step 3: determine the likely impacts on stakeholders;
- Step 4: determine the likely impacts on competition; and
- Step 5: assess the likely impacts and choose the best option.

1106 ComReg then followed these steps in assessing its proposed measures. ComReg also took into account the extent to which the proposed measures addressed ComReg's regulatory objectives, namely to:

- (i) *Promote competition and in particular to encourage efficient investment in infrastructure and promoting innovation;*
- (ii) *Contribute to the development of the internal market;*

*(iii) Promote the interests of users within the Community and in particular to encourage access to the internet at a reasonable cost to end-users<sup>622</sup>.*

1107 ComReg assessed a number of options, in particular:

- (a) the options considered in the context of determining the appropriate costing methodology to apply to Eircom's CEI access services in the context of NBI's MIP access, as discussed in Section 5.
- (b) the options considered in the context of determining the appropriate cost sharing / pricing methodology to apply to Eircom's CEI access services in the context of NBI's MIP access, as discussed in Section 6.
- (c) options considered in the context of the WACC parameters that should apply in the context of Eircom's CEI for the purposes of the NBP, as discussed in Section 7.
- (d) the options for the recovery of other costs related to Eircom's CEI services e.g., tree trimming services and pole furniture, as discussed in Section 8.
- (e) Consideration of an annual review of the PAM and DAM by Eircom so as to demonstrate compliance with its cost orientation obligation, in particular in the context of the CEI access charges for NBI's MIP.

1108 Each option was described. The impact on the various stakeholders was considered. ComReg determined the likely effect of each option on competition. Finally, ComReg analysed each option, and came to a preliminary conclusion on the preferred approach.

1109 ComReg invited the views of respondents (in Question 22 of the CEI Consultation) on whether they had any comments on the RIA and if there were other factors that ComReg should consider in completing its RIA.

### **11.1.2 Respondents Views and ComReg's Response:**

1110 ComReg received a direct response to Question 22 from seven Respondents, namely, Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. Sky did not address the issues raised in Question 22 in their general response. Siro stated that it had no comments.

1111 NBI<sup>623</sup> and BT<sup>624</sup> generally supported ComReg's approach on the RIA, although they both reiterated some concerns that they had on the appropriate costing/pricing methodology for NBI's MIP in the NBP IA as set out below. Eircom

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<sup>622</sup> Section 12 of the Communications Regulations Act 2002 (as amended).

<sup>623</sup> Page 73 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>624</sup> Page 18 of BT's Non-Confidential Response dated 18 November 2020.



raised a number of concerns in relation to the RIA, including its view that ComReg has inappropriately outsourced, to its consultants, its regulatory requirement to determine the regulatory impact of its proposed approach.<sup>625</sup> Eircom also raised issues with Step 1 of the RIA (policy issues and ComReg's regulatory objectives for CEI access)<sup>626</sup>, Step 2 of the RIA (impact on stakeholders<sup>627</sup> and Step 3 of the RIA (ComReg's assessment of the impact and choosing the best option)<sup>628</sup>, which are discussed in more detail under each of the relevant RIA steps below.

1112 NBI reiterated its view that ComReg should consider a "baseline scenario" where there is no CEI access from Eircom or no NBP in the NBP IA<sup>629</sup>, which ComReg has considered at paragraphs 436-440. BT<sup>630</sup> and ALTO<sup>631</sup> repeated its concerns about the possible entry by Eircom to parts of the NBP IA, which ComReg has considered at paragraphs 408-409 of the Decision. ALTO<sup>632</sup> and Vodafone<sup>633</sup> repeated their concerns about ComReg's approach on the recovery of common costs (from services sold in the Commercial Areas only) and their claims of cross subsidisation from the Commercial Areas to the NBP IA, which ComReg has considered at paragraphs 382-403. Virgin Media stated that it would like to see the likely impact of proposed CEI prices in IA on access seekers.<sup>634</sup>

1113 ComReg remains of the view that throughout the entire CEI Consultation it assessed and considered all appropriate regulatory options in the context of determining the appropriate CEI costing / pricing methodologies for NBI's MIP in line with its regulatory objectives and it has taken due consideration of the Respondents' Submissions before reaching its final position in this Decision. ComReg has justified any changes to its position since the CEI Consultation and it has updated the RIA steps accordingly, below. The points raised by Respondents in relation to the RIA are considered below under the appropriate RIA steps (Steps 1-5).

## 11.2 Step 1: Describe the policy issue and identify the objectives

1114 In the 2018 WLA / WCA Market Review Decision Eircom was designated with SMP in the WLA Market, nationally. As a result a number of regulatory obligations were imposed on Eircom across the national WLA Market to address various competition problems, including the obligation that Eircom provides access to its

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<sup>625</sup> Paragraphs 381-384 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>626</sup> Paragraphs 386-416 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>627</sup> Paragraphs 417-449 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>628</sup> Paragraphs 450-454 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>629</sup> Pages 73-74 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>630</sup> Page 19 of BT's Non-Confidential Response dated 18 November 2020.

<sup>631</sup> Page 18 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>632</sup> Pages 18/19 of ALTO's Non-Confidential Response dated 18 November 2020.

<sup>633</sup> Page 3 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>634</sup> Page 7 of Virgin Media's Non-Confidential Response dated 18 November 2020.

CEI and that the CEI prices are set in line with the obligation of cost orientation. The CEI access prices set in the 2018 WLA / WCA Market Review Decision were based on the costing / pricing methodology (and associated maximum annual prices for pole and duct access) for CEI from the 2016 Access Pricing Decision, as discussed in Section 3.2 and Section 5.2. Therefore, the CEI pricing obligations determined in this Decision are pursuant to the SMP findings set out in 2018 WLA/WCA Market Review Decision (ComReg Decision D10/18).

- 1115 In determining the appropriate costing / pricing methodology for Eircom's CEI in the context of the NBP, ComReg has taken into account the competition concerns identified in the WLA Market, as set out in the 2018 WLA / WCA Market Review Decision, including the risk of excessive pricing by Eircom as well as the potential for Eircom to distort competition given its presence in both the wholesale and retail broadband markets. ComReg has also taken into account developments in the markets since the 2018 WLA / WCA Market Review Decision. Please see Section 3, for further details.
- 1116 One of the key considerations in this Decision is the access differences between Generic Access to CEI and NBI's MIP access to CEI which mean that different approaches are warranted in order to achieve ComReg's statutory objectives under Section 12 of the Communications Regulation Act of 2002 (as amended) of promoting competition and encouraging efficient investment.
- 1117 Section 5 of this Decision determines the appropriate CEI costing methodology for NBI's MIP access to CEI i.e., LRIC for NBI's MIP access to CEI in the Commercial Areas and LR(A)IC for NBI's MIP access to CEI in the NBP IA. Section 6 determines the appropriate CEI cost sharing methodology in order to split the shared network costs for CEI between Eircom and NBI's MIP in the NBP IA for poles and for ducts. Section 7 determines that a lower WACC rate (of 3.76%) is appropriate in the context of CEI access by NBI's MIP while the fixed line WACC rate should apply in relation to Generic Access users of CEI.
- 1118 Section 8 determines that any additional costs associated with replacing a pole with pole furniture located on it should be recovered by way of a one-off charge levied at the time the pole is replaced. In addition, ComReg has determined in Section 8 that all tree trimming costs to prepare aerial cable routes in advance of cable deployment should be recovered from operators as a one-off charge on an as-needs basis and with any tree trimming associated with pole replacement to be recovered as part of the pole access charge. Section 10 determines that an annual review of NBI's MIP charges is justified and proportionate given the significance of the investments at play, which is not likely to be the case in the context of the prices for Generic Access to CEI.

1119 In choosing the appropriate costing / pricing methodology as well as the appropriate WACC in the context of CEI access for the NBP, ComReg has taken account of Section 12 of the Communications Regulation Act 2002 (as amended), Regulation 6(1) of the Access Regulations, Regulation 8(6) of the Access Regulations, Regulation 13 of the Access Regulations, Regulation 16 of the Framework Regulations and the similar provisions set out in the EECC.

1120 In the subsections below, ComReg has assessed the costing / pricing methodologies and the appropriate WACC, in the context of CEI access for the NBP, with reference to the analysis and reasoning already set out in the earlier sections of this Decision document against the various statutory objectives cited above at paragraph 1119. ComReg has also taken account of the Respondents Submissions in reaching its final Decision.

### 11.2.1 Respondents views and ComReg's Response:

1121 With regard to Step 1 of the RIA Eircom submitted that ComReg defined a national market (in D10/18) based on national ubiquity of Eircom's CEI and it did not determine that geographic differentiation of CEI remedies was required. Eircom stated that "*ComReg's differentiated approach is flawed*", but in particular, the fact that NBI will seek long-term, widespread and large scale access to Eircom's CEI does not change the level of risk for Eircom to the extent that it warrants the approach proposed by ComReg. Eircom claimed that rather than a further specification of the existing price control, ComReg is entirely altering the underlying assumptions that feed into the standard regulated tariffs in order to produce the lowest possible price for the benefit of NBI specifically and that ComReg's actions will ultimately result in a material altering of the level of the NBP subsidy and distort the market.<sup>635</sup> ComReg has considered these points at paragraphs 169-178 and further at subsection 11.2.2 below.

1122 Eircom stated that in the context of CEI and the "build-or-buy" signals in the Commercial Areas, it seems both unrealistic and undesirable to expect other firms, apart from utility companies, which would not anyway be access seekers facing a "build or buy" decision, to build out their own CEI and that this cannot constitute a justification for treating NBI on an entirely different basis to other access seekers.<sup>636</sup> ComReg has considered these points at subsection 5.6.2.

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<sup>635</sup> Paragraphs 406-410 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>636</sup> Paragraph 394 of Eircom's Non-Confidential Response dated 18 November 2020.

1123 Eircom reiterated its view that ComReg and Dot Econ place too much weight on the incentives for Eircom with regard to copper switch off and ComReg's proposal incorrectly assumes that Eircom actually has the ability to expedite copper to fibre migration, particularly where it continues to be subject to regulatory remedies on copper-based services and given that USO obligations remain in place.<sup>637</sup> ComReg has considered these points at paragraphs 153-168.

1124 Eircom referred to ComReg Decision D11/18 with regard to the views set out by ComReg in relation to the risk premium associated with FTTC and it referred to ComReg's view that "...as demand could be modelled and the cost was known, there was no reason to adjust the WACC." Eircom submitted that those conditions appear also met in the case of NBI's demand for Eircom's CEI access and the lack of regulatory consistency in ComReg's reasoning in respect to the WACC is very concerning. ComReg disagrees with Eircom. ComReg's reasons for a lower WACC rate for NBI's access to Eircom's CEI has been set out in Section 7.

### 11.2.2 Section 12 of the Communications Regulation Act 2002 (as amended)

1125 ComReg's objectives as set out in Section 12 of the Acts aims to:

- (i) *Promote competition and in particular to encourage efficient investment in infrastructure and promoting innovation;*
- (ii) *Contribute to the development of the internal market;*
- (iii) *Promote the interests of users within the Community and in particular to encourage access to the internet at a reasonable cost to end-users.*

#### *Promote competition and encourage efficient investment in infrastructure:*

1126 In Section 3.4 of this Decision, ComReg has set out its regulatory objectives including details on the objective of promoting competition and encouraging efficient investment in infrastructure.

1127 In the **NBP IA** given that the prospects of entry by another commercial operator is small — largely due to the less favourable cost and scale characteristics of the NBP IA, and hence the need for State intervention — ComReg's statutory objectives of promoting competition and encouraging efficient investment do not mean setting a price control in order to create sustainable and long term competition with Eircom, and facilitate new commercial entry, by either CEI providers or alternative wholesale broadband providers. Rather promoting competition and encouraging efficient investment mean, in ComReg's view, allowing for a cost effective deployment of

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<sup>637</sup> Paragraph 396 of Eircom's Non-Confidential Response dated 18 November 2020.

NBI's network and avoiding inefficient duplication of CEI assets.

1128 ComReg is of the view that promoting competition and encouraging efficient investment in the NBP IA means ensuring that the CEI access service being provided by Eircom to NBI's MIP and its fibre network will, when roll-out is completed, be available to all operators to seek wholesale access service to supply retail customers in the area. Hence, Eircom ought to be allowed to recover its efficiently incurred investment (plus a reasonable rate of return) when upgrading its CEI assets to allow for the sharing of those assets with NBI. It also means, taking into account that NBI is likely to eventually replace Eircom's copper-based services, as well as Eircom's plan as regards copper switch-off, avoiding inefficient investment through duplication of fixed costs and failure to achieve economies of scale and having duplicate (Eircom's and NBI's) networks running in parallel after the new fibre network is rolled out.

1129 ComReg also recognises that at some point in the future it is likely that Eircom will switch-off its copper access network (or in the case of poles remove its copper cables), in the NBP IA. In fact, it is likely that Eircom's copper network in the NBP IA will ultimately be replaced by NBI's fibre network, where NBI will become the main user of CEI in the NBP IA. However, the timing of Eircom's copper switch-off (and removal of its copper cables from poles) remains uncertain. ComReg believes that meeting its statutory objective of encouraging efficient investment means in the context of CEI access in the NBP IA, setting the right incentives for the transition from copper to fibre services in the NBP IA. Please see Section 3 of this Decision for further details. The issue of copper to fibre transition in the context of the NBP IA and how the chosen cost sharing methodology might provide Eircom with suitable incentives to decommission its copper network is discussed at Section 6.

1130 BT raised concerns that Eircom may possibly enter parts of the NBP IA to provide fibre services and that ComReg needs to take this into account. BT added that the implications of another operator entering the NBP-IA to provide fibre access raises the question on what happens to the incentives that ComReg is trying to provide to the NBP provider. BT questioned if the other party deploys first should this location/area be reclassified as within the Commercial Area otherwise would the incentives to support the NBI provider be inadvertently diverted to a commercial player.<sup>638</sup> Please refer to paragraphs 408-410 of this Decision.

1131 Virgin Media stated that it would like to see the likely impact of the proposed CEI prices in the NBP IA on access seekers as it expects that a lower access price faced by NBI in the NBP IA in comparison to the generic access price would be passed through to NBP IA access seekers.<sup>639</sup>

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<sup>638</sup> Pages 18/19 of BT's Non-Confidential Response dated 18 November 2020.

<sup>639</sup> Page 7 of Virgin Media's Non-Confidential Response dated 18 November 2020.

- 1132 To clarify, NBI is contracted to build its network by the Irish State and the prices that NBI charges for its wholesale services in the NBP IA are set by reference to the prices of comparable wholesale regulated broadband services in Commercial Areas as per the NBP contract, hence any changes to the CEI access prices as a result of this review should only impact on the State subsidy but not on users of NBI's wholesale broadband service. In other words, the typical investment (build/buy) incentives do not apply in this context in the NBP IA and so ComReg is primarily concerned with promoting efficient use of existing CEI while ensuring that the level of the CEI charges allows Eircom to recover the costs that it incurs plus a reasonable rate of return.
- 1133 In the **Commercial Areas**, different considerations apply, and it is also necessary to distinguish between Generic Access to CEI and NBI's MIP access to CEI for transit purposes. The considerations which led to the adoption of the existing price control for CEI continue to apply insofar as Generic Access to CEI is concerned. In particular the price for Generic Access to CEI should provide the correct investment incentives to promote competition by existing competing operators and facilitate commercial entry by alternative infrastructure providers, taking into account that by contrast to the NBP IA, Eircom is likely to continue to invest in CEI in these areas in order to continue to provide fixed line services to other operators, self-supply to its own retail arm and to end-users. Promoting competition and encouraging efficient investment mean sending the correct 'build-or-buy' signals to Eircom and other operators.
- 1134 By contrast, NBI's CEI access in the Commercial Areas may not be used for the purpose of competing with other operators in the Commercial Areas, as part of the conditions to the subsidy from the State (see Section 3.3.3). NBI's CEI access in the Commercial Areas is limited to those situations where it requires access for the purposes of transit in order to provide its services in the NBP IA, using its subsidised network. A factor for consideration in terms of NBI's access to CEI in the Commercial Areas is the fact that Eircom has already replaced poles and cleared duct blockages in the Rural Commercial Area to facilitate the deployment of its own 300k FTTH Rural Network and so the existing CEI assets in this context can be considered reusable for the provision of fibre broadband services by NBI in the Commercial Areas. The particular circumstances of NBI's transit access in the Commercial Areas has led ComReg to decide that the LRIC methodology is the appropriate costing / pricing methodology for setting the CEI access charges for NBI's MIP in the Commercial Areas, for the reasons set out in Sections 5.6.

*Contribute to the development of the internal market:*

1135 In terms of contributing to the development of the Internal market, in Section 3, subsection 3.5.2, ComReg has set out the relevant European Commission Recommendations and Directives which have been considered as part of this review. One of the key considerations as part of our review of the costing methodology for CEI is the assessment of Reusable CEI Assets and Non-reusable CEI Assets, which is a key focus of the 2013 EC Recommendation. This is considered by ComReg in Section 5 of this document.

1136 Separately, in Section 7 ComReg has determined why a differentiated WACC (to the generic fixed line telecoms WACC) is appropriate for setting the prices for CEI access services for NBI's MIP in the context of the NBP. ComReg's analysis recognises that while some other European jurisdictions use the generic telecoms WACC for passive (CEI) access services, that in the specific case of CEI access for the NBP an alternative WACC is justified and proportionate. This is discussed at Section 7.

1137 In addition, and in terms of contributing to the development of the internal market, the draft measures have been made accessible to the European Commission, BEREC as well as other NRAs in other European Member States, further to Article 32 of the EECR and Regulations 13 and 14 of the Framework Regulations. ComReg will consider all responses received before proceeding to a final decision.

*Promote interests of users within the community / Encourage access to internet at reasonable cost to end-users:*

1138 ComReg is required to take all reasonable measures to promote the interests of users within the community as well as encourage access to the internet at a reasonable cost to end-users.

1139 In the NBP IA, there is likely to be a transition from Eircom's copper based network to NBI's fibre based network over the next few years. As a result end-users should benefit from the availability of high speed broadband services, once NBI's network is deployed. As part of ComReg's assessment of the appropriate CEI wholesale prices that Eircom should charge for NBI's use of its CEI network, ComReg is cognisant of the fact that it would ultimately be inefficient to have duplicate networks running in parallel once the new fibre network is rolled out. i.e., Eircom's copper network running alongside NBI's fibre network.

1140 It is important to note that the CEI access prices set for NBI's MIP in this Decision do not impact on NBI's wholesale access charge, which is set based on comparable wholesale fibre access charges in the Commercial Areas. Hence, any changes to the CEI access price for NBI's MIP as a result of this Decision is only

likely to impact on the subsidy.

1141 In Section 6, ComReg's determination of the cost sharing approach for NBI's MIP in the NBP IA gives due consideration to setting the right incentives for the migration of copper to fibre services once NBI's fibre network is rolled out. These measures should ultimately benefit end-users in terms of migration towards fibre-based services.

### 11.2.3 Regulation 6 of the Access Regulations

1142 Regulation 6(1) of the Access Regulations provides that the Regulator shall acting in pursuit of its objectives set out in Section 12 of the Communications Regulation Acts and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure adequate access, interconnection and the interoperability of services in such a way as to:

- Promote efficiency;
- Promote sustainable competition;
- Promote efficient investment and innovation; and
- Give the maximum benefit to end-users.

#### Promote efficiency:

1143 A cost oriented price control aims to ensure that prices do not exceed an appropriate level of efficient costs.

1144 There are three forms of efficiency including:

- Allocative Efficiency: Where prices of different products result in an optimum allocation of resources to end-users;
- Productive Efficiency: Where the cost of producing the products is minimised;
- Dynamic Efficiency: This refers to the efficiency of investor and end-user behaviour over time.

1145 ComReg considers that any pricing remedy imposed needs to strike a balance between these three forms of efficiency.

1146 Allocative and productive efficiency are essentially static concepts taking into account the level of costs to deliver products/services at a particular point in time. In terms of productive efficiency, ComReg believes that the sequential nature of investment decisions, when assessing whether the level of costs reported is efficiently incurred, should be considered in the pricing remedy.

1147 The BU-LR(A)IC approach already assumes a level of efficiency (as it assumes



a brand new network) therefore no further adjustments are required. Please see Section 5, in particular subsection 5.11, for further details on the costing methodology and modelling approach relevant to CEI access.

1148 With regard to ComReg's consideration of efficiency adjustments regarding Eircom's HCA data, please see paragraphs 266-268 and 530 of this Decision.

*Promote sustainable competition*

1149 Please refer to paragraphs 1126-1134 of this Decision.

*Promote efficient investment and innovation*

1150 Please refer to paragraphs 1126-1134 of this Decision.

*Give the maximum benefit to end-users*

1151 Please refer to paragraphs 1138-1141 of this Decision.

#### **11.2.4 Regulation 8 of the Access Regulations:**

1152 Regulation 8(6) of the Access Regulations provides that:

*Any obligations imposed in accordance with this regulation shall –*

- a) be based on the nature of the problem identified,*
- b) be proportionate and justified in light of the objectives laid down in section 12 of the 2002 Act and Regulation 16 of the Framework Regulations, and*
- c) only be imposed following consultation in accordance with Regulation 12 and 13 of the Framework Regulations.*

*Based on the nature of the problem identified:*

1153 As set out in Section 3.2 of this Decision, in the 2018 WLA / WCA Market Review Decision ComReg identified the competition problems associated with the WLA market, which include exploiting end-users by virtue of Eircom's SMP position e.g. excessive pricing, leveraging its market power into adjacent vertically or horizontally related markets and foreclosing or excluding competitors so as to protect its existing dominance on the market or markets in question. Please see Section 3.2 for further details.

1154 Separately, in Sections 3.4 and 3.4.2, ComReg has also set out ComReg's regulatory objectives and how the various problems identified in this review of CEI and the measures set out meet those objectives.

Proportionate and justified:

- 1155 In Sections 5 and 6 of this Decision ComReg sets out the reasons why the costing / pricing methodology for CEI access in the context of NBI's MIP is proportionate and justified. ComReg's advisors, Dot Econ, support ComReg's decision on the costing / pricing methodology for NBI's MIP set out in this Decision. Please see the Dot Econ Final Report at Annex 2 for further reasoning and justification.
- 1156 Section 7 of this Decision sets out reasons why the differentiated WACC for CEI assets in the context of NBI's MIP is proportionate and justified. ComReg's advisors, Europe Economics, support the basis of the findings set out in this Decision regarding the WACC for CEI in the context of the NBP. Please see the Europe Economics Final Report at Annex 3 for further justification and reasoning.
- 1157 Section 10 of this Decision sets out a number of measures to assess the CEI costs incurred by Eircom as well as a means of monitoring Eircom's compliance with its cost orientation obligation, particularly with regard to NBI's MIP. Section 10 sets out reasons why Eircom should develop their cost accounting systems and HCAs so that CEI costs can be reported in a transparent and meaningful way. Furthermore, Section 10 looks at the reasons why Eircom should provide annual CEI statements to ComReg for its expenditure on CEI. In addition, Section 10 also sets out the reasons why Eircom should carry out an annual review of the PAM and DAM in the context of NBI's MIP charges as well as assessing its compliance with its cost orientation obligation for CEI, the details of which should be provided to ComReg by 7 months after Eircom's financial period ends. Please see Section 10 for further details.

Only be imposed following consultation:

- 1158 ComReg has considered all of the Respondents' Submissions to the CEI Consultation, and in some cases ComReg has refined (or changed) its approach. The reasoning behind any changes to ComReg's position has been set out throughout this Decision document. ComReg has made its draft measures accessible to the European Commission, BEREC as well as other NRAs in other European Member States and it will consider any responses or comments received before reaching a final decision.

### 11.2.5 Regulation 13 of the Access Regulations:

- 1159 Regulation 13(1) of the Access Regulations provides that ComReg may:

*"...impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of*

*access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end users.”*

1160 The requirements set out in Regulation 13(1) have already been addressed in the 2018 WLA / WCA Market Review Decision at the time of the imposition of the cost orientation obligation on Eircom in the WLA Market. In this Decision ComReg has further specified the cost orientation obligation for CEI, that has already been imposed.

1161 Regulation 13(2) of the Access Regulations provides that:

*To encourage investments by the operator, including in next generation networks, the Regulator shall, when considering the imposition of obligations under paragraph (1), take into account the investment made by the operator which the Regulator considers relevant and allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks involved specific to a particular new investment network project.*

1162 In Section 5 of this Decision ComReg considers the investments already made by Eircom in its CEI infrastructure as well as the likely investments to be made in the NBP IA and Commercial Areas over the next few years, and how this should be captured in determining the CEI access prices. Please see Section 5, in particular subsections 5.6, 5.7 and 5.11 for further details.

1163 Section 7 of this Decision considers the differentiated WACC (or rate of return) in the context of CEI access by NBI's MIP, recognising the somewhat lesser risks associated with the revenues that Eircom will receive for provision of CEI access for purposes of the NBP and the step-in rights set out in the NBP contract. Please see Section 7 for further details.

1164 Section 10 of this Decision sets out the annual review process so as to assess the level of actual CEI expenditure incurred by Eircom compared to that forecasted in the PAM and DAM models. This process recognises in particular the significance of NBI's MIP access for Eircom's CEI and the fact that a review of Eircom's rate of expenditure against that assumed / forecasted in the PAM and in the DAM is necessary to assess Eircom's compliance with its cost orientation obligation so as to ensure no material over-or-under recovery of costs on an annual basis. In addition, this annual review process should also provide certainty to Eircom such that if Eircom invests in CEI in an efficient manner then the CEI prices should allow it to recover the investments that it actually makes in CEI (including expenditure on the associated cost accounting obligations), while other stakeholders can be assured that there is no over-recovery of such investments.

1165 Regulation 13(3) of the Access Regulations provides that:

*The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.*

Promote efficiency:

1166 In terms of the provision in Regulation 13(3) regarding promoting efficiency, please refer to paragraphs 1143-1148.

Promote sustainable competition:

1167 In terms of the provision in Regulation 13(3) regarding promoting sustainable competition, please refer to paragraphs 1126-1134.

Maximise consumer benefits:

1168 In terms of the provision in Regulation 13(3) regarding maximising consumer benefits, please refer to paragraphs 1138-1141.

1169 Regulation 13(4) of the Access Regulations provides that:

*“Where an operator has an obligation under this Regulation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment shall lie with the operator concerned.....”*

1170 As set out in Section 10 of this Decision, Eircom shall undertake an annual review, including the provision of annual CEI statements on its expenditure on CEI, a review of the PAM and DAM and the provision of a statement of compliance to ComReg to ensure that the CEI prices for NBI's MIP are in compliance with its cost orientation obligation. Hence, these measures should ensure that the burden of proof remains with Eircom to ensure that the CEI prices continue to reflect the efficient costs incurred by it in terms of its CEI investments, particularly in the context of the TD HCA costs.

### 11.2.6 Regulation 16 of the Framework Regulations:

1171 Regulation 16 of the Framework Regulations aims to:

(1) *“In addition to, but without prejudice to, its objectives under section 12 of the Act of 2002, the Regulator shall–*

- (a) *unless otherwise provided for in Regulation 17, take the utmost account of the desirability of the technological neutrality in complying with the requirements of the Specific Regulations having particular regard to those designed to ensure effective competition,*
- (b) *in so far as the promotion of competition is concerned–*
- (i) *ensure that elderly users and users with special social needs derive maximum benefit in terms of choice, price and quality and*
  - (ii) *ensure that, in the transmission of content, there is no distortion or restriction of competition in the electronic communications sector,*
- (c) *in so far as contributing to the development of the internal market is concerned, co-operate with BEREC in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of European Union law in the field of electronic communications, and*
- (d) *in so far as promotion of the interests of users within the European Union is concerned–*
- (i) *address the needs of specific social groups, in particular, elderly users and users with special social needs, and*
  - (ii) *promote the ability of end-users to access and distribute information or use applications and services of their choice.*
- (2) *...the Regulator shall apply objective, transparent, non-discriminatory and proportionate regulatory principles...”*

1172 While some of the main requirements / objectives of Regulation 16 of the Framework Regulations have already been addressed above as part of the discussion on Section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 8 and Regulation 13 of the Access Regulations, set out below are some other key requirements associated with Regulation 16 which have not been addressed so far as part of the discussions above.

*Promoting regulatory predictability by ensuring a consistent approach over appropriate review periods:*

1173 With regard to promoting regulatory predictability by ensuring regulatory consistency across review periods, ComReg has assessed the costing / pricing methodology options for determining the prices for CEI access for NBI's MIP against the existing (status quo) costing / pricing methodology in Sections 5.6 (LRIC for NBI in Commercial Areas) and 5.7 (LR(A)IC for NBI in NBP IA) and in Section 6.5 (pole access by NBI in NBP IA) and Section 6.9 (duct access by NBI in NBP IA), while

considering the need for consistency across regulatory review periods.

1174 While ComReg has decided to continue with the existing costing / pricing methodology for Generic Access to CEI, for NBI's MIP access to CEI, ComReg has determined differentiated costing / pricing methodologies for CEI access in the NBP IA and separately in the Commercial Areas for the reasons set out in Sections 5 and 6, as referenced above at paragraph 1173.

1175 For the WACC for CEI in the context of the NBP, Section 7 has set out the rationale to differentiate the WACC used for NBI's MIP in the NBP IA and for NBI's transit access in the Commercial Areas. While the new WACC rate for CEI in the context of NBI's MIP differs to the newly revised WACC for generic fixed telecoms services determined in the 2020 WACC Decision and more recently updated in Information Notice 21/68, some of the parameters used are consistent across both. There are a number of specific WACC parameters that warrant a differentiated approach for CEI associated with NBI's MIP (compared to the WACC for generic fixed telecoms services) for the reasons justified at Section 7 of this Decision.

1176 While ComReg has decided to continue to require Eircom to provide an annual statement for its expenditure in poles, this statement is extended to include duct expenditure by Eircom as well as providing a split of the expenditure between the NBP IA and the Commercial Areas. These additional requirements are justified in Section 10 of this Decision.

*Taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State:*

1177 With regard to taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State, Section 4 of this document discusses the factors ComReg considered in differentiating the CEI price control remedy in relation to NBI's MIP in both the NBP IA and in the Commercial Areas so that ComReg can meet its regulatory objectives.

1178 The reasons why a varied price control for CEI is considered proportionate and justified for NBI's MIP access in the NBP IA and in the Commercial Areas is set out in Section 5 (costing methodology for CEI) and in Section 6 (cost sharing methodology for poles and ducts) as well as Section 7 for the differentiated WACC in the context of NBI's MIP access in the NBP IA and in the Commercial Areas.

### **11.3 Step 2: Identify and describe the regulatory options**

1179 The regulatory options considered by ComReg in the CEI Consultation are discussed in Sections 5 – 8 and in Section 10 of this Decision.

1180 In summary, the regulatory options considered in the context of determining the

appropriate costing methodology to apply to Eircom's CEI access services in the context of NBI's MIP are discussed in Section 5. The options considered by ComReg included LRIC, LRAIC, LRAIC+ cost standards, BU and TD models as well as the Historic Cost Approach and Current Cost Approach. Please refer to Section 5.6 (LRIC for NBI in Commercial Areas) and Section 5.7 (LRAIC for NBI in NBP IA) for further details.

1181 The regulatory options considered in the context of the determining the appropriate cost sharing / pricing methodology to apply to Eircom's CEI access services in the context of NBI's MIP and for Generic Access to CEI are discussed in Section 6. The options considered by ComReg included the per customer, per operator and primary / secondary approach (as well as the per metre of sub duct for sub-duct access). Please see Section 6.5 (pole access by NBI in NBP IA) and Section 6.9 (duct access by NBI in NBP IA) for further details.

1182 The regulatory options considered in the context of the WACC parameters for the WACC that should apply to Eircom's CEI for the purposes of the NBP are discussed in Section 7.

1183 In Section 8 ComReg assessed the options for the recovery of other costs related to Eircom's CEI services e.g., tree trimming services and pole furniture. Separately, in Section 10, ComReg considered the measure of Eircom undertaking an annual review of the PAM and DAM so as to demonstrate compliance with its cost orientation obligation for NBI's MIP. Please see Section 10 for further details.

### **11.4 Step 3: Determine the likely impact on stakeholders**

1184 ComReg has considered the impacts of its regulatory measures on the various stakeholders throughout this Decision, in particular in Sections 5 – 8 and in Section 10.

1185 In the CEI Consultation ComReg referred to the fact that Dot Econ, had assessed the impact of the proposed CEI costing methodology options on the various stakeholders at Annex C, parts C.4 and C.5 of the Dot Econ Draft Report (at Annex 2 of the CEI Consultation). In addition, ComReg noted that separately, Europe Economics had assessed the impact of the lower WACC for CEI services in the context of the NBP on the various stakeholders at Section 3 (subsection 3.7) of the Europe Economics Draft Report (at Annex 3 of the CEI Consultation).

#### **11.4.1 Respondents Views and ComReg's Response:**

1186 Eircom stated that ComReg has inappropriately outsourced, to its consultants, its regulatory requirement to determine the regulatory impact of its proposed

approach.<sup>640</sup>

1187 To clarify, ComReg engaged Dot Econ and Europe Economics to provide expert advice to it on the appropriate costing methodology(ies) to apply in the context of CEI access prices and the appropriate WACC in the context of CEI access by the NBP, respectively. As part of the requirements set by ComReg, on the work to be undertaken by Dot Econ and Europe Economics, ComReg specified that our advisors would set out in a report "*The likely regulatory impact of the recommended approach on the various stakeholders i.e. Eircom, other operators and consumer.*", which is published in the terms of reference set out in Information Notice 20/90<sup>641</sup> and Information Notice 20/108<sup>642</sup>.

1188 Given that ComReg has followed the recommended approaches put forward by Dot Econ on the costing methodologies that should apply in the context of setting Eircom's CEI access prices and separately the recommendation from Europe Economics on the differentiated WACC in the context of CEI access for the NBP, it would only seem logical and reasonable that ComReg generally agrees with the impact assessment put forward by our advisors. Nevertheless, for completeness ComReg has presented below its final position, taking full account of the impact assessment carried out by Dot Econ and Europe Economics, on the likely impact on stakeholders, as a result of the key measures implemented in this Decision.

1189 In addition, Eircom claimed that neither ComReg nor Dot Econ "...*explicitly discusses the option of maintaining the status quo...*".<sup>643</sup>

1190 ComReg disagrees with Eircom. Throughout the discussion in Section 5 of the CEI Consultation on the appropriate CEI costing methodology for NBI's MIP, ComReg compared its preferred approach i.e., LRIC in the case of the Commercial Area and LR(A)IC in the case of the NBP IA, against the existing cost methodology (of LRAIC+) used for Generic Access to CEI. Please refer to subsection 5.4 of the CEI Consultation and Sections 5.6 and 5.7 of this Decision for further details.

1191 Similarly, in the context of the cost sharing methodology for NBI's MIP in the NBP IA, ComReg compared its preferred approach (of per customer) against the existing per operator approach used for Generic Access to CEI. Please refer to Sections 6.3 and 6.5 of the CEI Consultation and Section 6.5 (pole access by NBI in NBP IA) and Section 6.9 (duct access by NBI in NBP IA) of this Decision.

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<sup>640</sup> Paragraphs 381-384 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>641</sup> Please see Appendix 2, part 4(d) at <https://www.comreg.ie/publication/information-notice-request-for-information-from-alto-regarding-comreg-consultation-document-20-81>

<sup>642</sup> Please see Appendix 1, part 4(e) at <https://www.comreg.ie/publication/information-notice-request-for-information-by-eircom-regarding-comreg-consultation-document-20-81>

<sup>643</sup> Paragraph 417 of Eircom's Non-Confidential Response dated 18 November 2020.



1192 Eircom's advisors, BRG Consultants, provided a sensitivity analysis between the various costing/pricing options, which ComReg has also considered in making its final Decision.

1193 ComReg has summarised below the potential impact of the regulatory options and ComReg chosen approach on the various stakeholders. ComReg considers the potential impacts that could be incurred by Eircom in complying with the obligations as well as the potential benefits that would accrue to Eircom, its wholesale customers and end users.

#### 11.4.2 Costing methodology for CEI access by NBI in Commercial Areas

1194 ComReg has set out below the potential impact of using LRIC as opposed to the (existing) LRAIC+ approach for setting the price for CEI access by NBI's MIP in the Commercial Areas, on the various stakeholders. ComReg has also taken into account Respondents Submissions before reaching its final position.

#### 11.4.3 Respondents Views and ComReg's Response:

1195 Eircom claimed that the move from the existing CEI charges to charges based on incremental costs for NBI's access in the Commercial Areas will have a significant impact on NBI's profitability, in particular given the design of the clawback mechanism.<sup>644</sup>

1196 ComReg has addressed Eircom's point at paragraph 173 of this Decision.

1197 According to Eircom, Dot Econ's impact assessment explicitly recognises that customers in the Commercial Areas could potentially be better off under the status quo but this is ignored by ComReg and Dot Econ.<sup>645</sup>

1198 To clarify, the existing LRAIC+ approach would allow Eircom to over recover its costs in the Commercial Areas given that NBI cannot use its subsidised network to compete in the Commercial Areas and so a LRIC methodology is the preferred approach for the reasons set out in Section 5.6 of this Decision.

1199 Eircom referred to Dot Econ's point that the effect of lowering Eircom's profitability (under the incremental approach in the Commercial Areas) would be transient but the serious implications that the proposal has on Eircom's ability to recover its costs has not been addressed. Eircom claimed that ComReg's proposal has serious implications for its ability to recover its costs and according to the estimates provided by its advisors, BRG Consultants, NBI will pay roughly (in net present value terms) €100m less for pole access and roughly €13 million less for

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<sup>644</sup> Paragraph 423 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>645</sup> Paragraphs 424-425 of Eircom's Non-Confidential Response dated 18 November 2020.

duct access than a generic access seeker would pay for the same level of pole and duct use.<sup>646</sup>

1200 In response to Eircom and BRG Consultants, ComReg considers that in the longer-term allowing Eircom to recover costs above the LRIC risks creating a competitive distortion which can disincentivise full infrastructure competition. Alternatively, allowing Eircom to just recover the LRIC associated with NBI's MIP access to CEI in the Commercial Areas allows it to be compensated for the costs that NBI causes in this area and so there is no risk to Eircom. However, there is the risk that if NBI's MIP pays more than incremental cost and Eircom earns a windfall gain on NBI's access services in the Commercial Areas, this eventually leads to lower prices for end-user services and/or access services in the Commercial Areas, which is likely to lead to reduced incentives for full infrastructure competition in the Commercial Areas, compared with the LRIC approach. Please see subsection 5.6, and in particular subsection 5.6.2, for further details.

**Table 21: Option 1: Maintain the existing methodology of LRAIC+ (and with TD costs for Reusable CEI Assets) for NBI's CEI charges in Commercial Areas**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p>Applying the <b>LRAIC+</b> methodology (compared with the LRIC) means that there is the potential for <b>Eircom</b> to over recover CEI costs (or earn a windfall gain) associated with NBI's transit access in the Commercial Areas over and above the efficient costs incurred by Eircom in the supply of that CEI service, as NBI's use of Eircom's CEI in the Commercial Areas will not impact on Eircom's downstream revenues from wholesale services sold to premises in the Commercial Areas as NBI cannot compete for or serve customers in this area.</p> <p>The <b>LRAIC+</b> option for NBI's transit access in the Commercial Areas would mean that <b>Eircom</b> should have a lesser amount of costs to recover from other wholesale regulated services</p>	<p><b>NBI</b> would pay a higher price (and hence higher payments) to Eircom for CEI access under a LRAIC+ approach (compared to LRIC), for transiting through the Commercial Area in order to backhaul to parts of the NBP IA. This would not take account of the fact that NBI cannot compete for or serve customers in the Commercial Areas and so Eircom's downstream revenues from wholesale services sold in this area are not impacted. A higher CEI payment to Eircom (compared with LRIC) means a larger subsidy payment from DECC to NBI for CEI access.</p> <p>For <b>other alternative operators</b>, LRAIC+ leads to a risk that any revenues that exceed incremental costs</p>	<p>In general, there is no obvious impact on <b>end-users</b> in Commercial Areas as NBI cannot use its network that transits the Commercial Areas to provide services there.</p> <p>For <b>end-users of other Eircom services in the Commercial Areas</b>, the LRAIC+ could leave these services cheaper (compared to the LRIC approach) due to the contribution to CEI common corporate costs made by NBI's demand for CEI access for transit purposes (the "waterbed" or "see-saw" effect described in Section 5.6.1). However, this should be mitigated by the fact that transit access to CEI by NBI's MIP predominately arises in the Rural Commercial Areas while the</p>

<sup>646</sup> Paragraph 426 of Eircom's Non-Confidential Response dated 18 November 2020.

<p>that use CEI i.e., CG SABB, but this over recovery and the impact on other services is difficult to assess given that not all services are cost oriented (i.e., FTTH).</p>	<p>could distort competition for services in related competitive markets. If Eircom recovered in excess of its incremental cost (under the option of LRAIC+) this may lead to additional margins being earned by Eircom from those CEI assets sold to NBI (and who are not in a position to compete in the Commercial Areas) which may, in turn, result in Eircom obtaining an unfair competitive advantage and result in part funding of other services to the disadvantage of other alternative operators.</p> <p><b>Other wholesale access seekers</b> argue that as NBI pay less than LRAIC+ means that other wholesale services have to pay more. However, this is mitigated by the fact that CEI access for transit purposes by NBI predominately arises in the Rural Commercial Area while the prices for wholesale services like FTTC or Generic Access to CEI are set with reference to costs in the Urban Commercial Area footprint.</p> <p>NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services in Commercial Areas. Under the <b>LRAIC+</b> the <b>comparable wholesale prices charged by NBI to other wholesale access seekers in the NBP IA could potentially be cheaper</b> if NBI makes a greater contribution to shared/common CEI costs in the Commercial Areas, reducing the cost contribution that needs to come from other</p>	<p>wholesale services such as FTTC or Generic Access to CEI are costed with reference to costs in the Urban Commercial Area footprint.</p>
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	<p>services (a 'see-saw' effect, as described at Section 5.6.1). Hence, maintaining the existing LRAIC+ approach for NBI in the Commercial Area could both increase NBI's costs (through higher CEI charges) and reduce its revenues (through lower benchmarked prices).</p>	
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**Table 22: Option 2: Apply LRIC methodology to NBI's CEI charges in Commercial Areas**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p>For <b>Eircom</b>, the LRIC approach still ensures that Eircom should recover (but not over recover) its efficiently incurred costs caused by NBI's shared access while promoting efficient use of existing reusable CEI assets.</p> <p>The LRIC also recognises that <b>Eircom</b> should suffer no loss of wholesale or retail revenues in this area as NBI cannot use its subsidised network outside the NBP IA to serve customer and compete in this area.</p>	<p><b>NBI</b> would pay a reduced price (and hence lower payments) to Eircom for CEI access under a LRIC approach (compared to LRAIC+), for transiting through the Commercial Area in order to backhaul to parts of the NBP IA. This would fully reflect the fact that NBI cannot compete for or serve customers in the Commercial Areas and so Eircom's downstream revenues from wholesale services sold in this area are not impacted. A reduction in NBI's payment to Eircom would also mean a reduction in the State subsidy payment from DECC to NBI for CEI access.</p> <p>For <b>other alternative operators</b>, the LRIC avoids the risk noted above (under the LRAIC+) where the potential over-recovery of costs could distort competition for services in related competitive markets. Hence, the LRIC should ensure that there are no distortions to competition in the</p>	<p>In general, there is no obvious impact on <b>end-users</b> as NBI cannot use its network that transits the Commercial Areas to provide services there.</p> <p>For <b>end-users of other Eircom services in the Commercial Areas</b>, the LRIC avoids the issue of cheaper services (under the LRAIC+ approach) as there would be no additional contribution to CEI common corporate costs made by NBI's demand for CEI access for transit purposes.</p>

	<p>Commercial Areas.</p> <p>There is no obvious impact on <b>other wholesale access seekers</b> as NBI cannot use its network that transits the Commercial Areas (built and operated using a State subsidy) to provide services in direct competition with Eircom or other operators in the Commercial Areas.</p> <p>The issue above (under the LRAIC+) of possible cheaper comparable wholesale prices charged by NBI to other wholesale access seekers in the NBP IA is avoided if LRIC approach is applied.</p>	
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#### 11.4.4 Costing methodology and cost sharing approach for CEI access by NBI in NBP IA

1201 ComReg has set out below the potential impact of using the existing costing approach i.e., LRAIC+ and the per operator / per metre of sub-duct cost sharing approaches, compared to the option of LRAIC with either the per customer cost sharing approach or LRAIC with the 'per operator plus' approach for poles and per metre of duct / sub-duct cost sharing approach for duct / sub-duct in order to determine NBI's MIP charges in the NBP IA, on the various stakeholders. ComReg has also taken into account the Respondents Submissions before reaching its final position.

#### 11.4.5 Respondents Views and ComReg's Response:

1202 Eircom referred to Dot Econ's impact assessment stating that it agreed that "*...higher prices for copper-based customers are a possible outcome.*" in a move to a per customer approach. It claimed, however, that Dot Econ seemed to "*...discount this effect on the basis of the trade-off with regard to ensuring that the copper network is not switched off too early.*" and so Eircom considered that Dot Econ completely failed to consider Eircom's ability in this regard as any eventual date for copper retirement will have to be approved by ComReg.<sup>647</sup>

1203 In addition, Eircom referred to Dot Econ's suggestion that the proposed per

<sup>647</sup> Paragraph 433 of Eircom's Non-Confidential Response dated 18 November 2020.

customer approach provides a "boon" for Eircom, by allowing the copper network to remain economically viable for longer than would be the case under the status quo and that this reduces the risk for Eircom that it will not be able to recover its costs if fibre deployment does not happen in a timely manner. Eircom claimed that *"it is strange that this is the only place that DotEcon considers eir's inability to switch off the copper network."* Eircom further stated that absent NBI deployment, Eircom would continue to have copper customers in the NBP IA and its CEI infrastructure would continue to be used (and invested in) to serve those customers.<sup>648</sup>

1204 ComReg has modified its approach on the cost sharing methodology since the CEI Consultation, from Option 2 in Table 24 to Option 3 in Table 25. Hence, for the reasons set out in Section 6.5 and Section 6.9 the proposed per customer approach is not practicable given that Eircom does not have the line/location information required to implement it. ComReg considers that the 'per operator plus' approach for allocating the shared pole network costs between NBI and Eircom in the NBP IA should provide the appropriate incentives to Eircom for copper removal from its poles, as Eircom will continue to contribute to 50% of the pole shared network costs until Eircom removes its cables from the poles, at which point NBI will then incur 100% of the pole costs. Please see Section 6.5 for further details.

1205 ComReg's discussion on copper switch-off is set out in paragraphs 153-168.

1206 Eircom reiterated its view that any excess profitability under the existing status quo approach, for short periods when Eircom might be able to generate more revenue from CEI than previously anticipated, would continue to be constrained by a regulatory framework that would prevent it from undertaking the kind of pricing behaviour that has been highlighted by Dot Econ and ComReg. Eircom pointed to Dot Econ's report at Section 5.7 which states that such returns would be "transitory" and Eircom claimed that this point is excluded from Dot Econ's impact assessment.<sup>649</sup>

1207 ComReg considers that Eircom's point at paragraph 1206 is addressed at paragraphs 401-403.

**Table 23: Option 1: Maintain the existing methodologies of BU-LRAIC+ (with TD costs for Reusable CEI Assets) and allocate shared network costs on a per operator basis for poles and per metre approach for duct access by NBI's MIP in the NBP IA**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
Eircom would continue to	For NBI, this approach means	As NBI's wholesale prices in the

<sup>648</sup> Paragraph 436 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>649</sup> Paragraph 435 of Eircom's Non-Confidential Response dated 18 November 2020.

<p>recover all of its incremental costs, shared network costs and mark-up for common corporate costs from the LRAIC+ based CEI charges. This could lead to excess profitability for Eircom, due to large volume of CEI access services sought by NBI in the NBP IA, which could be used by Eircom to lower prices of its other services in Commercial Areas and so could cause competitive distortions.</p> <p>This approach would be inconsistent with the 2018 Pricing Decision, which established the principle that common corporate costs should be recovered from Eircom's services in the Commercial Areas only.</p> <p>For poles, the costs would be split 50:50 between NBI and Eircom and so <b>Eircom</b> may not have the appropriate incentives to make its CEI network 'NGA ready', as the per customer approach and the 'per operator plus' approach allows Eircom to recover the incremental costs caused by NBI's MIP.</p> <p><b>Eircom's</b> incentive to remove its cables is stronger under the per operator approach (than the per customer approach or the 'per operator plus' approach) as under the per operator approach Eircom would have to remove all cables before NBI's MIP would be required to absorb more than 50% of pole related costs under the per operator approach. Hence, this approach may provide inefficient strong incentives to Eircom for copper removal</p>	<p>that NBI would pay a stable contribution of 50% of the pole costs in the NBP IA, i.e., incremental costs, shared network costs and common corporate costs once it gains access to the pole and this charge would continue until such time as Eircom removes its copper cables at which point NBI will then incur 100% of the pole costs.</p> <p><b>Other wholesale access seekers</b> will not be impacted as NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services and so any changes to the CEI access prices (including the WACC) for NBI's MIP will not be reflected in NBI's actual wholesale charge to other access seekers.</p>	<p>NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from <b>end-users</b> of NGA broadband service.</p> <p>The existing LRAIC+ may lead to somewhat lower prices for copper services due to a contribution to common corporate costs being made by NBI's fibre network, compared to other options below.</p>
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<p>(from poles) before NBI's fibre network has been fully deployed.</p> <p>For <b>Eircom</b>, the per operator is simpler to implement, compared to per customer and per operator plus, as there is no need to identify the incremental costs (or shared network costs).</p>		
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**Table 24: Option 2: Apply LR(A)IC methodology (with TD costs for Reusable CEI Assets) and allocate costs on a per customer basis for poles and for duct access by NBI's MIP in the NBP IA**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p><b>Eircom</b> would recover the incremental costs caused by NBI, similar to the 'per operator plus' approach below. This gives Eircom the incentive to make its CEI network 'NGA ready', as it is guaranteed that it will recover any incremental investment it makes for the purposes of NBI's deployment in the NBP IA.</p> <p>Moving from the per operator approach to the per customer approach delays payments for CEI access from NBI to Eircom but <b>Eircom</b> should still recover its reasonable efficient CEI costs.</p> <p>The LR(A)IC approach in the IA includes incremental costs and shared network costs but it does not include a contribution to common corporate costs (as these are not related to the provision of NBI's MIP in the NBP IA). Hence, this approach is consistent with the principle established in the 2018 Pricing Decision that common</p>	<p>Under the per customer approach <b>NBI</b> would always pay the incremental costs (similar to the per operator plus below) from the time access is initially granted but the attribution of shared network costs depends on the relative NBP IA customer numbers served by NBI's MIP and Eircom. Hence, for NBI the per pole charge under the per customer approach is likely to be initially lower (compared with the existing per operator approach) but the CEI payment will increase progressively as NBI's relative share of the customer base in NBP IA increases and so it takes a larger share of the shared network costs.</p> <p>The per customer approach should avoid sharp changes in overall CEI access charges for <b>NBI</b> as Eircom's copper network is retired.</p> <p>The per customer approach requires <b>NBI</b> to pay Eircom for</p>	<p>As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services in Commercial Areas any changes to the CEI access prices as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not on <b>end-users</b> of NGA broadband service.</p>



<p>corporate costs should be recovered from services sold in the Commercial Areas only.</p> <p>The per customer approach may not provide <b>Eircom</b> with the same incentive to remove copper cables compared to the per operator approach, as under the per operator approach Eircom will always have to recover 50% of the pole costs until it removes its cables from a pole after which NBI's MIP will incur 100% of the pole costs. In contrast, under the per customer approach the per-pole charge for NBI's MIP will exceed 50% once its share of the relevant customer base exceeds a certain level. Hence, a per customer approach could provide Eircom with better <i>incentives</i> to decommission copper.</p> <p>Under the per customer approach, the contribution to shared network costs would depend on relative active customer numbers served by both Eircom and NBI. The per customer approach requires active customer line and location information from <b>Eircom</b> (and NBI), which has an added administration burden. Eircom has confirmed in its submission to the CEI Consultation that this information is not available. Hence, it is not possible to pursue the per customer approach without the active customer line information. This information is not required for the per operator or the 'per operator plus' approaches.</p>	<p>the incremental costs caused by its access request for poles which is likely to be significant in the NBP IA given the extent of pole replacement that is expected. However, this should have little effect on NBI as State subsidy payments should be adjusted in line with changing CEI access costs for NBI.</p> <p>The per customer approach requires active customer line and location information from <b>NBI</b> which has an added administration burden, compared with the per operator and 'per operator plus' approaches.</p> <p><b>Other wholesale access seekers</b> will not be impacted as NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services and so any changes to the CEI access prices for NBI's MIP will not be reflected in NBI's actual wholesale charge to other access seekers.</p>	
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**Table 25: Option 3: Apply LRAIC methodology (with TD costs for Reusable CEI Assets) and allocate shared network costs on 'per operator plus' for poles and per metre approach for ducts for NBI's MIP in the NBP IA**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p><b>Eircom</b> will recover the incremental costs caused by NBI's deployments in the NBP IA. This approach is better aligned with the principle of cost causation and so whatever costs are caused by NBI's MIP in accessing Eircom's CEI in the NBP IA are paid by NBI, similar to the originally proposed per customer approach.</p> <p>Because Eircom will recover the incremental costs caused by NBI in the NBP IA both cost sharing approaches in the IA provides <b>Eircom</b> with appropriate incentives to make the CEI network 'NGA ready'.</p> <p>The 'per operator plus' approach reduces the quantum of shared networks costs that need to be split 50:50 between Eircom and NBI, and this in turn mitigates the potential excessive incentives that <b>Eircom</b>, under the per operator approach, may have to accelerate the switch-off of its copper network.</p> <p>Under a 'per operator plus' approach, <b>Eircom</b> will not be able to charge NBI's MIP 100% of the pole cost until it removes its cables from the poles. The 'per operator plus' approach reduces the quantum of shared networks costs (that need to be split 50:50 between Eircom and NBI), and this in turn mitigates the potential excessive incentives that Eircom, under the 'per operator' approach, may have to accelerate the switch-off of its copper network. This incentive does not exist with the originally proposed per customer</p>	<p><b>NBI</b> will pay the incremental costs that it causes in the NBP IA as the investments made by Eircom in this area are likely to be solely for the purposes of NBI's fibre rollout. Hence, given that NBI is likely to be the sole beneficiary of these investments it seems reasonable that NBI reimburses Eircom for these costs.</p> <p>As this approach provides Eircom with better incentives to invest in its pole network in the NBP IA, this should also mean that NBI has appropriate incentives to roll-out its fibre network faster in the NBP IA.</p> <p>Under the per operator plus approach NBI can only be charged for 100% of pole costs once Eircom removes its cables from the poles. This should provide certainty to NBI that Eircom cannot charge for 100% of pole costs while Eircom's cables remain on the poles.</p> <p>This option does not require <b>NBI's</b> active customer line information and so there is less administration burden associated with it, compared to the per customer approach.</p> <p><b>Other wholesale access seekers</b> will not be impacted as NBI's wholesale prices in the NBP IA are set by reference to comparable</p>	<p>As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices (or the WACC rate) as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from <b>end-users</b> of the broadband service.</p> <p>As this approach provides Eircom with better incentives to invest in its pole network in the NBP IA, this should also mean that NBI has appropriate incentives to roll-out its fibre network faster in the NBP IA, which is in the interest of <b>end-users</b>.</p>

<p>approach, where the charge to NBI is based on its share of active connections with the result that NBI's MIP could be paying 100% of the pole cost even if Eircom's copper cables remain on the pole.</p> <p>The LR(A)IC approach in the IA includes the incremental costs and the shared network costs but not a contribution towards common corporate costs. Hence, the LRAIC is consistent with the principle established in the 2018 Pricing Decision in that Eircom's common corporate costs should be recovered from the services sold in the Commercial Areas only. ComReg has respecified some common corporate costs to incremental costs associated with NBI's MIP service, further to Respondents Submissions, as discussed in at paragraphs 385-403.</p> <p>This option does not require Eircom's active customer line information and so there is less administration burden associated with it, compared to the per customer approach.</p>	<p>wholesale regulated broadband services and so any changes to the CEI access prices (including the WACC) for NBI's MIP will not be reflected in NBI's actual wholesale charge to other access seekers.</p>	
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#### 11.4.6 WACC rate for CEI access by NBI in Commercial Area and NBP IA

1208 ComReg has set out below the potential impact of applying a lower WACC in the case of NBI's access to Eircom's CEI as opposed to using the existing fixed line telecoms WACC rate, on the various stakeholders. ComReg has also taken into account the Respondents Submissions before reaching its final position.

#### 11.4.7 Respondents Views and ComReg's Response:

1209 Eircom claimed that Europe Economics overstates the extent to which NBI reduces risk for Eircom's CEI business in the NBP IA, and they reiterated their views on the fundamental risks of (a) substitution to other providers' CEI; and (b) substitution to non-fixed-line technologies. These points have been addressed at paragraphs 815-825 of this Decision.

1210 In addition, Eircom considered that ComReg's proposals for sharing common network costs associated with poles and ducts create additional risks and until and unless NBI's network is successful in gaining significant end-user acceptance, Eircom maintains that it will rely on its legacy copper products to cover its CEI costs.<sup>650</sup> Eircom claimed that Europe Economics did not consider the impacts of ComReg's proposed per customer approach on the WACC and so Europe Economics' assessment is not complete in Eircom's view.<sup>651</sup>

1211 ComReg considers that for the reasons set out in Section 6.5 and Section 6.9, the proposed per customer approach is not deemed appropriate at this time for cost sharing purposes in the NBP IA due to the absence of the necessary data required to implement it. Please refer to Section 6.5 and Section 6.9 for further details.

**Table 26: Option 1: Apply the fixed line telecoms WACC to NBI's CEI Access**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p><b>Eircom</b> would recover a higher rate of return on its CEI access to NBI (i.e., 5.56% based on fixed line WACC versus 3.76% based on CEI WACC) and so it would earn more profits from the higher fixed line telecoms WACC.</p>	<p><b>NBI</b> would pay a higher price for Eircom's CEI access (compared to applying the lower CEI WACC in the price), which would not reflect the lower risks associated with its specific CEI access as set out in the NBP contract.</p> <p><b>Other wholesale access seekers</b> will not be impacted as NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services and so any changes to the CEI access prices (including the WACC) for NBI's MIP will not be reflected in NBI's actual wholesale charge to other access seekers.</p>	<p>As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices (or the WACC rate) as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from end-users of the broadband service.</p>

<sup>650</sup> Paragraph 444 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>651</sup> Paragraph 449 of Eircom's Non-Confidential Response dated 18 November 2020.

**Table 27: Option 2: Apply a lower WACC to NBI's CEI Access to reflect specific circumstances of NBI's access**

Impact on Eircom	Impact on NBI and other access seekers	Impact on End users
<p>Eircom will recover a lower rate of return on its CEI access to NBI (i.e., 3.76% compared to 5.56% based on fixed line WACC) and so it will earn less profits from the lower CEI WACC rate.</p>	<p><b>NBI</b> will pay a lower price for Eircom's CEI access (compared to applying the higher fixed line WACC in the price), which would reflect the lower risks associated with NBI's specific CEI access as set out in the NBP contract. This is discussed in detail in Section 7.</p> <p><b>Other wholesale access seekers</b> will not be impacted as NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services and so any changes to the CEI access prices (including the WACC) for NBI's MIP will not be reflected in NBI's actual wholesale charge to other access seekers.</p>	<p>As NBI's wholesale prices in the NBP IA are set by reference to comparable wholesale regulated broadband services any changes to the CEI access prices (or the WACC rate) as a result of this review should only impact on the State subsidy (and hence amount to be recovered from tax payers) but not from end-users of the broadband service.</p>

## 11.5 Step 4: Determine the likely impact on competition

1212 In the 2018 WLA / WCA Market Review Decision ComReg found Eircom had the ability and incentive to engage in anti-competitive behaviours and problems which ComReg outlined in Section 7 of Consultation Document 16/96 preceding ComReg Decision D10/18 (2018 WLA / WCA Market Review Decision).<sup>652</sup> These problems arose, insofar as CEI is concerned, from the fact that CEI is a bottleneck asset without access to which access seekers are unlikely to build network infrastructure. As a vertically integrated undertaking with SMP in the WLA Market, Eircom has the ability and incentive to refuse to provide access to these CEI inputs, in circumstances where access to Eircom's CEI is necessary to ensure the development of sustainable and effective downstream competition and to minimise

<sup>652</sup> ComReg Document No 16/96 'Market Reviews, Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products', dated 11 November 2016.

foreclosure concerns that could arise, absent regulation. CEI access is key to promoting sustainable competition through network rollout by removing unnecessary network build costs. No other access obligation has the ability to reduce access network build costs, thereby creating the conditions necessary to promote sustainable competition.<sup>653</sup>

1213 ComReg further found that a cost orientation price control would ensure that Eircom is prevented from charging excessive prices for wholesale inputs and, at the same time, should promote efficient infrastructure investment and encourage service providers to climb the ladder of investment. A cost orientation price control also ensures that Eircom can recover the efficiently incurred costs which are relevant to the provision of WLA products, services and facilities. This should, in turn lead to efficient price and investment signals being provided to all market participants.

1214 In this Decision ComReg determines how to address the competition problems identified in the 2018 WLA / WCA Market Review Decision, most effectively in respect of CEI access, having regard to changed expectations in respect of demand for CEI access following the awarding of the NBP contract. In particular, ComReg has amended the specification of the obligation of cost-orientation imposed on Eircom so that the price control can address the risks that Eircom exploits CEI access seekers or end-users by virtue of its SMP position in the WLA Market and delay or deter investment and market entry into the Relevant WLA Market through CEI access taking into account developments arising from the signing of the NBP contract.

1215 The likely impact on competition both in the Commercial Areas and in the NBP IA has been considered throughout this Decision, in particular, Section 3 (subsection 3.4), Section 5 (in particular subsections 5.6 and 5.7) and Section 6. In addition, please refer to paragraphs 1126-1134 above.

## **11.6 Step 5: Assess the likely impact and choose the best option**

1216 As discussed in Section 11.2 above, ComReg has taken account of Section 12 of the Communications Regulation Act 2002 (as amended), Regulation 6(1) of the Access Regulations, Regulation 8(6) of the Access Regulations, Regulation 13 of the Access Regulations and Regulation 16 of the Framework Regulations, and the similar provisions set out in the EECC in arriving at its final position set out in this Decision.

1217 Given the competition concerns discussed in Section 3, and in particular the concerns that Eircom may charge excessive prices, ComReg considers that the

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<sup>653</sup> Paragraphs 8.188 to 8.192 of ComReg Consultation Document 16/96.

regulatory pricing measures set out in this Decision should address such concerns while also ensuring that the CEI access prices for NBI's MIP, should meet ComReg's regulatory objectives.

- 1218 The LRIC methodology for setting the CEI access price for NBI's MIP in the Commercial Area, and the LRAIC methodology used to set the CEI access price for NBI's MIP in the NBP represent the most justified, reasonable and proportionate approaches, for the reasons set out at Sections 5.6 and 5.7, respectively.
- 1219 Given the implementation issues associated with the proposed per customer cost sharing approach, ComReg has modified its approach from that set out in the CEI Consultation. ComReg considers that in the case of poles and ducts for NBI's MIP in the NBP IA the most justified and proportionate approach to allocate the shared CEI network costs between NBI and Eircom in the NBP IA is to ensure that NBI always pay the incremental costs that it causes and in addition for poles, the shared network costs will be split 50/50 between NBI and Eircom and split according to the per metre of duct / sub-duct length for duct access, as discussed in Section 6.5 (for pole access by NBI in NBP IA) and Section 6.9 (for duct access by NBI in NBP IA) of this Decision.
- 1220 The differentiated (lower) WACC for CEI access by NBI's MIP is proportionate and justified based on the step-in rights from the State set out in the NBP contract as well as the guaranteed revenue stream to Eircom over a 25 year period, which ComReg considers should be reflected in the WACC for NBI's CEI access compared to the WACC relevant to other Generic Access users of CEI (which are charged the fixed line WACC), as discussed in Section 7.
- 1221 In addition, ComReg has considered the potential impact of our proposals in the context of the key stakeholders, as summarised at Section 11.4. On balance, ComReg considers that the regulatory measures set out in this Decision are proportionate and justified while meeting ComReg's regulatory objectives and addressing the competition concerns associated with the WLA Market, for the reasons discussed in Sections 5 – 8 and in Section 10 of this Decision.

# 12 Points raised on the Draft Decision Instrument

## 12.1 Overview

1222 In Annex 1 of the CEI Consultation ComReg set out the Draft Decision Instrument relating to the price control obligation for CEI in the WLA Market.

1223 In this section of the document ComReg sets out the Respondents' Submissions on the Draft Decision Instrument, ComReg's consideration of those submissions and ComReg's final position on the Decision Instrument.

## 12.2 Decision Instrument for CEI services in the WLA Market

### 12.2.1 Position set out in the Consultation:

1224 In the CEI Consultation ComReg set out the draft text of the proposed Decision Instrument which was designed to give legal effect to the proposed WLA price control remedies for CEI services.

1225 In Question 23 of the CEI Consultation ComReg sought views as to whether the wording of the draft Decision Instrument was from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed. Respondents were asked to explain their response and to provide details of any specific amendments they believe are required.

### 12.2.2 Respondents' Views and ComReg's Response:

1226 ComReg received a direct response to Question 23 from seven Respondents, namely, Eircom, NBI, BT, Vodafone, Virgin Media, Siro and ALTO. Sky did not address the issues raised in Question 23 in their general response. Siro<sup>654</sup> and Vodafone<sup>655</sup> stated that they had no comments on the Draft Decision Instrument.

1227 Eircom raised a number of points, including issues regarding references to the EECC in the Decision Instrument, comments on some of the definitions used in the Decision Instrument and seeking clarity on the rationale of Section 11 of the Decision Instrument regarding publication and notification of the Decision to Eircom.<sup>656</sup>

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<sup>654</sup> Page 9 of Siro's Non-Confidential Response dated 18 November 2020.

<sup>655</sup> Page 10 of Vodafone's Non-Confidential Response dated 18 November 2020.

<sup>656</sup> Paragraphs 456-460 of Eircom's Non-Confidential Response dated 18 November 2020.



- 1228 While NBI stated that it had no specific comments on the Draft Decision Instrument it suggested that the Decision Instrument should be updated to reflect its previous comments on the customer line approach (which is addressed at paragraphs 693-698 of this Decision), a lower WACC (which is addressed at paragraphs 831-839 of this Decision), that ComReg should carry out the annual review (which is addressed at paragraphs 1069-1075 of this Decision) and that the Decision Instrument should be updated to ensure continuity of current levels of quality of CEI access provision.<sup>657</sup>
- 1229 BT raised a number of issues, including its concerns around CEI product offers in the Commercial Areas, that the Decision Instrument should include a clause on passive access records, that any additional CEI charges should be published (which is addressed at paragraphs 962-964), and its disagreement at a differentiated WACC for NBI's MIP in the NBP IA (which is addressed in Section 7).<sup>658</sup> Virgin Media suggested that the Decision Instrument should be clear around which access requests are applicable for the updated price and by way of example stated that if the updated prices take effect on 1st July 2021, the updated prices should be applied to uncompleted access requests made prior to this date (i.e. orders made before the new prices come into effect but has not yet been completed).<sup>659</sup> In addition, Virgin Media stated that processes and timelines for CEI access should be the same regardless of the access seeker and so this is an opportunity for Eircom to refresh its specifications on this.<sup>660</sup> ALTO referred to its comments on the RIA, which ComReg has addressed in Section 11 of this Decision.

### Considerations for the Decision Instrument

- 1230 Eircom stated that the draft Decision Instrument refers to ComReg acting pursuant to its powers under current Regulations and it considers that it seems highly unlikely that the Decision Instrument could be issued by ComReg prior to the transposition of the EECC. Eircom claimed that "*Simply referring to the Code in paragraph (ix) is not sufficient*" and that Section 1 of the Decision Instrument will need to be replaced and should be subject to further consultation.<sup>661</sup>
- 1231 ComReg notes that no specific legislation has been adopted at this time for the purpose of transposing the EECC in Irish law and the provisions, in particular, of the Access Regulations, the Framework Regulations and the Authorisation Regulations remain applicable. This being the case, there is no reason why this Decision could not be issued prior to the transposition of the EECC.
- 1232 Reference to the EECC at paragraph (ix) of Section 1 of the Decision Instrument makes it clear that, where relevant, ComReg has taken into account the

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<sup>657</sup> Pages 77-78 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>658</sup> Pages 20-21 of BT's Non-Confidential Response dated 18 November 2020.

<sup>659</sup> Page 7 of Virgin Media's Non-Confidential Response dated 18 November 2020

<sup>660</sup> Pages 7-8 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>661</sup> Paragraph 456 of Eircom's Non-Confidential Response dated 18 November 2020.

provisions of the EECC in adopting its decision. However, and contrary to what Eircom suggests, there is no need, and it would not be appropriate, for ComReg to refer to its powers to undertake a market analysis and define economic markets.<sup>662</sup> ComReg is not, by this Decision, completing a market analysis or defining economic markets. Rather in this Decision ComReg is further specifying the cost orientation price control obligation imposed in the 2018 WLA / WCA Market Review Decision. On that basis ComReg does not consider that a change to the Decision Instrument is required.

## Definitions

- 1233 Eircom queried the use of the defined term “Authorised Undertaking” to refer to NBI, noting its view that this is a departure from the usual practice of referring to Undertakings and the actual company being referred to,<sup>663</sup> as well as the use of the High Speed Broadband Map in the Price Control.
- 1234 First of all, as NBI is an undertaking which is subject to a general authorisation according to the terms of the Authorisation Regulations, it is appropriate for this wording to be used when defining NBI. As for the company that is being referred to, Eircom is correct that NBI as defined in the draft Decision Instrument<sup>664, 665</sup> is not the correct entity and the Decision Instrument has been updated to refer to the company NBI Infrastructure Designated Activity Company registered under the number 631656 with a registered address of 3009 Lake Drive, Citywest Business Campus, Citywest, Dublin 24, D24H6RR, Ireland.
- 1235 As for ComReg's definition of “High Speed Broadband Map”, having considered Eircom's comment that the definition used in the draft Decision Instrument is incorrect, including because DECC no longer differentiates between Blue and Light Blue area, and that the definitions of Urban Commercial Area and Rural Area should be revisited,<sup>666</sup> a number of amendments have been made to the Decision Instrument in this respect. In particular the Decision Instrument no longer includes a definition of the High Speed Broadband Map and instead defines the Intervention Area by references to the premises to which NBI is to deliver high speed broadband under its contract with the State, and the Rural Commercial Area by reference to Eircom's 2017 Commitment agreement with the State.
- 1236 ComReg is satisfied that this better reflects its approach to the pricing of CEI as contrary to what Eircom suggests, the price control specified by ComReg does not hinge on market definitions that are outside of ComReg's control or in any

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<sup>662</sup> Paragraph 457 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>663</sup> Paragraph 459 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>664</sup> NBI Infrastructure Designated Activity Company, a company registered in Ireland with number 629167 whose registered office at the date of this Decision is at Ten Earlsfort Terrace, Dublin 2, D02T380, Ireland

<sup>665</sup> Paragraph 459 of Eircom's Non-Confidential Response dated 18 November 2020.

<sup>666</sup> Paragraph 459 of Eircom's Non-Confidential Response dated 18 November 2020.

require that ComReg and DECC act in a coordinated manner. Changes in DECC practice will not impact on the operation of the Decision Instrument, which relies not on the High Speed Broadband Map as it evolves, but on the CEI cost models (PAM and DAM), which are entirely and solely within ComReg's control.

1237 ComReg notes again, for the avoidance of doubt, that in this Decision, ComReg does not define markets. ComReg further specifies the price control obligation of cost orientation by references to the different levels of costs involved in the provision of Generic Access and NBI's MIP access according to the different geographic areas where Access will be sought. This should ensure that Eircom can recover its CEI costs that are efficiently incurred as well as an appropriate rate of return while also ensuring that the build/buy pricing signals are provided to alternative providers in the relevant geographic areas i.e., Commercial Areas, in line with ComReg's objective of encouraging investment.

#### Other issues:

1238 NBI suggested that the Decision Instrument should be updated to ensure long-term continuity of at least the current levels of quality of provision of CEI.<sup>667</sup> BT claimed that duct and pole product offers in the Commercial Areas are not fit for purpose and that it is disappointed that the Draft Decision does not consider this matter,<sup>668</sup> and suggested that the Decision Instrument should include a clause on passive access records so as to ensure ease of data download onto user systems as the current format is inefficient and creates a lot of manual work.<sup>669</sup>

1239 Virgin Media suggested that the Decision Instrument should be clearer on how new prices are applied to uncompleted access requests that are made prior to the date of the price change.<sup>670</sup>

1240 Eircom referred to Section 11.1 of the Decision Instrument which states that "*This Decision Instrument shall be published on ComReg's website (www.comreg.ie) and on the same day, notified to Eircom.*" stating that it is not clear what its rationale and intention or effect are and Eircom questioned that if ComReg publishes the Decision Instrument but fails to notify Eircom, or vice versa, does that render the Decision Instrument ineffective.<sup>671</sup>

1241 ComReg notes that the issues raised by NBI and BT are outside of the scope of this CEI pricing review and therefore do not fall to be provided for in the Decision Instrument.

1242 Insofar as the application of the price control is concerned, the prices set out in

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<sup>667</sup> Page 78 of NBI's Non-Confidential Response dated 18 November 2020.

<sup>668</sup> Page 20 of BT's Non-Confidential Response dated 18 November 2020.

<sup>669</sup> Page 21 of BT's Non-Confidential Response dated 18 November 2020.

<sup>670</sup> Page 7 of Virgin Media's Non-Confidential Response dated 18 November 2020.

<sup>671</sup> Paragraph 460 of Eircom's Non-Confidential Response dated 18 November 2020.

this Decision shall apply to all relevant CEI orders from the first day of the third month after publication of this Decision in line with Section 3.3 of the Decision Instrument in Annex 1 below. This means that the new prices will apply to any relevant CEI access, irrespective of when the request for access was made.

1243 As for Section 11 of the Decision Instrument, it is entitled "Publication, Notification and Effective Date" and the intention of Section 11.1 is to set out clearly how the Decision will be published and notified to Eircom. As stated in Section 11.2 of the Decision Instrument, "*the Effective Date of this Decision Instrument shall be the date of its notification to Eircom*". On that basis, there is no impact on the Effective Date of this Decision if ComReg were to fail to publish it on ComReg's website on the same day as notifying the Decision to Eircom.

### 12.2.3 ComReg's Final Position:

1244 Having considered the Respondents' Submissions, ComReg has made some modifications and revisions to the Decision Instrument, as discussed throughout this Decision document and at paragraphs 1230-1239 above.

1245 The updated Decision Instrument is set out at Annex 1 of this Decision.

# Annex: 1 Decision Instrument – WLA Market

## 1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”):

- (i) Pursuant to Regulation 18 of the Access Regulations;
- (ii) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section 5 of the WLA Decision Instrument;
- (iii) Pursuant to the cost orientation price control obligation, imposed pursuant to Regulation 8 and Regulation 13 of the Access Regulations in Section 12.2 of the WLA Decision Instrument;
- (iv) Pursuant to Regulation 13(4) of the Access Regulations;
- (v) Pursuant to and having regard to the 2020 WACC Decision;
- (vi) Pursuant to Regulation 10.12 of the WLA Decision Instrument;
- (vii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended); Regulation 16 of the Framework Regulations; and Regulations 6, 8, and 13 of the Access Regulations;
- (viii) Having, pursuant to Section 13 of the Communications Regulation Act 2002 (as amended), complied with Ministerial Policy Directions where applicable;
- (ix) Having taken utmost account of the European Commission’s 2010 Recommendation and 2013 Recommendation;
- (x) Having regard to the provisions contained in the European Electronic Communications Code;
- (xi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and Article 32 of the European Electronic Communications Code having taken account of any comments made by these parties;
- (xii) Having had regard to the analysis and reasoning set out in ComReg Decision D10/18;

- (xiii) Having had regard to the analysis and reasoning set out in ComReg Document No. 20/81 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
- (xiv) Having had regard to the analysis and reasoning set out in ComReg Decision [.../...].
- 1.2 This Decision Instrument shall, where appropriate, be construed consistently with the provisions of ComReg Decision D10/18, ComReg Document No. 18/94 and ComReg Decision [.../...], ComReg Document No. [.../...] (this Decision).

## PART I - GENERAL PROVISIONS

### **2 DEFINITIONS**

- 2.1 In this Decision Instrument, unless the context otherwise suggests:

**“(the) 2010 Recommendation”** means the European Commission’s Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (C(2010) 572 final);

**“(the) 2013 Recommendation”** means the European Commission’s Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013) 5671 final);

**“Access Regulations”** means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

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

**“ComReg Decision D[xx]/21”** means ComReg Document No. [xx] entitled Pricing of Eircom’s Civil Engineering Infrastructure;

**“Effective Date”** means the date specified in Section 11 of this Decision Instrument;

**“Eircom”** means Eircom Limited, a company incorporated in Jersey (Number 116389), registered as a Branch in Ireland (Number 907674), with an Irish

registered Branch Office at 2022 Bianconi Avenue, Citywest Business Campus, Dublin 24, D24 HX03;

**“European Electronic Communications Code”** means Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

**“WLA Decision Instrument”** means the Decision Instrument included at Annex 20 of ComReg Decision D10/18.

### **3 SCOPE AND APPLICATION**

- 3.1 This Decision Instrument further specifies the requirements to be complied with by Eircom relating to the price control obligations imposed on Eircom in respect of access to Civil Engineering Infrastructure in the WLA Decision Instrument and determines the timelines applicable to Sections 12.6 and 12.8 of the WLA Decision Instrument as substituted by this Decision Instrument.
- 3.2 This Decision Instrument shall apply to Eircom and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom, and its successors and assigns, and the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.
- 3.3 The prices directed in Section 6.12 of the WLA Decision Instrument as amended by Section 5.1 of this Decision Instrument for the period commencing from the Effective Date, shall apply from the first day of the third month following the Effective Date. Eircom shall notify to ComReg and publish on Eircom's publicly available wholesale website the prices directed in Section 6.12 of the WLA Decision Instrument as amended by Section 5.1 of this Decision Instrument within one month after the Effective Date, to include in respect of the prices governed by Section 12.6.6 and 12.6.14, the prices to apply each year in the subsequent five years, subject to Section 12.8 of the WLA Decision Instrument as amended by this Decision Instrument.

## **PART II – AMENDMENTS OF THE WLA DECISION INSTRUMENT AND FURTHER SPECIFICATION OF OBLIGATIONS IN THE WLA DECISION INSTRUMENT**

### **4 AMENDMENT OF SECTION 2.1 OF THE WLA DECISION INSTRUMENT: DEFINITIONS**

4.1 Section 2.1 of the WLA Decision is hereby amended by adding the following definitions:

**“Authorised Undertaking”** has the same meaning as defined in Regulation 2 of the Authorisation Regulations;

**“Bottom Up Long Run Average Incremental Cost”** or **“BU-LRAIC”** means the average variable and fixed costs derived from the economic and/or engineering model of an efficient network that are directly attributable to a particular activity over the long-run including an apportionment of joint or shared network costs but excluding common corporate costs;

**“Commercial Area”** means the Urban Commercial Area and the Rural Commercial Area, representing all premises in the State that are not within the Intervention Area;

**“Duct Access Model”** or **“DAM”** means the model, as may be amended from time to time, used to calculate the costs of a hypothetical efficient operator providing Duct Access in Ireland, based on both Top Down HCA and BU-LRAIC+ costing methodologies, including all LRIC/LRAIC/LRAIC+ variants, as appropriate and more particularly described in Chapter 5 of ComReg Decision [Dxx/21];

**“Fully Allocated Costs”** or **“FAC”** means an accounting method to distribute all costs, including common corporate costs, among Eircom's various products and services in line with the allocation methodologies set out in Eircom's HCA regulatory accounts;

**“Generic Access”** means Access requested by or provided to an Undertaking to Eircom's CEI, excluding Access within the context of NBI's MIP;

**“Intervention Area”** means the geographic target areas for State intervention for the National Broadband Plan comprising the premises and delivery points in respect of which NBI has contracted with the Minister to deliver high-speed broadband services under the NBI State Contract;

**“Long Run Incremental Costs”** or **“LRIC”** means the costs that are directly attributable to the provision of a service which would be avoided in the long run



if that service were not provided and as such exclude joint or shared network costs and common corporate costs;

**“Long Run Average Incremental Costs” or “LRAIC”** means the average variable and fixed costs that are directly attributable to a particular activity over the long run including, an apportionment of joint or shared network costs but excluding common corporate costs;

**“Minister”** means the Minister for Environment, Climate and Communications;

**“National Broadband Plan”** means the Irish government’s initiative to deliver high speed broadband services to all premises in Ireland including intervention by the State in those parts of the country where private companies have no plans to invest;

**“NBI”** means the Authorised Undertaking NBI Infrastructure Designated Activity Company, a company registered in Ireland with number 631656 whose registered office at [date of Decision Instrument] is at 3009, Lake Drive, Citywest Business Campus, Citywest, Dublin 24, D24H6RR, Ireland;

**“NBI MIP” or “NBI’s MIP”** means the major infrastructure project undertaken by NBI to deliver the National Broadband Plan in the Intervention Area, as more particularly described in the NBI State Contract and references to “the purpose of NBI’s MIP” shall be construed accordingly;

**“NBI State Contract”** means the contract concluded between the Minister and NBI signed on 19 November 2019;

**“Non reuseable Pole(s)” or “Non reuseable Duct(s)”** means Poles or Ducts that are used for the copper network but cannot be reused to accommodate an NGA network without further investment;

**“Pole Access Model” or “PAM”** means the model, as may be amended from time to time, used to calculate the costs of a hypothetical efficient operator providing Pole Access in Ireland, based on both Top Down HCA and BU-LRAIC+ costing methodologies, including all LRIC/LRAIC/LRAIC+ variants, as appropriate and more particularly described in Chapter 5 of ComReg Decision [Dxx/21];

**“Reuseable Pole(s)” or “Re-useable Duct(s)”** means Poles or Ducts that are used for the copper network which can be reused to accommodate an NGA network without further investment;

**“Rural Commercial Area”** means the area in the State comprised of the premises passed by Eircom (or to be passed by Eircom) as a result of Eircom’s commitment to deliver high speed broadband on a commercial basis under its

2017 Agreement with the Minister in relation to National Broadband Plan – commercial deployment commitment;

“**Sole User**” in respect of an operator accessing Poles means that the operator is the only user of the Poles and no other operator has cable, whether fibre or copper, on the Poles;

“**Urban Commercial Area**” means the areas in the State comprised of premises that are not in the Intervention Area or the Rural Commercial Area;

“**WACC**” means Weighted Average Cost of Capital;

“**2020 WACC Decision**” means ComReg Decision No. D10/20 entitled “Review of Weighted Average Cost of Capital”, ComReg Document 20/96, dated 14 October 2020.

- 4.2 The definitions in Section 2.1 of the WLA Decision Instrument corresponding to the definitions in this Section 4.2 are hereby substituted and replaced as follows:

“**Bottom Up Long Run Average Incremental Cost Plus**” or “**BU-LRAIC+**” means the average variable and fixed costs derived from the economic and/or engineering model of an efficient network that are directly attributable to a particular activity over the long-run including an apportionment of joint or shared network costs including an apportionment of common corporate costs; and

“**Top-Down HCA**” means the costs calculated using Eircom’s HCA and network information, adjusted for efficiencies.

## **5 AMENDMENTS OF SECTIONS 12.6 AND 12.8 OF THE WLA DECISION INSTRUMENT: SPECIFICATION OF THE PRICE CONTROL OBLIGATION**

- 5.1 The specification of the obligation of cost orientation imposed by Section 12.2 of the WLA Decision Instrument is hereby amended by the substitution of Section 12.6 with the following section and sub-sections:

“12.6 - The cost orientation obligation set out in Section 12.2 is hereby specified as follows in respect of CEI:

### **Poles**

#### **Generic Access**

12.6.1 Save for the circumstances set out in Section 12.6.6 below, Eircom shall ensure that the annual rental price for Access to a Pole charged by Eircom to any Undertaking is no more than the cost of a Pole calculated in accordance with Section 12.6.2 divided by the number of Generic Access users (including Eircom) availing of that Pole.

12.6.2 For the purpose of Section 12.6.1, the cost of a Pole shall be the total costs of Poles in the Urban Commercial Area in the Pole Access Model, calculated on the basis of a combination of Top-Down HCA (calculated on a Fully Allocated Cost basis) and BU-LRAIC+ cost methodologies reflecting the proportion of Reusable and Non-Reusable Poles respectively, divided by the total number of Poles in the Urban Commercial Area in the Pole Access Model resulting, for the period set out below in Table A1, subject however to Section 12.6.3, in the following cost per Pole:

<b>Period ending 30 June 2022</b>	20.39
<b>1 July 2022 – 30 June 2023</b>	21.47
<b>1 July 2023 – 30 June 2024</b>	22.71
<b>1 July 2024 – 30 June 2025</b>	22.94
<b>1 July 2025 – 30 June 2026</b>	23.13

12.6.3 ComReg may, from time to time, update or require update to the Pole Access Model and amend Table A1 at Section 12.6.2 accordingly.

12.6.4 The cost per Pole calculated in accordance with Section 12.6.2 shall exclude both (i) the incremental costs to Eircom associated with removing an Access Seeker's Pole furniture from a Pole and relocating the Pole furniture onto a new Pole and (ii) the incremental cost of tree-trimming to Eircom involved with preparing aerial cable routes in advance of cable deployment of a specific Access Seeker, which costs Eircom may only recover by way of a one-off charge, subject to Eircom having complied with the publication and notification requirements respectively determined in Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision] and set out in Section 10.13.

12.6.5 No charges other than those provided for under Section 12.6.1 or 12.6.4 may be raised by Eircom on an Undertaking in respect of Pole Access unless and until Eircom demonstrates in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the cost orientation of the price for Pole Access and Eircom has complied with the requirements of Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision].

#### NBI's MIP

12.6.6 Where Pole Access is for the purpose of NBI's MIP, Eircom shall ensure that the annual rental price for Access to a Pole is no more than the cost of a Pole incurred by an efficient operator providing Civil Engineering Infrastructure as set out in the Pole Access Model, allowing

Eircom the rate of return set in accordance with Sections 12.6.17 and 12.6.18 below, which cost shall be determined as follows:

*Intervention Area*

(a) In respect of NBI's Access to a Pole which supports no fibre cable other than NBI's MIP's (but which may also support copper cables), the cost of a Pole shall be the LRIC associated with the provision of Pole Access to NBI in the Intervention Area in the Pole Access Model allocated in full to NBI, to which shall be added the joint or shared network costs of Poles in the Intervention Area in the Pole Access Model calculated on the basis of a combination of Top-Down HCA (excluding common corporate costs) and BU-LRAIC cost methodologies reflecting the proportion of Reusable and Non-Reusable Poles respectively, and allocated equally between Eircom and NBI or in full to NBI by reference to the estimated number of Poles in respect of which NBI is Sole User; and

*Outside the Intervention Area*

(b) In respect of Access to a Pole which supports the fibre cables of any operator other than NBI's MIP, the cost of a Pole shall be the LRIC directly attributable to the provision of Pole Access to NBI in the Commercial Area calculated using the Pole Access Model, allocated in full to NBI.

12.6.7 Subject to Section 12.8.1(c), the prices referred to in Section 12.6.6 shall be the prices set in Table B1 below which shall apply from the first day of the third month following the Effective Date of ComReg Decision [Dxx/21] [this decision] until 31 December 2022 in respect of the period ending 31 December 2022 and from 1 January 2023 to 31 December 2023, in respect of the period ending 31 December 2023. The prices referred to in Section 12.6.6 for the year commencing 1 January 2024 and any subsequent year thereafter shall be calculated as part of the annual review process set out in Section 12.8 and having been notified to ComReg under Section 12.8.1(d) and published in accordance with the requirements of Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision], shall apply from 1 January of the relevant year.

<b>TABLE B1 – Annual Price per Pole (€)</b>		
	<b>Intervention Area (Section 12.6.5(a))</b>	<b>Outside the Intervention Area (Section 12.6.5(b))</b>
<b>Period ending 31 December 2022</b>	8.96	0.07
<b>Period ending 31 December 2023</b>	9.37	0.07

12.6.8 The price per Pole calculated in accordance with Section 12.6.7 shall exclude both (i) the incremental costs to Eircom associated with removing NBI's Pole furniture from a Pole and relocating the Pole furniture onto a new Pole and (ii) the incremental cost of tree-trimming to Eircom involved with preparing aerial cable routes in advance of cable deployment of NBI, which costs Eircom may only recover by way of a one-off charge, subject to Eircom having complied with the publication and notification requirements respectively determined in Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision] and set out in Section 10.13.

12.6.9 For the avoidance of doubt, save where Section 12.6.19 applies, no charges other than those provided for under Section 12.6.6 may be raised by Eircom in respect of Pole Access for NBI's MIP unless and until Eircom demonstrates in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the cost orientation of the price for Pole Access and Eircom has complied with the requirements of Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision].

## **Ducts**

### **Generic Access**

12.6.10 Save for the circumstances set out in Section 12.6.13 below, Eircom shall ensure that the annual rental price for Duct Access, Direct Duct Access or Sub-Duct Access charged per metre of duct/sub-duct shall be no more than the cost of a metre of duct/sub-duct calculated in accordance with Section 12.6.11 below.

#### *Duct Access/ Direct Duct Access*

12.6.11 (i) For the purpose of Section 12.6.10, for Duct Access or Direct Duct Access (neither of which requires access to Eircom's sub-duct), the cost per metre of Duct shall be the costs incurred per metre by an efficient operator providing Ducts in the Urban Commercial Area set out in the Duct Access Model calculated on the basis of a combination of Top-Down HCA (calculated on a Fully Allocated Cost basis) and BU-LRAIC+ reflecting the proportion of Reusable and Non-reusable Ducts respectively, by dividing the total annual costs of the Duct network per metre by the average number of cables (copper and fibre) per Duct), allocated according to the type of surface (verge, footway or carriageway) resulting, subject however to Section 12.6.12, in the following costs:

	<b>Verge</b>	<b>Footway</b>	<b>Carriageway</b>
<b>Period ending 30 June 2022</b>	0.49	0.67	0.82
<b>1 July 2022 – 30 June 2023</b>	0.43	0.59	0.72
<b>1 July 2023 – 30 June 2024</b>	0.40	0.54	0.66
<b>1 July 2024 – 30 June 2025</b>	0.40	0.54	0.66
<b>1 July 2025 – 30 June 2026</b>	0.42	0.58	0.70

### *Sub-Duct Access*

12.6.11 (ii) For the purpose of Section 12.6.10, for Sub-Duct Access, the cost per metre of sub-duct shall be the costs incurred per metre by an efficient operator providing Sub-Ducts in the Urban Commercial Area set out in the Duct Access Model calculated on the basis of a combination of Top-Down HCA (calculated on a Fully Allocated Cost basis) and BU-LRAIC+ reflecting the proportion of Reusable and Non-reusable Ducts respectively, by adding to the incremental cost of sub-duct per metre, the total annual costs of the Duct network per metre divided by the average number of cables (copper and fibre) per Duct, allocated according to the type of surface (verge, footway or carriageway) resulting, subject however to Section 12.6.12, in the following costs:

	<b>Verge</b>	<b>Footway</b>	<b>Carriageway</b>
<b>Period ending 30 June 2022</b>	<b>0.56</b>	<b>0.74</b>	<b>0.89</b>
<b>1 July 2022 – 30 June 2023</b>	<b>0.50</b>	<b>0.66</b>	<b>0.79</b>
<b>1 July 2023 – 30 June 2024</b>	<b>0.47</b>	<b>0.61</b>	<b>0.73</b>
<b>1 July 2024 – 30 June 2025</b>	<b>0.47</b>	<b>0.62</b>	<b>0.73</b>
<b>1 July 2025 – 30 June 2026</b>	<b>0.49</b>	<b>0.65</b>	<b>0.77</b>

12.6.12 ComReg may, from time to time, update or require update to the Duct Access Model and amend the tables at Section 12.6.11 accordingly.

12.6.13 For the avoidance of doubt, no charges other than those provided for under Section 12.6.10 may be raised by Eircom on an Undertaking in respect of Duct Access, Direct Duct Access or Sub-Duct Access unless and until Eircom demonstrates in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the

cost orientation of the price for Duct Access, Direct Duct Access or Sub-Duct Access and Eircom has complied with the requirements of Section 6 of the Decision Instrument of ComReg Decision [Dxx/21].

### NBI's MIP

#### *Duct Access/Direct Duct Access*

12.6.14 (i) Where Duct Access or Direct Duct Access is for the purpose of NBI's MIP, Eircom shall ensure that the annual rental price for Duct Access or Direct Duct Access per metre of duct is no more than the annual cost of a metre of duct incurred by an efficient operator providing Ducts as set out in the Duct Access Model, allowing Eircom the rate of return set in accordance with Sections 12.6.17 and 12.6.18 below, which cost shall be determined and allocated as follows:

(a) *Intervention Area:* In respect of Duct Access or Direct Duct Access where the Duct holds no fibre cable other than NBI's MIP's (but which may also hold copper cables), the cost of Duct Access or Direct Duct Access shall include the LRIC associated with the provision of Duct Access or Direct Duct Access to NBI in the Intervention Area and allocated in full to NBI, to which shall be added the joint or shared network costs of Duct Access in the Intervention Area in the Duct Access Model calculated on the basis of a combination of Top-Down HCA (excluding common corporate costs) and BU-LRAIC cost methodologies reflecting the proportion of Reusable and Non-Reusable Ducts respectively, which costs shall be allocated equally between Eircom and NBI on a per metre of duct basis; and

(b) *Outside the Intervention Area:* In respect of Duct Access or Direct Duct Access where the Duct holds fibre cables of any operator other than NBI's MIP, the cost of Duct Access or Direct Duct Access shall be the LRIC associated with the provision of Duct Access to NBI in the Commercial Area calculated using the Duct Access Model, allocated in full to NBI.

#### *Sub-Duct Access*

12.6.14 (ii) Where Sub-Duct Access is for the purpose of NBI's MIP, Eircom shall ensure that the annual rental price for Sub-Duct Access per metre of sub-duct is no more than the annual cost of a metre of sub-duct incurred by an efficient operator providing Ducts as set out in the Duct Access Model, allowing Eircom the rate of return set in accordance with

Sections 12.6.17 and 12.6.18 below, which cost shall be determined and allocated as follows:

- (a) *Intervention Area*: In respect of Sub-Duct Access where the relevant Duct holds no fibre cables other than NBI's MIP's (although it may also hold copper cables), the cost of Sub-Duct Access shall be the LRIC associated with the provision of Sub-Duct Access to NBI in the Intervention Area and allocated in full to NBI, to which shall be added the joint or shared network costs of Duct Access in the Intervention Area calculated using the Duct Access Model on the basis of a combination of Top-Down HCA (excluding common corporate costs) and BU-LRAIC cost methodologies reflecting the proportion of Reusable and Non-Reusable Ducts respectively, which costs shall be allocated equally between Eircom and NBI on a per metre of sub-duct basis; and
- (b) *Outside the Intervention Area*: In respect of Sub-Duct Access where the relevant Duct holds fibre cables of any operator other than NBI's MIP's, the cost of Sub-Duct Access shall be the LRIC associated with the provision of Sub-Duct Access to NBI in the Commercial Area calculated using the Duct Access Model, allocated in full to NBI.

12.6.15 Subject to Section 12.8.1(c), the prices referred to in Section 12.6.14 shall be the prices set in Table B2 below which shall apply from the first day of the third month following the Effective Date of ComReg Decision [Dxx/21] [this decision] until 31 December 2022 in respect of the period ending 31 December 2022 and from 1 January 2023 to 31 December 2023, in respect of the period ending 31 December 2023. For the year commencing 1 January 2024 and any subsequent year thereafter, the prices referred to in Section 12.6.14 shall be the prices calculated as part of the annual review process set out in Section 12.8, having been notified to ComReg under Section 12.8.1(d) and published in accordance with the requirements of Section 6 of the Decision Instrument of ComReg Decision [xx/2021] [this decision] and apply from 1 January of the relevant year.



<b>TABLE B2 – Annual Price (€)</b>				
	<b>Duct Access and Direct Duct Access (per metre of duct)</b>		<b>Sub-Duct Access (per metre of sub-duct)</b>	
	Intervention Area	Outside the Intervention Area	Intervention Area	Outside the Intervention Area
<b>Period ending 31 December 2022</b>	0.56	0.02	0.63	0.09
<b>Period ending 31 December 2023</b>	0.56	0.02	0.63	0.09

12.6.16 For the avoidance of doubt, and save where Section 12.6.19 applies, no charges other than those provided for under Section 12.6.14(i) and 12.6.14(ii) may be raised by Eircom in respect of NBI's MIP in respect of Duct Access, Direct Duct Access or Sub-Duct Access unless and until Eircom demonstrates in advance to ComReg's satisfaction that any such additional charges are required for the purpose of ensuring the cost orientation of the price for Duct Access Direct Duct Access or Sub-Duct Access and Eircom has complied with the requirements of Section 6 of ComReg Decision [Dxx/21] [this decision].

#### **NBI's MIP – WACC**

12.6.17 Strictly for the purpose only of Sections 12.6.6 and 12.6.14 above, and by way of derogation from Section 4.1 and Section 4.2 of the Decision Instrument at Annex 1 of the 2020 WACC Decision, the reasonable rate of return allowable for Eircom shall be set by reference to the WACC as defined in the 2020 WACC Decision using the criteria set out in Table 10 of ComReg Decision [.../...] [this CEI Decision].

12.6.18 The WACC referred to in Section 12.6.17 shall be set at 3.76% on the Effective Date, and subject to annual review, to be conducted at the same time and in the same manner as the annual review set out in Section 5.2 of the Decision Instrument of the 2020 WACC Decision.

#### **NBI's MIP – Recovery of process costs and Alternative billing arrangements**

12.6.19 As the costs calculated in accordance with Section 12.6.6 and Section 12.6.14 do not include process costs, Eircom shall recover any such efficiently incurred costs by way of charges which shall be notified and published in accordance with the requirements of Section 6 of the Decision Instrument of ComReg Decision [Dxx/21] [this decision].

12.6.20 Subject to NBI's prior agreement in writing, and Eircom having notified ComReg of that agreement prior to its entering into force, Eircom may recover the charges calculated in accordance with Sections 12.6.6

and 12.6.14 other than by way of recurring charges, in part or in full, and in particular may recover part of the charges by way of upfront fee or other interim payments.

5.2 Section 12.8 of the WLA Decision Instrument shall be substituted as follows:

“12.8 Pursuant to Regulation 13(4) and Regulation 18 of the Access Regulations, for the purpose of Eircom's obligation of cost-orientation set out in Section 12.2, ComReg hereby specifies and directs as follows:

12.8.1 Eircom is hereby directed to provide ComReg with full justification of the continued cost-orientation of the prices referred to in Section 12.6.6 and Section 12.6.14 by submitting to ComReg annually, commencing with Eircom's full financial period ending 31 December 2022, the following:

(a) a statement of Eircom's actual investment in Poles for the financial periods 1 July 2020 to 31 December 2021 and 1 January 2022 to 31 December 2022, using the template contained in Annex 4 of ComReg Decision [.../...];

(b) a statement of Eircom's actual investment in Ducts for the financial periods 1 July 2020 to 31 December 2021 and 1 January 2022 to 31 December 2022, using the template contained in Annex 5 of ComReg Decision [.../...];

(c) the Pole Access Model and the Duct Access Model updated as and where required to adjust for differences identified between actual and modelled investments and any other updates as and where justified, including in particular as regards the number of Poles accessed by NBI as a Sole User (where neither Eircom nor other operators are present at any of those Poles), and the number of Poles accessed by NBI as shared user meaning both: (i) the number of Poles where, save for NBI's fibre, only Eircom's copper cables are present on those Poles; and (ii) the number of Poles where there are fibre cables (of Eircom or other operators), as well as those of NBI, actual and forecasted. Any updates shall account for any cumulative over or under recovery of cost arising in previous years;

(d) having regard to any adjustments made under (c), as the case may be, updated prices for CEI for the following five years calculated in accordance with Section 12.6.6 and Section 12.6.14; and

(e) a statement confirming that Eircom's published annual rental prices for CEI remain cost-oriented or in the alternative that the annual rental prices for CEI referred to in (d) above are cost-orientated, allowing Eircom in either case no more than a rate of return in the amount of the applicable WACC (the “CEI Price Compliance Statement”).

12.8.2 The statements referred to in Section 12.8.1 (a) and (b) shall be provided to ComReg in accordance with the procedure which governs the provision of Additional Financial Information contained in the Decision Instrument annexed to ComReg Decision D08/10 no later than seven months after the end of Eircom's financial period and published by Eircom on its website on the same day.

12.8.3 The updated Pole Access Model and Duct Access Model, and the CEI Price Compliance Statement, shall be provided to ComReg at the same time as the statements required by Section 12.8.1 (a) and (b), in accordance with the procedure which governs the provision of Additional Financial Information contained in the Decision Instrument annexed to ComReg Decision D08/10, and shall be provided no later than seven months after the end of Eircom's financial period in any given year.

12.8.4 Upon receipt of the statements referred to in Section 12.8.1, including the CEI Price Compliance Statement, and any additional information that ComReg may require, ComReg may direct Eircom pursuant to Regulation 13(4) of the Access Regulations to adjust the prices for CEI."

## **6 DETERMINATION OF APPLICABLE TIMELINES FOR THE PURPOSE OF SECTION 10.12 OF THE WLA DECISION INSTRUMENT**

- 6.1 In respect of Section 10.12(i) of the WLA Decision Instrument, save where Section 3.3 of the Decision Instrument of ComReg Decision [Dxx/21] [*this decision*] applies, ComReg hereby determines that in the case of a change to the price of an existing product, service or facility, the price of which has been determined in accordance with Section 12.6 of the WLA Decision Instrument, as substituted by this Decision Instrument, the price shall be made publicly available and published on Eircom's publicly available wholesale website at least two (2) months in advance of the changes coming into effect for Generic Access and at least one (1) month in advance of the changes coming into effect for NBI's MIP.
- 6.2 In respect of Section 10.12(ii) of the WLA Decision Instrument, ComReg hereby determines that in the case of a new product, service or facility the price of which is to be determined in accordance with Section 12.6 of the WLA Decision Instrument, as substituted by this Decision Instrument, the price shall be made publicly available and published on Eircom's publicly available wholesale website at least two (2) months in advance of the new product, service or facility becoming available for Generic Access and at least one (1) month in advance of the changes coming into effect for NBI's MIP.

## **PART III – OPERATION AND EFFECTIVE DATE**

### **7 STATUTORY POWERS NOT AFFECTED**

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

### **8 MAINTENANCE OF OBLIGATIONS**

- 8.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, including all obligations specified in the WLA Decision Instrument, continue in force and Eircom shall comply with same.

### **9 CONFLICT**

- 9.1 For the avoidance of doubt, to the extent that there is any conflict between a ComReg Decision Instrument or ComReg document dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail.

### **10 SEVERANCE**

- 10.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument, is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

### **11 PUBLICATION, NOTIFICATION AND EFFECTIVE DATE**

- 11.1 This Decision Instrument shall be published on ComReg's website ([www.comreg.ie](http://www.comreg.ie)) and on the same day, notified to Eircom.
- 11.2 The Effective Date of this Decision Instrument shall be the date of its notification to Eircom.
- 11.3 This Decision Instrument shall remain in force until further notice by ComReg.

**GARRETT BLANEY**  
**COMMISSIONER**  
**THE COMMISSION FOR COMMUNICATIONS REGULATION**  
**THE [...] DAY OF [...] 2021**

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## Annex: 2 Dot Econ Final Report

A 2.1 This report is published alongside this Decision as ComReg Document 21/[xx]a.

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# Annex: 3 Europe Economics Final Report

A 3.1 This report is published alongside this Decision as ComReg Document 21/[xx]b.

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## Annex: 4 Poles annual statement

### Template 1: Pole investments

	Pole investments	
GEOGRAPHIC FOOTPRINTS	<u>Commercial Areas</u>	<u>NBP Intervention Area</u>
	<u>Number of poles</u>	
Replacement of poles for Pole access		
Poles replaced for other network operational reasons		
Pole additions		
	<u>Actual pole investment - €</u>	
Replacement of poles for Pole access		
Poles replaced for other network operational reasons		
Pole additions		

Eircom shall provide ComReg with analysis of the quantity and cost relating to investment in poles during the past year indicating if the investments were required to support Pole Access or for other operational reasons such as pole replacement as part of ongoing maintenance programmes, pole additions or to allow Eircom deploy new cables.

### Template 2: Forecasts for pole investments

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Number of poles			
Pole investments			

Eircom shall provide ComReg with the latest available forecast of pole investments for the next three years.



## Annex: 5 Ducts annual statement

### Template 1: Duct investments

	Duct investments	
GEOGRAPHIC FOOTPRINTS	<u>Commercial Areas</u>	<u>NBP Intervention Area</u>
	<u>Duct (Trench) lengths</u>	
Remediation of ducts for Sub duct access		
Ducts remediated for other network operational reasons		
Duct (Trench) additions		
	<u>Actual duct investment - €</u>	
Remediation of ducts for Sub duct access		
Ducts remediated for other network operational reasons		
Duct (Trench) additions		

Eircom shall provide ComReg with analysis of the quantity and cost relating to investment in underground CEI during the past year indicating if the investments were required to support duct related access or for other operational reasons such as clearing and repairing ducts to allow Eircom deploy new cables.

### Template 2: Forecasts for duct investments

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Length of Ducts (Trench)			
Duct investments			

Eircom shall provide ComReg with the latest available forecast of duct investments for the next three years.

# Annex: 6 European Commission's response to ComReg's notified draft measures

A 6.1 [to be inserted]

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## **Annex: 7 ComReg's consideration of European Commission's Response to ComReg's notified draft measures**

A 7.1 [to be inserted]

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# Annex: 8 Submissions to Consultation Document 20/81

A 8.1 Non-confidential versions of the Respondents' Submissions made to ComReg (Eircom (including a report prepared on its behalf by BRG Consultants), NBI (including a report prepared on its behalf by Frontier Economics), BT Ireland, Vodafone, Sky Ireland, Virgin Media, Siro and ALTO) are published alongside this Decision as ComReg Document 21/[xx]c.

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