Commission for
Communications Regulation

Consultation Paper

Intra Migration Premium

Consultation and draft decision

Document No:	08/105
Date:	23 December 2008

All responses to this consultation should be clearly marked:- "Reference: Submission re ComReg 08/105" as indicated above, and sent by post, facsimile, e-mail or on-line at www.comreg.ie (current consultations), to arrive on or before 5pm, 20 February 2009, to:

Stephen Brogan
Commission for Communications Regulation
Irish Life Centre
Abbey Street
Freepost
Dublin 1
Ireland

Ph: +353-1-8049600 Fax: +353-1-804 9680 Email: Stephen.Brogan@ComReg.ie

Please note ComReg will publish all respondents submissions with the Response to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24

Contents

1 Executive Summary

The Commission for Communications Regulation ("ComReg") is consulting on a key regulatory pricing mechanism in relation to a migration premium from one regulated Eircom wholesale service to another which does not involve a change in the customer/operator relationship. This is called an Intra Migration.

A key to the growth of broadband in Ireland has been the competitive landscape provided by Other Authorised Operators ('OAOs'). Some of this competition has been facilitated through the provision of a wholesale bitstream service for OAOs by Eircom. However, some operators who wish to enter the retail broadband market, or who currently purchase bitstream, may wish to offer further differentiation to the retail consumer by opting to invest more heavily in their own equipment so as to avail of Local Loop Unbundling ('LLU') or Line Share. This move to unbundled products should give operators greater flexibility in the development of their retail products and may result in more innovative retail products, higher margins to the operators, and/or lower prices to retail consumers.

A key facilitator in moving from one wholesale service platform to another is the ability to migrate consumers seamlessly from, say, Eircom's wholesale bitstream service to the Line Share service. To date, OAOs have claimed that the premium charged by Eircom for migrating consumers from one wholesale service to another is excessive and this has, in some cases, prevented the OAO from moving consumers to the unbundled products as the investment payback is too long.

ComReg has reviewed the current premium charged by Eircom for Intra Migrations. Eircom's view is that the premium is justified by an "American Put Option" as Eircom bitstream customers have been given an option to switch from Bitstream to LLU, by 'putting' the value of bitstream specific assets onto Eircom at any time between the inception of the contract and the expiry date. ComReg's preliminary view is that Eircom's proposed price is excessive and has no real basis. As such, ComReg is of the preliminary opinion that there cannot be any granting of any such option to the OAO at the time of the Intra Operator Migration and therefore there is no option value, that is, the option value is €0 (zero).

ComReg welcomes respondents views on the proposal and draft decision contained in this consultation by 5pm, Friday, 20 February 2009.

2 Introduction and Background

2.1 Achieving the successful and widespread introduction of Local Loop Unbundling is an important element in facilitating and enhancing competition across a number of services, particularly Broadband. Intra migrations are essential for the development and enhancement of competition, particularly in the Broadband market.

2.2 ComReg's statutory objectives are defined under Section 12 of the Communication Regulation Act 2002 ("the Act")[1]. Under Section 12(1) and (2) of the Act, ComReg's statutory objectives are to *inter alia*:

- Promote competition;
- Promote the interests of users within the community;
- Ensure that there is no distortion or restriction of competition;
- Encouraging efficient investment in infrastructure and promoting competition;
- Encouraging access to the internet at a reasonable cost to end users.

2.3 An intra migration is defined as that migration which does not involve a change in the customer/operator relationship. The current list of migrations that are classified as "Intra" include:

1. Bitstream to Line Share;
2. Public Switched Telephone Network (PSTN) with Bitstream to combined geographic number portability and full unbundled local path including full unbundled local metallic path (GLUMP);
3. PSTN with Bitstream to full unbundled local path including full unbundled local metallic path ('ULMP');
4. Single Billing – Wholesale Line Rental (SB-WLR) with Bitstream to GLUMP or to ULMP;
5. SB-WLR with Line Share to GLUMP or ULMP;
6. SB-WLR to GLUMP or ULMP;
7. Return paths to wholesale operators or Eircom for all of the above.

Q. 1. Do you agree or disagree with what is classified as Intra Migration? Please explain your response in detail.

2.4 The current Intra Migration Premium applied by Eircom is €47 and was set in May 2007 with the product launched in September 2007.

2.5 The purpose of this consultation paper is to set out ComReg's proposed pricing approach for the Intra Migration Premium following a detailed review of the rationale of the Eircom approach. This consultation proposes to reduce the Intra

[1] Communications Regulation Act, 2002 (No. 20 of 2002), amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007)

Migration Premium from €47 to zero. The break out of the existing and proposed pricing is as per the table below:

	Existing LLU Connection Charge - €	Proposed LLU Connection Charge - €
Standard ULMP Connection[2]	45.00	45.00
GLUMP Surcharge Connection Fee	3.50	3.50
Total GLUMP Connection Fee	48.50	48.50
Intra Migration Premium	**47.00**	**0.00**
Total GLUMP Intra Migration	95.50	48.50

Table 1: Detail of existing and proposed connection charge

Q. 2. Do you agree or disagree that the premium for Intra Migration should be reviewed? Please explain your response in detail.

2.6 All other forms of migration to LLU will continue to attract standard Line Share, ULMP and GLUMP charges only.

[2] As per Access Reference Offer price list is subject to 5% discount subject to level of order completion being achieved, that is 50,000 orders and a further 5% when achieve 100,000 orders.

3 The regulation of Intra Migration Premium

3.1 ComReg is of the view that the obligations imposed on Eircom in the Designation of Significant Market Power and the Decision on Obligations – Decision Notice D8/04 'Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops' ("the Decision") include obligations in relation to migrations. In particular, section 9 of the Decision states:

> "*Eircom shall have an obligation to offer cost orientated prices for LLU services, collocation, and associated facilities on the basis of forward looking long run incremental costs (FL-LRIC) as provided for by Regulated 14 of the Access Regulations.*"

3.2 It is ComReg's position that migration is contemplated by and encompassed in the Decision, in particular at section 4.2 of the Decision which states:

> "*…eircom shall provide to authorised undertakings, access to the following services and facilities:-*
>
> *I. Full unbundled local metallic path ('ULMP');*
>
> *II. Shared access line sharing;*
>
> *III. Full sub-loop unbundling;*
>
> *IV. Shared sub-loop unbundling;*
>
> *V. Collocation;*
>
> ***VI. Associated Facilities;***
>
> *VII. Technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services related to LLU; and*
>
> *VIII. Operational support systems or, similar software systems necessary to ensure fair competition in the provision of LLU services."*

(Emphasis added)

3.3 Migrations are an associated facility and that the cost orientation obligation at section 9 of the Decision applies to the cost of providing migration facilities.

4 Option value for Intra Migrations

4.1 Migrations have been available from Eircom to industry for over a year now. However, following a number of representations from LLU operators, it appears that incentives to migrate customers is being thwarted by what the LLU operators believe is an unjustified premium for intra migrations. ComReg shares these concerns. Therefore on 29 August 2008, ComReg directed Eircom to demonstrate with supporting workings/model that the migration premiums were cost oriented pursuant to Regulation 14(4) of the Access Regulations[3]. Eircom provided a submission which it claimed justified the current Intra Migration premium and proposed an updated premium. This submission was prepared by Indecon International Economic Consultants for Eircom. A redacted, non-confidential version of the Indecon report is published as part of this consultation in ComReg document 08/105a.

4.2 A summary discussion of Eircom's proposal and ComReg's preliminary opinion is included below. For aspects that have been marked confidential by Eircom, ComReg will correspond directly with Eircom and invite Eircom's response to this correspondence as part of its response to this consultation. ComReg will take all views into consideration prior to a final decision being made.

Eircom's proposal

4.3 Eircom justify the current Intra Migration premium based on the modelling of an "American Put Option" as Eircom claim that this is the type of option that an access seeker will avail of when choosing to migrate from Bitstream to LLU. The "American Put Option" was priced using the Black Scholes formula modified with an early exercise premium. Further detail of Eircom's proposal which was prepared by Indecon International Economic Consultants can be found in their non-confidential report published at 08/105a.

4.4 In their report, Indecon briefly describe the theory of options:

- Real Call Options (Option buyer has the right, but not the obligation to buy a real asset for a certain price - the strike price)
- Real Put Options (Option buyer has the right, but not the obligation, to sell a real asset for a certain price - the strike price)
- A European Option can be only exercised at the expiration date
- An American Option can be exercised at any time between the inception of the contract and the expiration date

4.5 Indecon believe that when an OAO moves from bitstream to Line Share or LLU with its customer, it benefits from an "American Put Option" as Eircom bitstream customers have been given an option to switch from Bitstream to LLU, by 'putting'

[3] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

the value of bitstream specific assets onto Eircom at any time between the inception of the contract and the expiry date.

4.6 To value this "American Put Option", they use the Black-Scholes formula modified for an early exercise premium. The factors that Indecon then take into account to calculate the option value are as follows;

- The strike price – that is Eircom's sunk bitstream cost per customer
- The cost of asset redeployment
- The probability of asset redeployment
- The average time between migration and asset redeployment
- The volatility of the underlying asset
- The risk free rate of return
- The time to maturity - that is the duration of the option

ComReg's preliminary opinion

4.7 Following a review of the Indecon Report it would appear that the first question to address is whether an option of the type described by Eircom in fact exists. If an option does exist, ComReg must then consider at what point in time it is purchased (Eircom uses the term "granted") and must then attempt to measure the value of this option. Finally ComReg must consider in what circumstances this value should be charged for and if it is already effectively reflected in Eircom's pricing structure. ComReg must also look at this issue from Eircom's perspective and establish if its claim that it faces the risk of asset stranding while the OAO faces no commensurate risk is valid.

4.8 Eircom proposes an "American Put Option" to justify the Intra Migration premium. A put option is a right to sell a variable asset (such as a share) for a fixed amount (the strike price). It is suggested by Eircom that the strike price would be the amount received by the OAO, while the underlying asset value is given up by the OAO when it migrates. Upon exercise, the OAO gains an amount equal to the strike price minus the underlying asset value.

4.9 ComReg however believes that the proposition of a put option is inappropriate given the situation the OAO faces when considering migration to LLU. ComReg believes that the option to migrate is held by the OAO before it invests. This can in fact be viewed as a call option. In this model the OAO pays the strike price (the sum of the three sunk cost elements (i)-(iii) below) and receives the underlying asset (the Net Present Value ('NPV') of future profits, which is variable in value).

4.10 When an OAO decides to migrate from bitstream to LLU, a number of costs are incurred as follows, of which the first is by far the largest:

(i) OAO infrastructure: The OAO (or a third party on its behalf) must build its own infrastructure to replace bitstream assets previously leased from Eircom (backhaul, Digital Subscriber Line Access Multiplexer 'DSLAM', cards and other equipment at the exchange);

(ii) LLU set-up costs;

(iii) Bitstream disconnection costs: €60 if an OAO does not avail of minimum term Bitstream contract.

4.11 These costs are incurred at the point of migration and are (largely) irrecoverable, or sunk. These sunk costs form the "strike price" of the option to migrate from bitstream to LLU.

4.12 The benefit from migration received by the OAO is the cost saving and/or quality improvement from using LLU relative to bitstream. The size of this benefit (which is a stream of future profits) is uncertain, depending on, for example, future demand, consumer willingness to pay for enhanced products (e.g. video on demand), technological developments and costs. Since these elements, and firms' expectations of them, change over time, the NPV of future profits fluctuates over time. This value can be regarded as the underlying asset value, equivalent to the share price underlying a financial call option. The volatility parameter measures its variability over time.

4.13 If the migration decision can be deferred until some future date, the decision to migrate involves optionality. The expiration (or maturity) date is the time at which this option expires, that is, the time by which the OAO must migrate; otherwise it loses the opportunity to do so.

4.14 When the NPV exceeds the strike price, the option is "in the money", and by exercising it the OAO makes a gain equal to the underlying asset value minus the strike price. If the NPV is less than the strike price, the option will not be exercised; by doing so the firm would lose money, and since it is not obliged to go ahead, it can simply do nothing (making zero). A "European" option may be exercised only on the expiration (or maturity) date, whereas an "American" option may be exercised any time up to the expiration date. Therefore ComReg believes that any option held by an OAO would therefore be similar to an "American Call Option".

4.15 The option value forms an opportunity cost that is incurred at the moment investment takes place; by investing, the OAO gives up the option to do this at a later date. To determine optimal investment timing, the option value is added to the direct cost of investment, which if these are entirely sunk, equals the strike price of the option. At the point when the expected NPV from the project equals this amount, it is optimal to invest:

Direct investment costs + option value = expected NPV of future profits.

4.16 With positive option value, the OAO delays investment until the expected NPV of investment exceeds direct investment costs by an amount equal to the option value that it forfeits.

4.17 With the conditions of sunkness, uncertainty and the ability to delay, there is an option value associated with migration. This is the value of the call option to migrate to LLU. It is already held by the OAO while it leases bitstream access, and is lost when it migrates to LLU. This is a fundamental point since an option that is purchased (or granted) is purchased at the time the operators decide to use Bitstream. There is no option being bought by the OAO when it migrates; rather, the existing option value is being forfeited. It follows that, there is no further option value to be paid. If a premium were to be paid for the option to migrate, it would be payable upfront while the option to migrate is held, not at the moment it is exercised. It therefore appears to makes no sense to incorporate an "option value" into the payment made by the OAO to Eircom when it migrates.

4.18 Moreover, if a further premium were added to (i)-(iii)[4] above (by adding Eircom's supposed "option value" to the migration premium), this would increase the OAO's investment cost and push up the strike price of its existing call option, holding back investment. This would distort the OAO's behaviour relative to what is optimal in view of the sunk costs and uncertainty involved in the situation.

4.19 Eircom's option calculation takes as its strike price the net book value of Eircom's infrastructure assets used to provide the bitstream service that it estimates will not be redeployed elsewhere, that is the part of Eircom's existing assets that are sunk. These costs were previously incurred by Eircom, they are not new costs that are incurred at the time of migration, and from a real options perspective they do not give rise to any further optionality at this point.

4.20 However, a legitimate question might be asked about Eircom's investment in the infrastructure used to provide bitstream. These investments are costs incurred by Eircom in providing the bitstream service, which (among other things) enables OAOs to hold the option to make the investments necessary to use LLU at a later date. For Eircom to be willing to make this investment, it must expect to cover its costs and make a reasonable return over the lifetime of these assets. Moreover, some of this investment may be sunk (to the extent that some assets cannot be redeployed elsewhere for an equivalent return), and if migration occurs, a part of this might be lost. This raises the issue of Eircom's cost recovery which is discussed below.

Eircom's infrastructure investment

4.21 To assess whether a significant stranding problem is likely to arise when an OAO migrates to LLU, the following questions need to be addressed:

- what are the relevant investment costs which might in theory be stranded?; and
- what, if any, allowance is made for these costs?

4.22 It is also of crucial importance to note that at present, the level of Bitstream prices are determined by Eircom and monitored by ComReg for possible margin squeeze issues, since these prices are governed by a retail minus price control[5]. Eircom therefore controls the costs it recovers through the derived wholesale charges as long as the appropriate discount from retail prices is maintained and no margin squeeze occurs in the market for WBA.

4.23 It should also be noted that there may be no option value at all if asset lives and WACC are set correctly, therefore there may be no reason for Eircom to claim that it has under recovered its costs or failed to make reasonable return. However this is beyond the scope of the present consultation.

[4] At paragraph 4.10

[5] ComReg Decision D01/06 'Retail minus wholesale price control for the WBA market'

What are the relevant investment costs?

4.24 A narrow interpretation of the costs of providing bitstream access would include specific interconnection infrastructure and set-up costs for order processing systems, but little else. Such costs may be very large. A broader definition might include broadband infrastructure such as PSTN racks, DSLAM cards, line cards and related equipment. These items form part of Eircom's network infrastructure and may be used in providing either its own retail broadband services or wholesale products such as bitstream to OAOs. However, these assets are unlikely to be entirely redundant following migration as redeployment should be possible.

What allowance is made for "sunk" costs?

4.25 At present, the level of Bitstream prices are determined by Eircom, since these prices are governed by a retail minus price control. Eircom is therefore perfectly free to recover whatever costs it wishes as long as the appropriate discount from retail prices is maintained. Assuming that the "minus" is set appropriately to reflect downstream costs, Eircom's cost recovery for broadband assets from bitstream access prices should be similar to that from its retail prices. Moreover, since the overall level of pricing is chosen by Eircom itself, it has the freedom to set prices that recover its costs. It could be assumed that Eircom believes its retail prices are adequate in view of market conditions and possible future developments, including the risk that costs change or technologies evolve causing some assets to become redundant. Therefore Eircom's infrastructure costs should already be accounted for elsewhere, in its own retail prices and bitstream rental prices; therefore there is no stranded asset cost to be recovered through the migration premium.

4.26 Even if the OAO were regarded, as Eircom represent it, as having "acquired" the bitstream assets when it started leasing them, and its decision to terminate bitstream was then characterised as a put option (i.e. the OAO hands back the bitstream assets and no longer receives the cashflow earned from its use of them), this decision is not taken is isolation. Rather it is part of the decision to migrate to LLU which, in view of the costs and cashflows involved, should properly be thought of as a call option.

4.27 It is ComReg's provisional view that the elements of the "American Put Option" as modelled by Indecon for Eircom appear to lack coherence from a regulatory pricing perspective. When the bitstream assets are relinquished (if it was to be viewed in this way), the OAO gives up the value of the bitstream customer; if it wishes to earn a return from the customer using LLU it must incur considerable infrastructure and LLU costs, an issue Eircom seem to ignore. If we were to look at the "put" element alone (which would make little sense, since this does not determine the timing of migration), the relevant underlying asset value is the entire bitstream customer value, not the difference between this and the LLU customer value. This cashflow is significant, giving a much larger underlying asset value than the close to zero used in the study and, correspondingly, a much smaller "option" value.

4.28 It is unclear in the Indecon report exactly how the underlying asset value is defined; as written ("[t]he price of the underlying is the difference between the present value to an OAO of a bitstream customer and the present value of an LLU customer"[6]). This could be taken to mean:

Underlying asset value = PV of bitstream customer – PV of LLU customer.

4.29 If this is what is meant, it appears to make little sense, because the option to migrate from bitstream to LLU would not be exercised unless the value of the latter were higher than the former, in which case the underlying asset value as defined above would be negative. This is not permitted in the Black-Scholes framework. But if the value of a bitstream customer always exceeds that of an LLU customer (so that the underlying asset value defined above is positive), the OAO would never migrate to LLU. Again this approach would make no sense and would go against any of the regulatory principles set out at paragraph 2.2.

4.30 Also one should consider what happens to the value of the "American Put Option" and to the OAO's actual migration decision as the underlying asset value changes. As defined above, the value of the OAO's "American Put Option" increases as this falls; the OAO will not exercise its option to migrate until this has fallen to a low, and negative, level. As already discussed, a negative value cannot be incorporated into the Black-Scholes model. But if the underlying asset value is defined the other way round, for instance:

Underlying asset value = PV of LLU customer – PV of bitstream customer

then the OAO's migration option becomes more valuable as this rises and the OAO will wait until the underlying asset value rises to some positive level before it exercises the option to migrate. But if this is how Eircom intends the underlying asset value to be defined, its option cannot be a put option as a put option rises in value and is exercised when the underlying asset value falls (but remains positive), not when it rises. Therefore, ComReg believes that Eircom's analysis appears incoherent.

4.31 As discussed above, ComReg's is of the opinion that there is no option being bought by the OAO for Intra Operator Migration, for example, when it migrates from Bitstream to LLU. As explained above, the OAO might be viewed as holding an "American Call Option" to make an investment and gain a higher cashflow. The strike price consists of the costs that are incurred at the point of migration. It does not include costs that were sunk some time before, as is the case for Eircom's infrastructure assets used in providing bitstream. Moreover, Eircom's infrastructure costs should already be accounted for elsewhere, in its own retail prices and bitstream rental prices; therefore there appears to be no stranded asset cost to be recovered through the migration charge.

[6] Section 4.1.2 (p.12) of Eircom's (Indecon) Report at 08/105a

Q. 3. Do you agree or disagree with ComReg's preliminary opinion that there is no option being bought by the OAO for Intra Migration? Please explain your response in detail.

Q. 4. Do you agree or disagree that the appropriate mechanism for Eircom to recover such a migration option value is in the current Bitstream price as set by the current retail minus price control? Please explain your response in detail.

Q. 5. Do you believe any issue associated with stranded Bitstream assets following a migration from Bitstream should be dealt with under a review of Bitstream pricing planned for 2009 where a cost plus regime will be considered? Please explain your response in detail.

Q. 6. Do you agree or disagree that if the current Intra Migration Premium were to continue for Intra migrations (for example from Bitstream to LLU), that this could have a negative impact on investment by OAOs in retail broadband over the medium to long term? Please explain your response in detail.

Q. 7. Do you agree or disagree that an Intra Migration Premium is contrary to the principles set out in paragraph 2.2? Please explain your response in detail.

Q. 8. If you believe a premium should be charged for Intra Migration (for example from Bitstream to LLU), what premium would you believe is appropriate and when should this premium be paid by OAOs? Please explain your response in detail.

Q. 9. Do you have any further views on the theory of option value that has not been considered by ComReg when setting regulated wholesale prices? Please explain your response in detail.

Q. 10. Do you have any further views on the Intra Migration Premium methodology as set out in Eircom's report published as 08/105a, other than that set out by ComReg in this consultation? Please explain your response in detail.

Q. 11. Do you have any experience of, or know of, any similar charging mechanism using an option value in other European member states? Please explain your response in detail.

5 Other costs for consideration in Intra Migration Premium

5.1 As discussed above, ComReg is of the opinion that there is no option being bought by the OAO for Intra Migration for example, Bitstream to LLU. Therefore there is no option value in the Intra Migration Premium.

5.2 Eircom put forward no other costs for consideration in the Intra Migration Premium other than the "American Put Option" valuation.

5.3 ComReg considers that there are no other costs for consideration in the Intra Migration Premium but would welcome respondents' views on other costs that should be considered.

Q. 12. Do you agree or disagree that there are no other costs for consideration in the Intra Migration Premium? Please explain your response in detail.

6 ComReg's proposed Intra Migration Premium

6.1 As ComReg considers there is no option value for consideration in the Intra Migration Premium and there are no other costs for consideration, ComReg's proposed Intra Migration Premium is as set out in the table below:

	Existing LLU Connection Charge - €	Proposed LLU Connection Charge - €
Standard ULMP Connection	45.00	45.00
GLUMP Surcharge Connection Fee	3.50	3.50
Total GLUMP Connection Fee	48.50	48.50
Intra Migration Premium	**47.00**	**0.00**
Total GLUMP Intra Migration	95.50	48.50

Table 1: Detail of existing and proposed connection charge

Q. 13. Do you agree or disagree with ComReg's proposed pricing for the Intra Migration Premium being set at €0(NIL)? Please explain your response in detail.

7 ComReg's draft decision

7.1 ComReg has published a draft decision in the Appendix to this document. ComReg would appreciate respondents' views on this draft decision.

Q. 14. Do respondents believe that the draft text of the proposed decision instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

8 Submitting Comments

All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

The consultation period will run from 23 December, 2008 to 20 February, 2009 during which the Commission welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review the proposed pricing for Intra Migration and will publish a report and decision in Quarter 2, 2008; which will, inter alia summarise the responses to the consultation.

In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Please note

ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.

As it is ComReg's policy to make all responses available on its web-site and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response

Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24

Appendix A – Draft Decision

1 STATUTORY AND LEGAL POWERS

1.1 This Direction is made by the Commission for Communications Regulation:

1. Pursuant to the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003[7];

2. Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom contained in ComReg Decision No. [BLANK] which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations[8];

3. Having, where appropriate, complied with Policy Directions made by the Minister[9];

4. Having taken account of the submissions received in relation to Document No.[]

5. Having had regard to the analysis and reasoning set out in ComReg Document No. [] which shall, where necessary, be construed together with this Direction; and

6. Having regard to its functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act, 2002.

2 DEFINITIONS AND INTERPRETATION

2.1 In this Direction:

“**Access Regulations**” means European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I. No. 305 of 2003;

“ComReg” means the Commission for Communications Regulation, established under section 6 of the Communications Regulation Act, 2002;

“Intra Operator Migration” means the facility that allows services eligible for migration on an end user line to be substituted with the same operator and in particular migration from Bitstream to local loop unbundling with the same operator. For the avoidance of doubt, intra operator migration does not involve a

[7] S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

[8] S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

[9] Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

change in the customer/operator broadband relationship. The current list of requested migrations that are classified as "intra" include:

1. Bitstream to Line Share;
2. Public Switched Telephone Network (PSTN) with Bitstream to combined geographic number portability and full unbundled local path including full unbundled local metallic path (GLUMP) ;
3. PSTN with Bitstream to full unbundled local path including full unbundled local metallic path ('ULMP');
4. Single Billing – Wholesale Line Rental (SB-WLR) with Bitstream to GLUMP or to ULMP;
5. SB-WLR with Line Share to GLUMP or ULMP;
6. SB-WLR to GLUMP or ULMP;
7. Return paths to wholesale operators or Eircom for all of the above.

"**Intra Operator Migration Premium"** means the once off charge currently described as €47 in paragraph 4.1d of the document described as "Migration Services Terms and Conditions v2.1" dated 30 November 2007 on www.eircomwholesale.ie;]

"SMP Decision" means ComReg Decision No. [] which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations;

2.2 The provisions of ComReg Decision No. [] and the individual decisions in the Response to Consultation and Decision in ComReg Document No. [] (Decision No. []) shall where necessary be construed as forming part of this Direction.

3 SCOPE AND APPLICATION

3.1 This Direction applies to Eircom Limited and its subsidiaries, its successors and assigns ("Eircom").

3.2 This Direction is binding upon Eircom and Eircom shall comply with it in all respects.

4 PRICE CONTROL

4.1 The SMP Decision imposed *inter alia ex ante* regulatory obligations pursuant to Regulation 14 of the Access Regulations. The obligations imposed on Eircom under Regulation 14 of the Access Regulations include obligations relating to price control and cost orientation of prices.

4.2 Under Regulation 17 of the Access Regulations, ComReg may issue directions to Eircom to do or refrain from doing anything which ComReg specifies in the direction, for the purpose of further specifying requirements to be complied with by Eircom relating to its obligations under the Access Regulations.

4.3 This Direction is issued pursuant to Regulation 17 of the Access Regulations, for the purpose of further specifying requirements to be complied with by Eircom relating to obligations imposed on Eircom, under Regulation 14 of the Access Regulations and Section 9 of the SMP Decision.

4.4 Eircom is hereby directed to apply price of €NIL as the Intra Operator Migration Premium.

4.5 Section 4.4 shall apply to all bills issued by Eircom 30 days after the effective date and to all bills issued at any time thereafter.

5 MAINTENANCE OF OBLIGATIONS

5.1 Unless expressly stated otherwise in this Decision, 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, are continued in force by this Decision and Eircom shall comply with same.

5.2 If any section, clause or provision or portion thereof contained in this Direction is 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 section, clause or provision or portion thereof shall, to the extent required, be severed from this Direction and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Direction, and shall not in any way affect the validity or enforcement of this Direction.

6 STATUTORY POWERS NOT AFFECTED

6.1 Nothing in this Direction shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the effective date of this Direction) from time to time as the occasion requires.

7 EFFECTIVE DATE

7.1 This Direction shall be effective 28 days from the date of its publication and shall remain in force until further notice by ComReg.

JOHN DOHERTY
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE [] DAY OF [] 2009

Appendix B – Consultation Questions

List of Questions