



Decision Notice - Designation of SMP and Related Remedies

**Market Analysis – Wholesale Broadband Access**

<b>Decision No:</b>	<b>03/05</b>
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**Document Revision History**

<b>Document Version</b>	<b>Date</b>	<b>Nature of Revision</b>
05/11r	24 <sup>th</sup> February 2005	ComReg has, pursuant to Regulation 15 of the Access Regulations, amended this document. The document contained a minor formatting error in that section 9.2 V, bullet No.3 of the decision instrument in the Annex should have been a separate sub-section 9.2 VI. Accordingly, ComReg has, on 24 February, 2005, amended the document to rectify this.
05/11	17 <sup>th</sup> February 2005	Original Document

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## 1 Introduction

- 1.1 The new EU electronic communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.<sup>1</sup> In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.2 The Framework Regulations further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ('the Relevant Markets Recommendation'<sup>2</sup>) by the EU Commission.<sup>3</sup> In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Markets Recommendation and the EU Commission Guidelines on Market Analysis and Significant Market Power ('The SMP Guidelines'<sup>4</sup>).
- 1.3 The Relevant Markets Recommendation states that there is a market for the supply of **wholesale broadband access** services, a market which covers 'bitstream' access permitting the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bit stream access.
- 1.4 ComReg formed the view that there is a distinct relevant market in Ireland for wholesale broadband access. ComReg also takes the view that the relevant geographic market for the provision of wholesale broadband access is Ireland.
- 1.5 ComReg concluded that the market for wholesale broadband access should include the provision of bitstream services through self-supply and supply to third parties; and the self-supply by cable operators and Fixed Wireless Access ('FWA') operators. ComReg considers that the indirect pricing constraint exercised by cable and FWA based services at the retail level has a sufficiently significant impact at the wholesale level to justify its inclusion in the wholesale broadband access market. ComReg is of the view that currently there is no viable direct competitive constraint by wholesale cable and FWA operators on bitstream providers in the wholesale broadband access market and it is unlikely that there will be within the timeframe of the review.
- 1.6 Furthermore, ComReg concurs with the views expressed by the EU Commission in the Explanatory Memorandum to the Relevant Markets Recommendation that an

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<sup>1</sup> S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>2</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>3</sup> Regulations 26 and 27.

<sup>4</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, ('the SMP Guidelines').

operator purchasing wholesale broadband access will not consider unbundled local loops to be a substitute.

- 1.7 ComReg conducted an analysis of the relevant market to decide whether or not it is effectively competitive. ComReg used a wide range of criteria including market share, absence of potential competition, high barriers to entry and expansion, absence of or low countervailing buyer power, pricing and profitability and also conducted a prospective analysis of the relevant markets.
- 1.8 Having regard to the above, ComReg is of the view that, in accordance with the Framework Regulations, *eircom Ltd.* should be designated as having Significant Market Power ('SMP') on the markets for 'wholesale broadband access'. Within the period of this review, there is nothing to suggest to ComReg that the SMP of *eircom Ltd.* will be diluted in any meaningful way in the absence of appropriate and proportionate SMP obligations.
- 1.9 ComReg conducted a national consultation and considered all comments in coming to its preliminary conclusions in relation to market definition, market analysis and SMP remedies. As required by Regulation 20 of the Framework Regulations, the draft measure containing these preliminary conclusions was made accessible to the EU Commission and the national regulatory authorities ('NRAs') in other member states of the EU. ComReg considered all comments on the draft measure and notified the response to the EU Commission.
- 1.10 Having determined that the relevant market reviewed is not effectively competitive, ComReg is now designating the undertaking with SMP, in accordance with Regulation 27 (4) of the Framework Regulations. This document also contains the final decision in relation to regulatory obligations to be imposed further to the SMP designation. The final decision is set out as an Annex to this document and the obligations therein are binding on the designated SMP operator, *eircom Ltd.*, from the date of publication.

## 2 Background to Decision

- 2.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has, taken account, of amongst other things, its functions under Regulation 6(1) of the Access Regulations;<sup>5</sup> has (where appropriate) complied with the Policy Directions made by the Minister for Communications<sup>6</sup> under section 13 of the Communications Regulation Act, 2002; and has also taken the utmost account of the EU Commission's Recommendation<sup>7</sup> and the Guidelines.<sup>8</sup>
- 2.2 ComReg concluded (as detailed in the SMP decision and notification document *ComReg Document Number 04/83*), that the market for wholesale broadband access should deviate from that specified in the Relevant Markets Recommendation. In context of Irish circumstances the market should include the provision of bitstream services through self supply and to third parties; and the self supply by cable and FWA operators.
- 2.3 This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale broadband access,<sup>9</sup> as part of the consultation process arising from the ComReg document entitled *Market Analysis: Wholesale Broadband Access Response to Consultation (Document No. 04/83)*, dated 29 July 2004. That document forms part of this Decision.
- 2.4 The measures imposed under this Decision were notified to the EU Commission in accordance with Regulation 20 of the Framework Regulations and the Article 7 Recommendation,<sup>10</sup> and were registered by the EU Commission on 29 July 2004. The notified measures were accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 25 August 2004.
- 2.5 Pursuant to Article 7 (3) of the Framework Directive the EU Commission examined the notification and commented on the inclusion of self supply by cable operators and FWA operators in the relevant product market. The EU Commission recognised that ComReg's approach to defining a wholesale market on the basis of the competitive

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<sup>5</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Regulations').

<sup>6</sup> Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 26 March 2004.

<sup>7</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>8</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

<sup>9</sup> As referred to in the EU Commission's Recommendation.

<sup>10</sup> Commission Recommendation of 23 July 2003 on notifications, time limits and consultation provided in Article 7 of Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services.

conditions in the corresponding retail market is not in principle inconsistent with the methodology set out in The SMP Guidelines. However, the EU Commission did draw ComReg's attention to the definition of wholesale broadband access in the Relevant Market Recommendation, which covers both (PSTN) bitstream access and "wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bitstream access."

- 2.6 The EU Commission continued to note that in respect of the definition of the relevant market, demand side substitution represents the most immediate and effective disciplinary force on suppliers of a given product. ComReg excluded the viability of any direct constraint from providers of cable or FWA based wholesale inputs and based its conclusions entirely on the assumed indirect pricing constraint derived from substitutability at the retail level. The EU Commission noted that the indirect competitive constraint could have been taken into account subsequent to the definition of the relevant markets at the stage of assessment of SMP. While this may have led to a narrower definition the exclusion of cable and FWA based wholesale services from the market definition in this particular case would not have led to a different result in the SMP analysis. Consequently the EU Commission considered that the conclusion of the exact scope of the market (whether with the inclusion or exclusion of self supply by cable and FWA operators) is not relevant for the purposes of SMP designation.
- 2.7 In Document 04/83, ComReg consulted upon its Draft Decision and asked if respondents believed that the draft text of the proposed decision was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed. Comments were considered and the Final Decision (Document 04/113) was notified to the EU Commission on the 24 November 2004. The EU Commission registered the notification by ComReg concerning the final remedies relating to the review on wholesale broadband access market. The EU Commission examined the notification and the supplementary information provided by ComReg and had no comments.<sup>11</sup> The notified Decision was accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 21 December 2004.
- 2.8 The EU Commission also noted that a further consultation will be held on the detailed implementation of wholesale price control, accounting separation obligations and cost accounting obligations and that draft measures relating to these regulatory obligations are required to be notified under Article 7(3) of the Framework Directive.

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<sup>11</sup> Case IE/2004/0016: Remedies related to Case IE/2004/0093

### **3 Market Review**

#### **Market Definition**

- 3.1 This Decision relates to the market for wholesale broadband access.
- 3.2 The relevant geographic market for the product market is defined as the Republic of Ireland.
- 3.3 ComReg concluded that the market for wholesale broadband access should include the provision of bit stream services through self-supply and supply to third parties and the self-supply by cable operators and Fixed Wireless Access (FWA) operators. Furthermore, ComReg concurs with the views expressed by the EU Commission in the *Explanatory Memorandum to the Relevant Markets Recommendation* that an operator purchasing wholesale broadband access will not consider unbundled local loops to be a substitute. ComReg's conclusions in this Decision are also based on the lack of demand and supply-side substitution for narrowband services.

#### **Designation of Undertaking with Significant Market Power ('SMP')**

- 3.4 The criteria used to assess SMP in the wholesale broadband access market include:-
  - i. Market shares;
  - ii. High barriers to entry and expansion;
  - iii. Absence of, or low, countervailing buying power;
  - iv. Absence of potential competition; and
  - v. Pricing and profitability.
- 3.5 *eircom Ltd.* is designated as having SMP in the wholesale broadband access market.
- 3.6 A reference in this section to *eircom Ltd.* shall be deemed to include that undertaking and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant markets defined in section 2 of this Decision.

#### **SMP Obligations**

- 3.7 ComReg is required to impose *ex ante* regulatory obligations that are, appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of the Framework Directive. ComReg has previously identified remedies it considers may be appropriate to impose on a SMP operator in these markets. These were the obligations of access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting obligations. Details of the obligations for accounting separation and price control will be subject to an additional consultation and interim measures have

been outlined. However, ComReg has consulted fully on the remedies to be imposed and the details to attach to those considered suitable in this instance.

- 3.8 In Document 04/83, ComReg consulted upon its Draft Decision and asked if respondents believed that the draft text of the proposed decision was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed. Comments were considered and the Final Decision (Document 04/113) was notified to the EU Commission on 24 November, 2004. The EU Commission registered the notification by ComReg concerning the remedies relating to the review of the wholesale broadband access market. The EU Commission examined the notification and the supplementary information provided by ComReg and had no comments.<sup>12</sup> The notified Decision was accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 21 December 2004.
- 3.9 ComReg refers to paragraphs 6.165 and 6.182 of the notification document (ComReg Document Number 04/83) wherein it consulted on the proposal that new products and charges introduced during the interim period would be considered on a case by case basis. ComReg proposed that the retail minus principle would be applied to new products and that guidance in relation to the application of the principle in this context could be extrapolated from existing products. ComReg, having carefully considered this matter, has decided to adopt its proposal. This has been reflected in amendments to the text of the Decision contained in the Appendix hereto.

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<sup>12</sup> Case IE/2004/0016: Remedies related to Case IE/2004/0093.



## Annex - Decision

### 1 Statutory Powers Giving Rise to Decision

- 1.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has taken account, its functions under Regulation 6 (1) of the Access Regulations,<sup>13</sup> has (where appropriate) complied with the Policy Directions made by the Minister<sup>14</sup> and has also taken the utmost account of the EU Commission's Recommendation<sup>15</sup> and the Guidelines<sup>16</sup>. This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale broadband access for the purpose of delivering broadband to end users,<sup>17</sup> as part of the consultation process arising from the ComReg document entitled *Market Analysis: Wholesale Broadband Access – Response to Consultation* (Document No. 04/83) dated 29 July 2004. Document No. 04/83 forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations<sup>18</sup>, Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations and having regard to sections 10 and 12 of the Communications Regulations Act, 2002.

### 2 Market Definition

- 2.1 This Decision relates to the market for wholesale broadband access as identified in the EU Commission's Recommendation. The market in this Decision is defined as the market for wholesale broadband access as identified in the EU Commission's Recommendation.
- 2.2 The relevant geographic market for wholesale broadband access is defined as Ireland.

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<sup>13</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>14</sup> Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

<sup>15</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>16</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

<sup>17</sup> As referred to in the EU Commission's Recommendation.

<sup>18</sup> S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

### **3 Designation of Undertaking with Significant Market Power ('SMP')**

3.1 *eircom Ltd* is designated as having SMP in market for wholesale broadband access in Ireland.

### **4 SMP Obligations<sup>19</sup>**

4.1 ComReg has decided to impose the *ex ante* SMP obligations set out in Regulations 10 – 14 inclusive of the Access Regulations. These SMP obligations are described further in the sections below.

### **5 Access<sup>20</sup> Obligations**

5.1 *eircom Ltd* shall have an obligation to meet reasonable requests for access to, and use of, wholesale bitstream access products, features or additional associated facilities by undertakings<sup>21</sup> requesting access or use of such wholesale bitstream access products, features or additional associated facilities, as provided for by Regulation 13 of the Access Regulations. Without limiting the generality of Regulation 13 of the Access Regulations and this section, *eircom Ltd* shall:-

- I. Negotiate in good faith with undertakings requesting access.
- II. Give third parties access to specified network elements, facilities or both such elements and facilities.
- III. Not withdraw access to certain facilities already granted without the prior approval of ComReg.
- IV. Grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services.
- V. Provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.

5.2 It shall be a condition of the obligations contained in section 5.1 that *eircom Ltd* concludes legally binding Service Level Agreements ('SLAs') with Other Authorised Operators ('OAOs') in respect of relevant products and appropriate process points.

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<sup>19</sup> ComReg is legally obliged to impose *ex ante* SMP obligations that are appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services in order to remedy SMP in the market on which *eircom* is designated as having same.

<sup>20</sup> As defined in the Access Regulations.

<sup>21</sup> The expressions 'associated facilities' and 'undertaking' shall have the same meaning as contained in Regulation 2 of S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

## **6 Obligation of Non-Discrimination**

6.1 *eircom Ltd* shall have an obligation of non-discrimination as provided for by Regulation 11 of the Access Regulations. Without limiting the generality of Regulation 11 and this section, *eircom Ltd* shall:-

- I. Provide sufficient wholesale products to support the full range of *eircom Ltd* retail offerings.
- II. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to undertakings under the same conditions and of the same quality as *eircom Ltd* provides for its own services or those of its subsidiaries or partners.
- III. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are equivalent to those provided to *eircom Ltd's* retail arm and *eircom Ltd* associates or subsidiaries.
- IV. Conclude legally binding SLAs with OAOs in respect of relevant products and appropriate process points.

## **7 Obligation of Transparency**

7.1 *eircom Ltd* shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations. Without limiting the generality of Regulation 10 of the Access Regulations and this section, *eircom* shall publish and keep updated a bitstream access reference offer ('BARO') that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. *eircom Ltd* shall ensure that the BARO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.

7.2 *eircom Ltd* shall publish, specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

7.3 *eircom Ltd* shall publish all SLAs concluded (and as from time to time amended) in accordance with section 5.1 and section 6.1 (iv) of this Decision.

## **8 Accounting Separation**

8.1 *eircom Ltd* shall have an obligation to keep separated accounts as provided for by Regulation 12 of the Access Regulations. All of the obligations in relation to accounting separation applying to *eircom Ltd* in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and *eircom Ltd* shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and

implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations<sup>22</sup> in force immediately prior to the effective date of this Decision, *eircom Ltd* shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and *eircom.net*.
- D7/01- *eircom Ltd's* Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by *eircom Ltd*.

## 9 Price Control

9.1 *eircom Ltd.* shall, pursuant to Regulation 14 of the Access Regulations, have obligations relating to wholesale price control as determined from time to time by ComReg (following consultation) for the following purposes:

- I. Establishing the margin between wholesale and retail prices proposed to be offered by *eircom Ltd*.
- II. Preventing the potential application by *eircom.* of a price or margin squeeze.
- III. Preventing *eircom Ltd.* from sustaining prices at an excessively high level.

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<sup>22</sup> Including any obligations contained in various Decision Notices not relating exclusively to accounting separation, any obligations set out in Decision Notices relating to the Reference Interconnect Offer ('RIO') and any detailed requirements and obligations set out in any correspondence between ODTR/ComReg and *eircom*.

## **Interim Price Controls**

9.2 Pending a further decision by ComReg (to be made following further consultation) in relation to the details of and implementation of wholesale price controls referred to in section 9.1 and without limiting the generality of Regulation 14 of the Access Regulations and section 9.1, *eircom Ltd.* shall:-

- I. Pursuant to its obligations of non-discrimination referred to in section 6 and its obligations of transparency referred to in section 7, notify ComReg in writing of any proposed amendments to retail terms and conditions, including price, in respect of its existing and future Asymmetric Digital Subscriber Line ('ADSL') products. In this regard, *eircom Ltd.* shall also notify ComReg in writing, for its prior approval, of any proposed amendments to wholesale terms and conditions, including price, in respect of its existing and future bitstream products. ComReg shall as soon as is reasonably practicable, undertake and complete its assessment of *eircom Ltd.*'s proposed wholesale amendments and either approve such amendments or, pursuant to its powers under Regulations 10, 14 and 17 of the Access Regulations, direct that adjustments be made to such amendments, or the actual wholesale terms and conditions, including price, if no amendments have been proposed or notified to ComReg. The procedure described in this section shall, for the purpose of this Decision, be referred to as 'the Assessment Procedure'.
- II. Apply the retail minus controls to each of the connection and rental charges for each of the four *eircom Ltd.* wholesale bitstream products, as set out in the table below ('the Table').<sup>23</sup> The margin between the retail prices and the wholesale prices shall be at least as great as the margin implied by the retail minus controls in the Table. ComReg may, for the purpose of ensuring the fulfilment of its functions and objectives in Regulation 6 of the Access Regulations and section 10 and section 12 of the Communications Regulation Act, 2002 and for the purpose of ensuring compliance with Regulation 14 of the Access Regulations, deviate from the formulae set out in the Table.
- III. If *eircom Ltd.* introduces a new retail product, it shall apply the principle of the retail minus price controls as implied by the Table. *eircom Ltd.* shall ensure that the margin between the new product and a respective wholesale product, which would allow other operators to offer a competing retail product, is at least as large as that between the nearest equivalent pair of retail and wholesale products described in the Table. This margin must be respected by *eircom Ltd.* for all new or amended retail products and their associated wholesale products. *eircom* shall ensure that the introduction of a new product does not result in a price or margin squeeze or in prices that

<sup>23</sup> Namely: '*eircom* Bitstream Expand IP', '*eircom* Bitstream Swift IP', '*eircom* Bitstream Express IP' and '*eircom* Bitstream Sonic IP' as described in *eircom*'s ADSL Bitstream Service Product Description, Version 1, dated 31 March 2004.

are excessively high. ComReg may, for the purpose of ensuring the fulfilment of its functions and objectives in Regulation 6 of the Access Regulations and section 10 and section 12 of the Communications Regulation Act, 2002 and for the purpose of ensuring compliance with Regulation 14 of the Access Regulations, deviate from the formulae set out in the Table.

**Table – Interim Retail Minus Price Controls**

Regulated Wholesale Product & Charge	Related Retail Product & Charge	Price Control*
<i>eircom</i> Bitstream expand IP; connection	<i>eircom</i> broadband home starter; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream expand IP; monthly rental	<i>eircom</i> broadband home starter; monthly rental	Retail minus 12.95 euros
<i>eircom</i> Bitstream Swift IP; connection	<i>eircom</i> broadband home plus/business starter; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream Swift IP; monthly rental	<i>eircom</i> broadband home plus/business starter; monthly rental	Retail minus 18 euros
<i>eircom</i> Bitstream Express IP; connection	<i>eircom</i> broadband business plus; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream Express IP; monthly rental	<i>eircom</i> broadband business plus; monthly rental	Retail minus 29.40 euros
<i>eircom</i> Bitstream Sonic IP; connection	<i>eircom</i> broadband business enhanced; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream Sonic IP monthly rental	<i>eircom</i> broadband business enhanced monthly rental	Retail minus 54 euros

\*These price controls apply to prices exclusive of VAT.

#### Retail Discount Schemes

- IV. Notify ComReg in writing of any proposed amendments to the *eircom Ltd.* Bulk Connection Discount Scheme or, of the proposed introduction of any new retail discount scheme. *eircom Ltd.* may be required to make corresponding amendments to wholesale bitstream product prices, or other terms and conditions, if it makes any amendment to the *eircom Ltd.* Bulk Connection Discount Scheme or, proposes to introduce any new discount scheme. *eircom Ltd.* shall notify ComReg in writing, for its prior approval, of any proposed corresponding amendments to wholesale bitstream product prices. The Assessment Procedure shall apply in respect of *eircom Ltd.*'s proposed wholesale amendments. In making its assessment, of what (if any) amendments are required to wholesale bitstream product prices and if demonstrated to ComReg's satisfaction, ComReg will take into account the extent of any objective justification for a discount scheme for example, the scheme characteristics implying cost savings relative to the standard product. Where an objective justification of this nature has not been

demonstrated to ComReg's satisfaction, ComReg may require changes in wholesale prices that reflect the retail minus formulae set out in the Table and apply the approach applied to new promotion schemes as set out below.

Retail Promotions

- V. Notify ComReg in writing of any proposed amendments to a retail promotion (including a new retail promotion) that amends the self-install connection charges or monthly rental charges or, makes any other amendments to the characteristics of the relevant product. *eircom Ltd.* shall also notify ComReg in writing, for its prior approval, of any corresponding proposed wholesale price amendments. The Assessment Procedure shall apply in respect of *eircom Ltd.*'s proposed wholesale amendments. In addition, the following shall apply:-
- Any promotion that only makes amendments to self-install connection charges or monthly rental charges will have the retail minus controls set out in the Table applied to it. In order to allow further pricing flexibility in respect of *eircom Ltd.* promotions, ComReg will however allow *eircom Ltd.* to distribute required monetary reductions in wholesale prices across the wholesale connection and rental charges as *eircom Ltd.* sees fit.<sup>24</sup> ComReg may allow *eircom Ltd.* to make equivalent reductions to other relevant wholesale charges, where it can be shown that it would not lead to a disadvantage to purchasers of bitstream products.
  - Where promotions change product characteristics, other than the connection or rental charges,<sup>25</sup> ComReg will amend the retail minus controls as set out in the Table in a manner that reflects the change in cost implied by the amendment in product characteristics.<sup>26</sup>
- VI. Not put in to effect, publish or cause to be published any associated amendments to retail prices and / or terms and conditions prior to publishing any amendments to wholesale prices. *eircom Ltd.* shall not make

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<sup>24</sup> For example, if *eircom* wishes to introduce a retail promotion for its broadband home starter product, providing free connection and the first 2 months line rental for free, it could, for the same promotional period, set a wholesale connection charge of minus €21.81 and a monthly wholesale rental of minus €12.95 for the first two months, or it could set a wholesale connection charge of minus €47.71 ( $€21.81 + €12.95 + €12.95 = €47.71$ ), equivalent to a reduction in the wholesale connection charge by the same monetary amount in total, with no change in the wholesale monthly rental charge. Other combinations would also be possible. ComReg would restrict the timing of any wholesale price reductions to be broadly similar to the timing of retail price reductions (for example, in this instance, ComReg would not accept a reduction in wholesale monthly rental prices for the last 2 months of the customer or port life).

<sup>25</sup> This includes the bundling of other products and services.

<sup>26</sup> This approach is aimed at preventing *eircom* from squeezing margins by other means, for example, improving the retail product instead of reducing the price differential. This will allow *eircom* to improve the retail product, but will require *eircom* to make corresponding improvements to the wholesale product, usually to the price. For example, if as part of a promotion *eircom* wished to provide a freephone customer helpdesk number instead of a tariffed number, then ComReg would use an estimate of the net cost of making this change and require a corresponding downward adjustment to wholesale prices, allowing *eircom* flexibility as to which wholesale price(s) to reduce.

such associated amendments to retail prices effective, prior to the amendments to the wholesale prices becoming effective.

- VII. Pursuant to its non-discrimination obligations referred to in section 6 and its transparency obligations referred to in section 7, publish the amendments to its wholesale prices (referred to in section 9) in the BARO no less than 15 working days prior to the date they are intended to become effective and specify the date on which they are intended to become effective.
- VIII. With respect to the charges and products detailed in the Product Schedule below, notify ComReg in writing, for its approval, of any proposed amendments thereto. The Assessment Procedure shall apply with respect to such a notification. *eircom Ltd.* shall not publish or cause to be published any increase in the prices (or any proposed amendments to the other terms and conditions) to the products detailed in the Product Schedule without first notifying ComReg thereof and at the same time, submitting to ComReg an appropriate cost based justification with respect to any such proposed increases or amendments.

Product Schedule

- The *eircom Ltd.* Service Establishment Charge.
  - The *eircom* Cessation Charge.
  - The *eircom* Bitstream Connection Service VT Link Charge.
  - The *eircom* ATM Products.<sup>27</sup>
  - *eircom* New Products / Charges.
- IX. Ensure that the *eircom* Bitstream Connection Service Access and Transport Link Charge ('ALT') is consistent with the equivalent wholesale leased line price.

## 10 Cost Accounting

- 10.1 *eircom Ltd.* shall have obligations in relation to cost accounting as provided for by Regulation 14 of the Access Regulations. All of the obligations in relation to cost accounting applying to *eircom Ltd.* which were in force immediately prior to the effective date of this Decision shall be maintained in their entirety and *eircom Ltd.* shall comply with those obligations pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations.

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<sup>27</sup> *eircom* Bitstream Swift and *eircom* Bitstream Express.



**11 Effective Date**

11.1 This Decision shall be effective from the **17<sup>th</sup> day of February 2005** and until further notice by ComReg.

**Isolde Goggin**  
**Chairperson**  
**The Commission for Communications Regulation**  
**The 17th day of February 2005**