



Consultation Paper

**Market Analysis: Wholesale unbundled access
(including shared access) to metallic loops and
sub-loops**

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All responses to this consultation should be clearly marked:-
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(*current consultations*), to arrive on or before 5.30 pm, 30th
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Please note ComReg will publish all submissions with the
Response to Consultation, subject to the standard confidentiality
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1 Executive Summary

- 1.1 The new communications regulatory framework requires that ComReg define relevant 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*. 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*”) by the European Commission.¹ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the Commission's *Guidelines on Market Analysis and Significant Market Power* (“*The Guidelines*”).
- 1.3 ComReg would welcome comments from all interested parties on the questions posed in this market review. Comments are to be supplied only in writing on or before 30 January 2004.
- 1.4 Under Article 5 of the *Framework Regulation* and in order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.²
- 1.5 The European Commission's *Relevant Markets Recommendation* states that there is, at the wholesale level, a market for “wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services” The ‘local loop’ is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber premises to the main distribution frame or equivalent facility.
- 1.6 The European Commission takes the view that an operator using unbundled local loops will not consider another form of wholesale broadband access to be a substitute. The European Commission considers that it is equally unlikely that an entity using wholesale broadband access could easily switch to unbundled loops to provide equivalent retail service(s).
- 1.7 In ComReg’s view it would not be economically viable for a new entrant to attempt to replicate the incumbent’s local access infrastructure. Alternative technologies such as wireless local loops, cable or satellite do not provide the level

¹ Framework Regulations 26 and 27.

² ComReg may publish submissions with the Response to Consultation, subject to confidentiality. 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. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.

of ubiquity of the local loop network and are not likely to do so in the time frame of this review.

1.8 There are a number of products currently available in Ireland to allow new entrants access to the metallic local loop:

- fully unbundled local metallic paths (ULMP)
- shared loops (line sharing)
- fully unbundled sub loops
- shared sub loops
- collocation³
- related facilities

1.9 Access to the local loop allows access seekers the ability to offer narrowband and broadband services. Therefore provision of local loop access allows operators to offer services which compete in a number of retail markets. It should be noted however that to date access seekers have concentrated on offering broadband products. Given the Carrier Pre Select (CPS) options available in Ireland, it may not make commercial sense to use local loop unbundling access for PSTN services. There is growing demand at the retail level for broadband access services and although broadband access via other technologies is available, roll-out and take up have been limited. This is mainly due to the fact that the incumbent local loop network has a widespread geographic reach which is not matched by other technologies.

1.10 ComReg takes the view that there are clear and distinct functional differences between bitstream services and unbundled loops which preclude their inclusion in the same relevant product market. This conclusion is supported by the view taken by the European Commission as stated in the *Relevant Markets Recommendation*. ComReg also believes that there are significant differences between the pricing of bitstream and wholesale unbundled access services (both fully unbundled and line sharing), which reflect the functional differences between the services. In effect, the service operates at entirely different functional layers.

1.11 The wholesale unbundled access acquirer must make not insignificant investments in its exchange equipment and must play a much greater role in managing its services (in that it bears responsibility for identifying faults). The pricing data available to ComReg indicates that it is unlikely that an access acquirer would respond to a 5 to 10% increase in bitstream prices by switching to unbundled loops or that an unbundled loop acquirer would respond to a similar increase by switching to bitstream. As such, the service price and other cost differences suggest that wholesale unbundled access services are not in the same relevant market as bitstream services.

1.12 ComReg is of the view that there is limited scope for network operators currently operating in Ireland to provide effective supply-side substitutes for wholesale unbundled access to metallic loops (in response to a 5 to 10% increase in price by a hypothetical monopolist supplier). Operators of existing networks capable of

³ Regulation (EC) No 2887/2000 on unbundled access to the local loop defines collocation as "the provision of physical space and technical facilities necessary to reasonable accommodate and connect the relevant equipment of a beneficiary".

supporting uni-directional or narrowband access services would be required to make significant investments in upgrading their networks to support broadband access. ComReg is unaware of any such operators intending to make such investments in "brown-field" networks during the timeframe of this review.

- 1.13 ComReg has formed the preliminary view that there is a distinct relevant market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. ComReg also takes the view that the relevant geographic market for the provision of wholesale unbundled access is national in scope, to include the whole of Ireland.
- 1.14 This view is based primarily on the fact that services offered nationally by eircom fall within these relevant markets and are homogeneous in nature. It is also the case that the market conditions are not significantly different across the country and eircom's local access infrastructure is the ubiquitous network across the whole of Ireland
- 1.15 ComReg having first identified a "relevant market"⁴ relating to wholesale unbundled access in Ireland is required to conduct an analysis of the relevant market to decide whether or not it is effectively competitive. Where it concludes that the market is not effectively competitive it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.
- 1.16 eircom currently supplies 100% of the market for unbundled metallic local loops. In terms of future competition ComReg takes the view that there is little likelihood of the development of an alternative local access network which could provide comparable services during the timeframe of this review. While there is likely to be some expansion in the medium-term in the roll-out of platforms using alternative technologies (*e.g.*, satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms) the extent of such expansion is very uncertain and is unlikely to provide effective competition in the local loop during the timeframe of this review.
- 1.17 The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. The issues are also associated with economies of scale and scope, leverage of facilities (both historic and new), ubiquity and access to customers which limit the feasibility of self-supply by new entrants.
- 1.18 Having regard to the above, ComReg is of the view that, in accordance with the *Framework Regulations* eircom should be designated as having SMP on the markets for "wholesale unbundled access" (including shared access) to metallic loops and sub-loop for the purpose of providing broadband and voice services.
- 1.19 According to the SMP Guidelines⁵, the purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets. ComReg can only impose *ex-ante* regulation in markets where there are one or more undertakings with

⁴Framework Regulation 27.

significant market power (SMP), and where national and Community competition law remedies are not sufficient

- 1.20 Due to the nature of the market, it is probable that competition problems of both a structural and a behavioural nature will exist. Such generic competition problems as entry deterrence, exploitative behaviours and productive inefficiencies lead to effects on competing operators which hinder their ability to compete, or even enter their desired markets. The kind of competition problems which may appear centre on issues including refusal to deal and denial of access, which have both price and non-price implications
- 1.21 ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power⁶. ComReg also has the obligation under Regulation 6⁷ to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations⁸ which include transparency, non-discrimination, accounting separation, access to specific network facilities and price and cost accounting obligations
- 1.22 ComReg is proposing to place obligations on eircom under all of the headings above. Detailed remedies are included in section 6 below.

⁵ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 16.

⁶ Regulation 27(4) states 'Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate'

⁷ Framework Regulation 6(1-5)

⁸ Access Regulation 9(1) states 'Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 26 of the Framework Regulations, the Regulator shall impose on such an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate'

2 Introduction

Objectives under the Communications (Regulation) Act 2002

- 2.1 Part 2 Section 12 of the Communications (Regulation) Act 2002 outlines the objectives of ComReg in exercising its functions. These are, in relation to the provision of electronic communications networks, electronic communications services and associated facilities:
- (i) to promote competition
 - (ii) to contribute to the development of the internal market, and
 - (iii) to promote the interests of users within the European Union.
- 2.2 This review is in line with the objectives set out in the Communications Regulation Act 2002, in particular as ComReg seeks to promote competition and ensure that end-users derive the maximum benefit in terms of price, choice and quality.

Regulatory Framework

- 2.3 Four sets of Regulations,⁹ which transpose into Irish law four European Community directives on electronic communications and services,¹⁰ entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, was transposed into Irish law on 6 November 2003. The Minister for Communications, Marine and Natural Resources has consulted on the draft regulations¹¹.

⁹ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the *Framework Regulations*"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the *Authorisation Regulations*"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the *Access Regulations*"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the *Universal Service Regulations*").

¹⁰ The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the *Framework Directive*"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the *Specific Directives*"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the *Authorisation Directive*"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the *Access Directive*"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the *Universal Service Directive*"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the *Privacy and Electronic Communications Directive*"), OJ 2002 L 201/37.

¹¹ ComReg Document No. 03/99 outlines ComReg's response to the draft regulations.

- 2.4 The new communications regulatory framework requires that ComReg define relevant 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*.¹² In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.¹³ Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP in that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.¹⁴ Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market. If ComReg has previously imposed sector-specific regulatory obligations on undertakings in that relevant market, it must withdraw such obligations and may not impose new obligations on those undertaking(s).¹⁵
- 2.5 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“the *Relevant Markets Recommendation*”) by the European Commission.¹⁶ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the Commission's *Guidelines on Market Analysis and Significant Market Power* (“*The Guidelines*”).

Consultation

- 2.6 All comments to this Public Consultation are welcome. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 2.7 The consultation period will run from 11 December 2003 to 30 January 2004 during which ComReg welcomes written comments on any of the issues raised in this paper. All questions are summarised in section 8.
- 2.8 As required by Regulation 20 of the Framework Regulations, the draft measure will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking the measure.

¹² Framework Regulation 26.

¹³ Framework Regulation 27.

¹⁴ Framework Regulation 27(4).

¹⁵ Framework Regulation 27(3).

¹⁶ Framework Regulations 26 and 27.

ComReg procedure

- 2.9 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services (“ECNS”), and from consumer surveys commissioned by ComReg, in order to carry out thoroughly its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of the *Relevant Markets Recommendation* and the *Guidelines*.
- 2.10 ComReg published an information notice on the market analysis process on December 19, 2002. The first of the industry workshops held by ComReg took place on January 23, 2003 and questionnaires were sent to all operators on February 18. Following representations made by operators at ComReg’s first workshop, industry was given until the 15 April to respond to the questionnaire. ComReg held its second workshop on the 25 February to discuss the questionnaire.
- 2.11 The results of ComReg’s consumer surveys are referred to in this report. In particular, ComReg commissioned Amárach to carry out research in July / August 2003 on users regarding their usage of fixed services.

Liaison with Competition Authority

- 2.12 There is a requirement on National Regulatory Authorities (NRAs) to co-operate with National Competition Authorities (NCAs) throughout the process of market definition and analysis. In December 2002, ComReg signed a co-operation agreement with the Competition Authority for a period of three years.¹⁷ To facilitate market review decision-making, a Steering Group including a representative from the Competition Authority was established by ComReg. Through this forum, the Competition Authority has been informed and involved throughout the market review decision making process.

Structure of Consultation Document

- 2.13 The remainder of this consultation document is structured as follows:

- section 3 presents ComReg’s preliminary conclusions on the definition of the market for "wholesale unbundled access" (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments at the wholesale and retail level;
- section 4 and its market analysis for the markets listed above and presents ComReg’s preliminary view on whether this market is effectively competitive;
- section 5 presents ComReg’s preliminary view on those undertakings with significant market power in the market;

¹⁷ ComReg Document No. 03/06

- section 6 provides a discussion of the general principles associated with remedies and outlines a range of possible, as well as our proposed remedies, under the new regulatory framework; and
- section 7 outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention markets; and
- section 8 provides details with regard to the submission of comments on this consultation document.

3 Relevant Market Definition

Background

- 3.1 The *Framework Regulations* require ComReg to define relevant markets appropriate to national circumstances, in particular the relevant geographic markets within Ireland, in accordance with the market definition procedure outlined in the *those Regulations*. This obligation applies to both the relevant markets identified in the *Relevant Markets Recommendation* and to additional relevant markets that ComReg may consider to merit investigation (*i.e.*, so-called “Article 7” markets). In accordance with the *Framework Regulations*, the market definition exercise must be carried out in accordance with the principles of competition rules and must take “utmost account” of the *Relevant Markets Recommendation*, as well as the *SMP Guidelines*.^{18 19}
- 3.2 The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that providers of ECNS encounter, thereby also facilitating the subsequent market analysis procedure. According to the European Court of Justice,²⁰ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question.
- 3.3 The definition of the relevant market concentrates on identifying constraints on price setting behaviour of operators. The principal constraints to consider are demand-side and supply-side substitution. For the purpose of defining the relevant market ComReg will take into account a range of measures in assessing demand and supply substitution, including the SSNIP test where practicable²¹. The market definition exercise is concerned with the likely competitive response of a body of customers, which is not necessarily the majority of customers.²²

¹⁸ Framework Regulation 27.

¹⁹ 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”).

²⁰ See, for example, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law (“the Commission Notice on Market Definition”), OJ 1997 C 372/3, and the SMP Guidelines.

²¹ See the Commission Notice on Market Definition, the SMP Guidelines and ComReg’s Market Data Information Notice for additional guidance. Applying the SSNIP test, one tries to ascertain whether customers purchasing a particular product or service would switch to readily available substitutes or to suppliers located elsewhere if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level, thereby rendering such a rise in prices as being unprofitable.

²² See, for example, Case 85/76, *Hoffman-La Roche & Co. A. G. v. Commission*, [1979] ECR 461, as well as Case 66/ 86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803.

- 3.4 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Scope of Review

- 3.5 The European Commission's *Relevant Markets Recommendation* states that at the wholesale level, there is a market for “wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services”.
- 3.6 The European Commission takes the view that an operator using unbundled local loops will not consider another form of wholesale broadband access to be a substitute, even if such other access allowed the supply of the same retail services provided over the unbundled loops, because the use of such other access would require that the "DSL technologies or equivalents used over the loops were compatible at every level of the network"²³. Even if such synchronous deployment of technology existed, it would require continued synchronous technology development in the future, making it difficult for service differentiation at a technical level to evolve.
- 3.7 The European Commission considers that it is equally unlikely that an entity using wholesale broadband access could easily switch to unbundled loops to provide equivalent retail service(s). It finds that such an entity would only do so if it has all the other network elements needed to self provide an equivalent service. Similarly, supply-side substitution is dependent on the same condition. It is clear, from the European Commission, therefore that unbundled local loops and wholesale broadband access constitutes distinct markets.

Q. 1. Do you agree with the scope of ComReg’s review of wholesale unbundled access? Please elaborate your response.

Background

- 3.8 The primary platform for access services in Ireland is the copper loop, with some cable connections. The ‘local loop’ is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility. With the exception of some cable infrastructure the copper loop is the primary telephony connection to end users in Ireland.
- 3.9 eircom’s local loop infrastructure was rolled out over a significant period and the incumbent operator was protected for most of that time by exclusive rights. The incumbent therefore has significant economies of scale and increasing economies of scope which act as a significant barrier to entry for other operators. Eircom is the

²³ Explanatory Memorandum *Relevant Markets Recommendation*

incumbent provider of local loops in Ireland, with a network of approximately 1.6 million²⁴ connections with a wide geographic reach.

- 3.10 ntl and Chorus are television distribution companies which operate nationally with a combination of cable and MMDS (Multipoint Microwave Distribution System) networks in a number of regional areas in Ireland. There are also a number of smaller cable providers who provide a range of services in their locality. Currently cable networks pass approximately 85% of all households in Ireland. However at this point cable networks have generally not been upgraded to the point where they are able to provide services other than broadcasting services.
- 3.11 In 1999 Ireland offered eight nationwide licences for the provision of broadband and narrowband access, using fixed wireless links in the 3.5 GHz, 10.5GHz and 26GHz. Only six were taken up, of which three of these licences had to be subsequently revoked for failure to comply with licence conditions, or bankruptcy. Currently eircom is the only licensed operator to provide services in the 3.5 GHz band via Fixed Wireless Access (FWA). Both voice and Internet services can be delivered to end users over the platform. However this is limited by eircom to areas where it is more economical in the delivery of local loops and for backhaul.
- 3.12 In order to encourage entry into the FWA market on a smaller scale, in light of the difficulties in respect of national licences, ComReg adopted a competitive procedure to assign licences on a base station by base station basis. In the second half of 2003, ComReg offered fifty nine licences to eight applicants for the provision of fixed wireless access local level services using the spectrum from the 3.5 GHz frequency band²⁵ Thirty two of the initial offers have been accepted, and further awards may be made following this first round. While there is sufficient spectrum to provide national coverage, it is not clear that all areas will be licensed. It is expected that services will become available by year end 2004.
- 3.13 Fibre optic cables can support the provision of local loops. They are mainly used for high capacity users, which are almost always non-residential and are generally installed as part of a corporate network. ComReg takes the view that currently the impact of fibre local loops is minimal and will remain insignificant within the timeframe of this review. ComReg will, however, monitor the development of fibre based infrastructure.

The relevant product market

- 3.14 There are a number of products currently available in Ireland to allow new entrants access to the metallic local loop:
- fully unbundled local metallic paths (ULMP)
 - shared loops (line sharing)
 - fully unbundled sub loops
 - shared sub loops
 - collocation
 - related facilities.

²⁴ ComReg (03/144) Key Data for Irish Communications Market –December 2003

²⁵ ComReg (03/32) Request for Expressions Of Interest - 3.5 GHz Local Licences for Wireless Broadband

3.15 Based on the types of wholesale services currently available and technologies in use in Ireland, ComReg's market definition analysis considers:

- the downstream retail services capable of being supported by the relevant wholesale services;
- whether notional cable access (*i.e.*, self-supply by the operator of a digitised bi-directional cable network) should be included in the wholesale market analysis, given that some retail cable services compete with xDSL services at the retail level;
- whether functional differences at the wholesale level suggest that LLU and bitstream services are not in the same relevant market; and
- price differences (including costs attributable to additional equipment) suggest that LLU and bitstream services are not in the same relevant market.

3.16 In doing so, ComReg will consider demand-side substitution at both the retail and wholesale levels and supply-side substitution at the wholesale level

Demand-side substitution (retail level)

3.17 Access to the local loop allows access seekers the ability to offer narrowband and broadband services. Therefore provision of local loop access allows operators to offer services which compete in a number of retail markets. It should be noted however that to date access seekers have concentrated on offering broadband products.

3.18 The local loop network has a widespread geographic reach²⁶ which is not matched by other technologies such as FWA and cable infrastructures.

3.19 There is growing retail demand in Ireland for broadband access services. The total number of retail broadband subscribers, as at the end of the third quarter of 2003, was 21, 560, comprising approximately 4,200 broadband cable subscribers and 13,380 Asymmetric Digital Subscriber Line (ADSL) subscribers (including both eircom's subscribers and other licensed operator ISPs)²⁷. These numbers have increased from 3,330 ADSL subscribers and 2,300 cable subscribers at the beginning of 2003. Other broadband subscribers receive services via lease lines (3,000) and Wireless Local Loop (700)

3.20 The number of broadband subscribers via cable however is aggregated in a small number of geographic locations and is not, for reasons outlined below, expected to increase significantly in the period of this review.

3.21 The surveys conducted on ComReg's behalf indicate that there is a clear perception among end users that there are distinct narrowband and broadband access markets. End users indicate that they perceive that broadband cable connections and ADSL connections as being functionally substitutable services, where the former are available.²⁸

²⁶ However not all geographic areas will be suitable for DSL services

²⁷ 28TNS MRBI Broadband & Data Communications Survey, May 2003; MRBI Broadband Internet Survey – Residential, August 2002.

- 3.22 Presently Fixed Wireless Access (FWA) is equally infeasible as a substitute due to the limited roll out of FWA technology by eircom or any other operator which limits geographic reach and the low take up of the service at this time.

Wholesale demand-side substitution

- 3.23 There are a number of potential demand-side substitutes at the wholesale level. Cable infrastructure, which has coverage of approximately 85% of Ireland, could over time provide a substitute to the metallic local loop. However this would require substantial investment and is unlikely within the timeframe of this current review. Given the existing state of the cable networks it is not possible to offer a functionally equivalent substitute to the local loop in the timeframe of this review. The broadband services via cable are available to approximately 56,000²⁹ subscribers and take-up by 4,200 as against eircom's 1.6 million fixed lines. Accordingly, 90% of cable connections can not provide access to support the provision of data services at all.
- 3.24 Presently Fixed Wireless Access (FWA) is equally unfeasible as a substitute due to the limited roll out of FWA technology as discussed above and the unavailability of a wholesale product.

Substitution between bitstream and wholesale unbundled access

Functional substitutability

- 3.25 There are a number of functional differences between wholesale unbundled access and bitstream services for acquiring entities. These are outlined in Appendix C of the document.
- 3.26 The local loop is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility.³⁰

29 Cable modem services are available to subscribers areas of Limerick, Cork, Dublin, Kilkenny, Tipperary, Waterford and Longford

30 Regulation(EC) No 2887/2000 of the European Parliament and of the Council on unbundled access of the local loop

- 3.27 In the case of full unbundling the local loop the copper pair is rented to a third party for its exclusive use. The lessee has full control of the relationship with its customer for the provision of a full range of services over the local loop, including deployment of DSL.
- 3.28 Shared use of the copper line allows the incumbent operator to continue to provide telephone service, while the new entrant delivers high-speed data services over the same local loop using its own high-speed ADSL modems. Telephone traffic and data traffic are separated by means of a splitter before the incumbent's switch. The local loop remains connected to and part of the public switched telephone network. Diagram in Appendix C of the document, illustrate the different types of local loop unbundling.
- 3.29 Bitstream services may limit the extent to which the purchaser can produce innovative services for retail supply or, for that matter, depart significantly from the retail services made available by eircom. The wholesale provider of bitstream controls both the bandwidth (or speed) and geographic coverage of retail service development
- 3.30 With wholesale unbundled access, purchasing operators have the scope to choose the geographical areas most appropriate for them which may not be the case with bitstream products. Purchasing operators, having the scope to provide a wider range of services across the local loop, can develop a range of products, for example variants of DSL to compete for leased line customers.
- 3.31 Unbundled local loops (both full and shared) give control to the purchasing operator of the local loop connection to the end user. As such, the purchasing operator has almost complete discretion in relation to the bandwidth of services offered. In addition, the purchasing operator, by installing its own DSLAM and related equipment, has a greater degree of control over geographic coverage and roll-out of new retail services.
- 3.32 High speed bitstream access³¹ refers to the situation where the incumbent installs a high speed link to the customer's premises (by installing its preferred ADSL equipment and configuration in its local access network) and then makes this access link available to third parties to enable them to provide high speed services to customers.
- 3.33 Consequently, ComReg takes the viewpoint that there are clear and distinct functional differences between bitstream services and unbundled loops which preclude their inclusion in the same relevant product market. This conclusion is supported by the view taken by the European Commission as stated in the *Relevant Markets Recommendation* and outlined in the scope of the review above.

Price comparisons

The current standard charges for (fully) unbundled local loops are as follows³²:

³¹Bitstream can be defined as the provision of transmission capacity (upward/downward channels may be asymmetric) between the end-user connected to a telephone connection and the point of interconnection available to the new entrant. ERG Document, November 21st 2003

³² All charges are exclusive of VAT

Service	Charges
Successful connection for existing metallic path	€121.52
Successful connection for existing metallic path (with survey option to allow connection of spare path)	€154.25
Cancelled connection order	€24.12
Upgrade from line sharing to full unbundling	€80.70
Monthly rental charge	€16.81
Line testing	€49.18
Fault clearance	€117.31
Disconnection Charge	€49.58

eircom's current standard charges for (sub) unbundled local loop – Full are as follows³³:

Service	Charges
Cabinet Survey	€99.17
Cabinet Site Offer	€81.96
Subloop ULMP	€168.65
Monthly rental charge	€15.25
Line testing	€49.18
Sub Loop ULMP Disconnection	€69.03

eircom's current standard charges for (sub) unbundled local loops – Line Sharing are as follows³⁴:

Service	Charges
Cabinet Survey	€99.17
Cabinet Site Offer	€81.96
Subloop Line sharing	€172.51
Monthly rental charge	€8.22
Line testing	€18.09
Sub Loop (Line sharing) Disconnection	€92.34

eircom's current standard charges for line sharing connections are as follows:

Service	Charges
Successful line sharing connection for existing path	€123.41
Successful shared connection for existing path (with survey option to allow connection of spare path)	€156.14
Cancelled connection order	€24.12

³³ Attendance charges will also apply, which are dependent on an initial charge for the first 30 mins and subsequent charge thereafter and whether the visit is planned/unplanned/ standard/after-hours

³⁴ Attendance charges will also apply, which are dependent on an initial charge for the first 30 mins and subsequent charge thereafter and whether the visit is planned/unplanned/ standard/after-hours

Monthly rental charge	€9.00
Line testing	€18.09
Fault clearance	€117.31
LS Disconnection	€75.00

eircom's current standard charges for collocation facilities are as follows:

Service	Charges
Pre-ordering charges	
Information requests	€318 per site
Full survey reports	ranging between €1143 and 2845 per distant site
Site inspections	ranging between €1143 and 2845 per distant site
Site offers	€6133
Occupancy charges	varying by location
Basic rental	
Licence fees	For generator provision, flooring and air-conditioning, the MDF and cabling
Capital contributions	For generator provision and air-conditioning
Power charges, process charges and charges for attendance services	(both planned and unplanned).

eircom's current standard charges for bitstream access³⁵ are as follows:

Service	Charges
Service establishment per access seeker (not per line)	€8,035
Port connection charge	€375
Monthly service charge for 512 kbps port	€55
Monthly service charge for 1,024 kbps port	€89
Monthly service charge for Rate Adaptive Port	€27
Port Transfer Charge	€60

3.34 ComReg notes a number of key difficulties in both setting and assessing prices for broadband access services, including: identifying the range of services across which the costs of broadband investments should be allocated, the appropriate method of apportioning such costs, the period over which costs should be depreciated and appropriate methods for allowing for the fact that IP and ATM networks are dimensioned for anticipated demand, not demand at the time of service launch (impacting significantly on unit costs).

3.35 Noting this, however, ComReg believes that the higher prices associated with bitstream as opposed to pricing for wholesale unbundled access services (both fully

³⁵ These charges are currently subject to an number of promotional discounts

unbundled and line sharing), reflect the functional differences between the services. In effect, the services operate at entirely different functional layers. The wholesale unbundled access acquirer must make not insignificant investments in its exchange equipment and must play a much greater role in managing its services (in that it bears responsibility for identifying faults). The pricing data available to ComReg indicates that it is unlikely that an access acquirer would respond to a 5 to 10% increase in bitstream prices by switching to unbundled loops or that an unbundled loop acquirer would respond to a similar increase by switching to bitstream. As such, the service price and other cost differences suggest that wholesale unbundled access services are not in the same relevant market as bitstream services.

Development of customer numbers

3.36 By the end of the third quarter of 2003, the number of unbundled lines and bitstream access lines provided by eircom to other operators was as follows:

Product	Number of lines installed	Number of contracts
Fully unbundled lines	240	1
Shared access lines	960	1
Bitstream access	2,380	2

3.37 Accordingly, there were 1,200 unbundled lines and 2,380 bitstream access lines (of eircom's 1.6 million fixed access lines).³⁶

3.38 While these figures indicate that the supply of such services to third parties is in the early stages of development, ComReg notes that eircom's retail ADSL subscriber growth patterns indicate that self-supply by eircom is somewhat more mature (e.g., 11,000 ADSL subscribers).

Conclusions

3.39 ComReg takes the preliminary view that at the wholesale lever there is limited demand side substitutability.

Wholesale supply-side substitution

3.40 ComReg is of the view that there is limited scope for network operators currently operating in Ireland to provide effective supply-side substitution for wholesale unbundled access to metallic loops (in response to a 5 to 10% increase in price by a hypothetical monopolist supplier). Operators of existing networks capable of supporting uni-directional or narrowband access services would be required to make significant investments in upgrading their networks to support broadband access. ComReg is unaware of any such operators intending to make such investments in "brown-field" networks during the timeframe of this review.

³⁶Currently over 1 million lines are served from DSL enabled exchanges

- 3.41 In particular, ComReg believes that the majority of cable networks are currently technically incapable of providing broadband access services (at either the wholesale or retail levels). The upgrading of these networks to the point at which they could provide such services will require the types of investment referred to above, and that the operators of such networks do not intend to make such investments (at least within the timeframe of this review).
- 3.42 The network architecture and management tools for such upgraded cable networks do not currently allow the supply of control over the cable connection to a particular end user (in contrast to unbundled local loops). As such, ComReg does not anticipate that there will be significant supply-side substitution for unbundled local loops from such cable networks.
- 3.43 Fixed wireless access providers have rights to use frequencies and have constructed networks that would allow the provision of broadband access. However, ComReg notes that the fragmented nature of the coverage and ownership of such networks limits the extent of such competitive pressure on the incumbent provider. As such, it appears that such entities do not have the ability to impose sufficient supply-side pressure in response to a 5 to 10% increase in price for wholesale unbundled local loops by a hypothetical monopolist supplier to render such an increase unprofitable.
- 3.44 Finally, there are high sunk costs associated with building green-field access networks. Together with the economies of scale and density that characterise access networks, these costs significantly increase the barriers to entry for entities considering constructing new extensive local access networks capable of supporting the provision of broadband access. As such, ComReg takes the view that the possibility of entry using access to satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms, should be considered as potential competition rather than supply-side substitution and is more appropriately considered in the assessment of market power.

Conclusion

- 3.45 ComReg has formed the preliminary view that there is a distinct relevant market in Ireland for wholesale unbundled access (both fully unbundled and shared lines) including collocation services and related facilities

The relevant geographic market

- 3.46 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of services for which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those in those areas.
- 3.47 On this basis, ComReg takes the view that the relevant geographic market for the provision of wholesale unbundled access is national in scope. This view is based

primarily on the fact that eircom offers its services that fall within these relevant markets on a national basis, on the same terms and conditions but it is also the case that the market conditions are not significantly different across the country and eircom's local access infrastructure is the ubiquitous network across the whole of Ireland

Q. 2. Do you agree that the relevant geographic market for wholesale unbundled access is Ireland? Please expand in your response.

Preliminary conclusions

3.48 ComReg has formed the preliminary view that there is a distinct relevant market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.

3.49 On this basis, ComReg takes the view that the relevant geographic market for the provision of unbundled local loops is Ireland.

Q. 3. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.

4 Relevant Market Analysis

Background

- 4.1 Having first identified a relevant market, ComReg is required to conduct an analysis of whether the market is effectively competitive by reference to whether any given undertaking or undertakings is/are deemed to hold SMP in that market. Recital 27 of the *Framework Directive* states that a relevant market will not be effectively competitive “*where there are one or more undertakings with significant market power*”. Regulation 25(1) of the *Framework Regulations* states that:
- 4.2 “*A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers*”.
- 4.3 Accordingly, an undertaking may be deemed to have SMP either individually or jointly with other undertakings in a relevant market. In addition, where an undertaking has SMP on a relevant market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.³⁷
- 4.4 ComReg is obliged under the *Framework Regulations* to assess SMP in accordance with European Community law and to take the utmost account of the *SMP Guidelines*.³⁸ Those criteria considered to be most relative in this market on the issue of SMP are discussed below.

Market shares

- 4.5 There is only one supplier of wholesale metallic local loops in Ireland (eircom). Accordingly, it has 100% share of the relevant market.
- 4.6 The SMP guidelines state that the existence of a dominant position cannot be established on the sole basis of large market shares and that NRAs should undertake a thorough and overall analysis of economic characteristics of the relevant market before coming to the conclusion as to the existence of significant market power³⁹. However the SMP guidelines state that according to established case law, very large market shares – in excess of 50% - are in themselves save in exceptional circumstances, evidence of the existence of a dominant position.⁴⁰

³⁷ Framework Regulations, Regulation 25(3).

³⁸ Framework Regulation 25(2).

³⁹ SMP Guidelines, Paragraph 78

⁴⁰ SMP Guidelines, Para 75

Potential competition and barriers to entry

- 4.7 The threat of market entry, either on a long-term or "hit and run" basis, is one of the main potential competitive constraints on incumbent firms, where such entry is probable (rather than hypothetical), timely and appreciable. The threat of entry will be reduced by the existence of barriers to entry.
- 4.8 ComReg considers that entry to the market for wholesale unbundled access would require significant investment, predominantly as sunk costs. As noted above, these high sunk costs, together with the economies of scale and density that characterise access networks, significantly increase the barriers to entry for entities considering constructing new local access networks. As such, ComReg takes the view that there is little likelihood of new fixed entry to provide services in the period of the review.
- 4.9 In addition, ComReg does not anticipate medium-term market entry using alternative platforms (*e.g.*, satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms), given the asymmetry of the positions of the incumbent and new entrants. While there is likely to be some expansion in the medium-term in the roll-out of these platforms the extent of such expansion is very uncertain and cannot at this point be relied upon to provide effective competition in the local loop. The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. In addition, the incumbent has better access to potential retail customers for the new downstream services. These and other differences in risk and return might conceivably lead to a higher required rate of return on investment for new entrants. As such, they might, collectively (as well as individually), constitute another barrier to entry.
- 4.10 Currently eircom is the only licensed operator to provide services in the 3.5 GHz band via Fixed Wireless Access (FWA). In the second half of 2003, ComReg offered fifty nine licences to eight applicants for the provision of fixed wireless access local level services using the spectrum from the 3.5 GHz frequency band⁴¹ Thirty two of the initial offers have been accepted, and further awards may be made following this first round. While there is sufficient spectrum to provide national coverage, it is not clear that all areas will be licensed. It is expected that services will become available by year end 2004. ComReg notes that the roll out of such services, will not pose a competitive threat to the local loop within the timeframe of this review.
- 4.11 In response to the market analysis industry questionnaires circulated by ComReg, operators other than eircom referred to the economies of scale and scope enjoyed by eircom in relation to local access networks, the ubiquity of the network and services.

41 ComReg (03/32) Request for Expressions Of Interest - 3.5 GHz Local Licences for Wireless Broadband

4.12 ComReg is not aware that any new entrant is intending to build a new access network (capable of supplying such services) replicating all or part of eircom's network or that sufficient investment will be made in existing infrastructure to upgrade it to the point at which it is able to support the provision of replicable access.

Countervailing buying power

4.13 If an operator engages in practices that are potentially exploitative, customers might be able to exert countervailing buyer power against such practices. Where buyers are large and powerful, they can effectively respond to any attempt to increase prices by sellers. ComReg has considered the likelihood and/ or existence of such countervailing power, given that countervailing power is often a relevant factor in wholesale markets.

4.14 However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (*e.g.*, not to purchase or to switch supplier) in response to a price increase or threatened price increase. ComReg does not believe that any purchaser of wholesale unbundled access has credible alternatives to eircom. As such, ComReg does not believe that any purchaser has countervailing market power that would offset eircom's overwhelming market power in these markets.

Preliminary conclusions

4.15 eircom currently supplies 100% of the market for unbundled metallic local loops. In terms of future competition ComReg takes the view that there is little likelihood of an alternative local access network of whatever technology on any significant scale during the timeframe of this review.

4.16 In addition, ComReg does not anticipate medium-term market entry on any significant scale using alternative platforms (*e.g.*, satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms), given the asymmetry of the positions of the incumbent and new entrants. The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. ComReg therefore has come to the preliminary conclusion that the market is not effectively competitive.

4.17 The structure of the market for unbundled local loops is conducive to eircom charging rates above the competitive level, if unregulated. As shown above there is no credible threat to constrain eircom's prices. The issues associated with economies of scale and scope, leverage of facilities (both historic and new), ubiquity and access to customers limit the feasibility of self-supply by new entrants.

Q. 4. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response.

5 Designation Of Undertakings With Significant Market Power

- 5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the *Framework Regulations*:
- 5.2 eircom should be designated as having SMP on the markets for "wholesale unbundled access" (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.

A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Proposed Market Remedies

Local Loop Unbundling (LLU)

- 6.1 The introduction of Local Loop Unbundling was mandated by Regulation 2887/2000 of the European Parliament and of the Council on unbundled access to the local loop in order to facilitate the development of competition for access services provided over the local access networks of incumbent operators, and most importantly to facilitate competition and innovation in the market for broadband internet access. LLU is a wholesale product that can enable competition in a number of retail markets: broadband internet access; PSTN and ISDN access for voice calls; PSTN and ISDN access for dial-up internet access; and leased lines.

The need for ex-ante regulation

- 6.2 According to the Guidelines⁴², the purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets. ComReg can only impose *ex-ante* regulation “in markets where there are one or more undertakings with significant market power (SMP), and where national and Community competition law remedies are not sufficient”.⁴³ The Guidelines make it clear that the mere designation of an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16 (4) of the Framework Directive⁴⁴. Indeed, NRAs must impose at least one regulatory obligation on an undertaking that has been designated with SMP⁴⁵.
- 6.3 For the reasons detailed in section 4 above, ComReg finds that eircom has significant market power in the market for wholesale unbundled access (including shared access) to metallic loops and sub loops. *Ex-ante* regulation should be imposed where there is not sufficient competition in a market and where standard competition law remedies are not sufficient or of a timely nature to prevent or remedy market failures. Where markets are effectively competitive *ex-post* competition law is generally sufficient to prevent the emergence of a dominant position, and to prohibit market abuses by one or more parties. Where, for historic reasons, a market is not effectively competitive, and/or where there are high and non-transitory barriers to entry, standard competition law is not generally sufficient to promote the development of competition. *Ex-ante* regulation is required in these circumstances to promote and facilitate the development of competition as the remedies of standard *ex-post* competition law will not be sufficient to establish

⁴² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 16.

⁴³ Recital 27 of the Framework Directive.

⁴⁴ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 114.

⁴⁵ *Ibid*, paragraphs 21 and 114.

competition and the market failures associated with dominant positions will remain. *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the relevant directives, whereas competition law remedies aim to sanction agreements or abusive behaviour which restrict or distort competition in the relevant market⁴⁶.

- 6.4 As stated above, the metallic access network is characterised by very high sunk costs, often predominantly incurred during monopoly conditions, and by large economies of scale and scope. These sunk costs and economies of scale and scope present a very considerable and non-transitory barrier to entry into the market, and unless there is regulated access to the network infrastructure market entry is likely to be deterred. The Guidelines refer to the difficulties which sunk costs present as an entry barrier:-

“One of the most important types of entry barriers is sunk costs. Sunk costs are particularly relevant to the electronic communications sector in view of the fact that large investments are necessary to create, for instance, an efficient electronic communications network for the provision of access services and it is likely that little could be recovered if a new entrant decides to exit the market. Entry barriers are exacerbated by further economies of scope and density which generally characterise such networks. Thus, a large network is always likely to have lower costs than a smaller one, with the result that an entrant in order to take a large share of the market and be able to compete would have to price below the incumbent, making it thus difficult to recover sunk costs”⁴⁷.

- 6.5 By allowing competing operators to utilise eircom’s network infrastructure entry barriers will be greatly reduced, however, the *ex-ante* regulation of the terms and conditions, including prices, of the supply of wholesale inputs will be required to promote competition at the retail level.

What are the competition problems?

- 6.6 Due to the nature of the market, it is probable that competition problems of both a structural and a behavioural nature will exist. Such generic competition problems as entry deterrence, exploitative behaviours and productive inefficiencies lead to effects on competing operators which hinder their ability to compete, or even enter their desired markets. The list below describes both actual and potential competition problems which therefore may occur in this market. It should be noted the list is not exhaustive but provides an indicative list of the types of competition problems which ComReg has identified through its market analysis.

Refusal to deal and denial of access

- 6.7 Without mandated access, competing operators would not be able to enter their desired market at all. Their only option would be to enter the market on the basis of

⁴⁶ *Ibid* paragraph 31.

⁴⁷ *Ibid* at footnote 85.

uneconomic investment. Additionally, it is important to note that access does not simply refer to access to the local access network but also may require access to associated facilities.

However, mandating access to the bottleneck facility does not eliminate all competition problems. In this case the SMP operator may still attempt to leverage its position from the wholesale market into the retail market (vertical leveraging) in a number of ways. These can be divided into two basic categories – non price and price.

Non-price problems

6.8 These generally occur from discriminatory behaviour, perhaps following the introduction of a regulated access price so price discrimination is not possible. As a group these provide for the incumbent to benefit from a first mover advantage, potentially squeezing quality and raising other operators' costs, hence leading to a restriction of competitors' sales. Non-price competition problems are set out below:

- Withholding of information

6.8.1 This relates to a practice whereby the SMP operator on the wholesale market provides its retail arm with information – such as the characteristics of its network – which it does not provide (either at all, or within a timely and/or accurate manner) to competing operators. This leaves the new entrant at a significant disadvantage and may amount to refusal to deal.

- Low quality

6.8.2 The wholesale arm of an SMP operator may not provide services or information of the same quality or accuracy, or within the same timescales it provides to its own retail arm.

- Delaying tactics

6.8.3 Rather than outright refusing to deal, SMP operators may employ delaying tactics such as lengthy contract negotiations, or provision of essential services and information only following negotiation or direction from the regulator. This may provide the SMP operator's retail arm with a first mover advantage and hence restrict sales of competing operators.

- Undue requirements

6.8.4 This may relate to contract terms such as overly onerous requirements for deposits, credit checks, and non disclosure agreements. Restriction of services offered or points of access allowed may also be imposed. Inappropriate bundling may also be proposed, in that the SMP operator may require that the competing operator buy extra elements from the SMP operator, which are unnecessary for provision of their end user retail services.

Negotiation on these points may cause a delay, and the issues may raise

competing operators' costs and restrict their sales. It is worthwhile noting that contract terms may also be imposed on customers to restrict switching: these may include long contracts, penalties for switching and administrative difficulties.

- Strategic design of product
 - 6.8.5 SMP operators may design access points and products according to their own network topology and vendors and may require that competitors use the same, for example, standards, protocols or design. This may mean that products are designed to be easy for the SMP operator's retail arm to use, but require the new entrant to amend its own business plan.
- Discriminatory use of information
 - 6.8.6 Where an SMP operator provides a new entrant with wholesale access it may gain information about retail services provided to that customer. Use of that information to target the retail customer (for example for winback or to sell a competing product) may be discriminatory.

Price problems

6.9 Such problems may also accompany mandated access to the market, leading to a rise in competitors' costs, negative welfare effects and inefficiencies of allocation. These include:

- Excessive prices/cross-subsidization
 - 6.9.1 With mandated access, the SMP operator may seek to set an excessive price on the wholesale market. This could be done in a number of ways. In the absence of price control this could be simply by increasing prices to a level that is unjustified by cost. Even with price control mechanisms such as cost orientation the same objective could be achieved by the inappropriate allocation of costs to the wholesale product or the recovery of inefficiently incurred costs which would imply a requirement for cost accounting and accounting separation obligations.
- Price discrimination
 - 6.9.2 A vertically integrated operator with SMP on the wholesale market can use price discrimination to raise the wholesale cost to its external wholesale customers or to impose costs on them that are not borne by its downstream retail arm thereby putting the external operator at an unfair disadvantage. This problem may imply the need for a n obligation of non discrimination supported by obligations of transparency and accounting separation
- Predatory Pricing
 - 6.9.3 SMP operators may offer predatory prices to end users in order to foreclose the retail market for competitors. There may be an incentive to leverage power in

the wholesale market into downstream retail markets in an effort to eliminate or reduce competitive pressures over the longer term.

Q. 5. Do you agree with this analysis of competition problems? Are there any further competition problems which you believe ComReg should consider? Please elaborate your response

Remedies available in the Access Regulations

6.10 ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power⁴⁸. ComReg also has the obligation under Regulation 6⁴⁹ to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations⁵⁰. The obligations are:

Obligation of Transparency

- 6.11 Regulation 10 sets out the requirements with regard to the obligation of Transparency and covers the following;
- a. Publication of information such as accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices in relation to interconnection and/or access;
 - b. Publication of a sufficiently unbundled reference offer;
 - c. The Regulator's power to specify the precise information to be made available in the reference offer with regards to the level of detail and the manner of publication;
 - d. The Regulator's power to make changes to the reference offer and to direct the operator designated as having significant market power to publish the reference offer with such changes.

⁴⁸ Framework Regulation 27(4) states 'Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate'

⁴⁹ Framework Regulation 6(1-5)

⁵⁰ Access Regulation 9(1) states 'Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 26 of the Framework Regulations, the Regulator shall impose on such an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate'

Obligation of Non-discrimination

- 6.12 Regulation 11 lays down the requirements with regard to the obligation of Non-discrimination and covers the following;
- a. Regulator's power to impose non-discrimination in relation to interconnection and/or access;
 - b. Such non-discrimination shall ensure that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall ensure that the operator provides services and information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

Obligation of Accounting Separation

- 6.13 Regulation 12 sets out the requirements with regard to the obligation of Accounting Separation and covers the following;
- a. Regulator's power to impose accounting separation on an operator in relation to specified activities related to interconnection and/or access;
 - b. Regulator's power to make a vertically integrated company to make transparent its wholesale prices and its internal transfer prices to ensure compliance with any obligation imposed under Regulation 11 and to prevent unfair cross-subsidy.

Obligation of access to, and use of, specific network facilities

- 6.14 Regulation 13 lays down the requirements with regard to the obligation of access to and the use of specific network facilities and covers the following;
- a. Regulator's power to impose on an operator obligations to meet reasonable request for access;
 - b. Regulator's power to attach conditions of fairness, reasonableness and timeliness to the obligation to meet reasonable request for access;
 - c. Regulator's obligation to review the imposition of meeting reasonable requests for access against a number of factors to ensure proportionality.

Price control and Cost Accounting obligations

- 6.15 Regulation 14 sets out the requirements with regard to the obligation of Price control and cost accounting and covers the following;
- a. Regulator's power to impose cost orientation of prices and obligations concerning cost accounting systems for the provision of interconnection and/or access where a market analysis indicates that a lack of effective competition means that an operator might sustain prices at an excessively high level or apply a price squeeze;
 - b. Regulator's obligation that the operator is able to earn a reasonable rate of return on adequate capital employed following the imposition of cost oriented prices;
 - c. Regulator's obligation to ensure that the cost recovery mechanism serves to promote efficiency and sustainable competition and maximise consumer benefits;

- d. Regulator's power to direct an operator to provide full justification for its prices and to require prices to be adjusted;
 - e. Clarification that the burden of proof is place upon the operator show that charges are derived from costs including a reasonable rate of return;
 - f. Regulator's obligation to ensure that where implementation of a cost accounting system is imposed under this Regulation, a description of the system is made publicly available, verified as appropriate and a statement regarding compliance published annually.
- 6.16 It should be noted that NRAs may be justified in imposing remedies other than those set out above or, in exceptional cases remedies that *go beyond* what is prescribed in the Access Regulations provided that the approval of the European Commission is first obtained⁵¹.

Principles to be applied when selecting remedies

- 6.17 When selecting appropriate remedies to address the competition problems identified ComReg has an obligation to consider the objectives of Section 12 of the Communications (Regulation) Act 2002 (to promote competition, to contribute to the development of the internal market, and to promote the interests of users) and of Regulation 6 of the Access Regulations (to promote efficiency, promote sustainable competition, and give maximum benefit to end users).
- 6.18 Furthermore, Regulation 9 of the Access Regulations requires that any obligations imposed by ComReg must be based on the nature of the problem identified, and be proportionate and justified in the light of the objectives laid down in Section 12 of the Communications Act 2002.
- 6.19 ComReg has identified in the section above a number of actual or potential competition problems arising from eircom's dominance in the market for unbundled metallic local loops and associated facilities. As set out previously ComReg believes that it is most unlikely that within the period of this review, or for the foreseeable future thereafter, that there is any possibility of the development of significant competition utilising competing local access infrastructure. The remedies imposed must facilitate competitors in entering their chosen retail markets by providing access to eircom's local access infrastructure on terms and conditions that promote efficiency and sustainable competition, while being mindful of the need to encourage efficient investment in infrastructure and promote innovation.
- 6.20 It is unlikely that any single remedy can achieve this, so the remedies proposed below should be seen as a complementary suite which support and reinforce each other.

⁵¹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. See paragraphs 21 and 116. See also Regulation 9 (5) of the Access Regulations.

Q. 6. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?

Remedies proposed

6.21 In this section ComReg sets out the detailed remedies that it proposes to impose on eircom, the designated SMP operator and measures these against the principles set out above. In the consideration of remedies below, ComReg has set out remedies that it considers to be appropriate at this time and in the prevailing market conditions. However should ComReg consider that market needs require these remedies to be refined, ComReg proposes to reserve this right.

(A) Access to, and use of specific network facilities (Regulation 13)

6.22 When considering whether or not to impose an access obligation and the proportionality of so doing, ComReg must take account of Regulation 13 (4) of the Access Regulations. These factors include, *inter alia*, the technical and economic viability of using or installing competing facilities, in the light of market development; the feasibility of providing the access proposed, in relation to the capacity available; the initial investment by the facility owner bearing in mind the risks involved in making the investment; and the need to safeguard competition in the long term.

6.23 It is likely that a vertically integrated operator with market power on the wholesale market will restrict access to its wholesale product as retail entry will erode its market power on the retail market and could in the longer term, do so at the wholesale market. By denying access, the dominant undertaking can entrench its market power (and may charge an excessive price on the retail market). In this way it can leverage its market power from the wholesale market into the potentially competitive retail market. The welfare effects of such behaviour are clearly negative.

- 6.24 Competition at the wholesale level of course, theoretically possible for competing operators, would solve the problem. In this paper, ComReg has concluded that whereas it is of course possible for competing operators to invest in their own infrastructure, it is unlikely to be desirable or indeed practicable for replication of the local metallic access network. As Recital 6 of Regulation 2887/2000⁵² states ‘It would not be economically viable for new entrants to duplicate the incumbent’s metallic local access network in its entirety within a reasonable time’.
- 6.25 The only way in which competition on the downstream market can currently be created in such a situation is by forcing the SMP undertaking to grant access to the necessary input it owns. It is obvious that no other remedy from the suite of potential remedies can solve this competition problem and so an access obligation according to Regulation 13 is applicable.
- 6.26 Therefore without an access obligation of Local Loop Unbundling (LLU), ComReg concludes that it is unlikely that any other operator would provide services. It is equally unlikely that the SMP operator will voluntarily provide access to the local loop. Evidence of this can be seen from the use of a Regulation as the legislative tool when mandating access to the local loop and related facilities in 2000. ComReg therefore concludes that without imposition of an access obligation it is likely that an SMP operator such as eircom will refuse to deal and hence deny access. ComReg therefore considers that mandating access to the local loop is based on the nature of the problem identified, is proportionate and is justified. Regulation 13 is – on its own – unlikely to solve the problem, however. ComReg does consider that further remedies may be required to accompany this remedy to address all potential competition problems such as excessive pricing or discriminatory practices. These are addressed later in this section.
- 6.27 In consideration of the remaining factors set out in Regulation 13 (4), ComReg concludes that, based on current experience and the take-up of these products, it is feasible for eircom to grant access to the local loop. ComReg has also considered whether access to the local loop safeguards competition in the long term. As access allows new entrants to compete with SMP operators in offering (typically) broadband services, ComReg concludes that mandated access safeguards development of competition and in fact allows for new entrants to further climb the ladder towards infrastructure investment.

Q. 7. Do you agree that an access obligation should be imposed on eircom?

Please provide details in support of your answer

- 6.28 Turning to the detail, there are varying types of access obligations which can be imposed as set out in Regulation 13 (2) of the Access Regulations.
- 6.29 ComReg believes the following obligations should be imposed.

⁵² Regulation 2887/2000 of the European Council and of the Parliament on unbundled access to the local loop.

1. Pursuant to Regulation 13 (2) ComReg has further considered the type of access that should be provided to the local loop. There are four types of access offered at present. Two of these – full (ULMP) and shared local loop unbundling – are currently used by alternative operators to deliver service to end customers. Access to two further forms – full and shared sub loop unbundling – is also mandated. Product descriptions for these access products are appended to Service Schedules 102, 103, 104 of the current version (version 1.18) of the eircom Access Reference Offer
2. It is also necessary to mandate additional facilities necessary to ensure access to the local loop. Regulation 2887/2000 defines these related facilities as ‘the facilities associated with the provision of unbundled access to the local loop, notably collocation, cable connections, and relevant information technology systems, access to which is necessary for a beneficiary to provide services on a competitive and fair basis’. The Framework Regulations define associated facilities as ‘those facilities associated with an electronic communications network, an electronic communications service or both such network and service which enable, support, or both enable and support the provision of services via that network and service’. Furthermore, pursuant to Regulation 13 (2) (e) ComReg also considers it appropriate that, insofar as it is required to avail of LLU, eircom should also grant open access to technical interfaces, protocols, or other key technologies and similarly, pursuant to Regulation 13 (2) (h) eircom is required to provide such OSS or similar software necessary to ensure fair competition in the provision of services.

ComReg considers that eircom can fulfil the obligations in respect of associated facilities set out above by maintaining the facilities detailed in eircom’s Access Reference Offer v 1.18; the Process Manual for ULMP and line sharing; the Process Manual for physical collocation; the Technical Manual for physical collocation; and the Copper Loop Frequency Management Plan. In addition, provision of the bulk data (as directed in D15/03⁵³) should be maintained.

3. ComReg also believes that in order to reasonably accommodate and connect the relevant equipment of a new operator, collocation (understood to be the provision of physical space and technical facilities) is required pursuant to Regulation 13 (2) (f) This corresponds to the product description appended to Service Schedule 101 in eircom’s Access Reference Offer (version 1.18) and also the specific offering of a cabin collocation product in respect of Roches St. exchange.
- 6.30 The obligations set out in (1), (2) and (3) above correspond to those already offered by eircom in its Access Reference Offer v1.18 and supporting documentation entitled ‘Industry LLU documentation’ set out on eircom’s website. Obligations in respect of provision of bulk data and the cabin collocation product are also in place. ComReg is of the view that all current offerings should be maintained.

6.31 In addition to the services set out above, ComReg proposes to maintain the obligation for eircom to honour reasonable requests for additional access products,

⁵³ Decision Notice D15/03 Local Loop Unbundling: Provision of Bulk Data

collocation or associated facilities made by operators.

- 6.32 Additionally, pursuant to Regulation 13 (2) (b) ComReg also believes that eircom has the obligation to negotiate in good faith. Pursuant to Regulation 13 (2) (c) eircom have the obligation not to withdraw access to facilities already granted.
- 6.33 Pursuant to Regulation 13 (3) ComReg may also attach conditions covering fairness, reasonableness and timeliness to the obligations set out above. In this context, ComReg believes that Service Level Agreements (SLAs) are required in respect of all products for all process points such as provision and fault repair. Where SLAs apply, ComReg is also of the view that appropriate penalties should apply.

Q. 8. Do you consider that all existing access obligations set out in Section (A) of proposed remedies, should be maintained? Are there any further access obligations which should be imposed? Please detail any further comments.

Non- discrimination–

- 6.34 Where an access obligation has been imposed pursuant to Regulation 13, - and in particular where cost orientation and/or price control has been imposed subject to Regulation 15 – an SMP operator may have increased incentives to discriminate on non-price parameters.
- 6.35 These competition problems were set out earlier, and include withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of product, and discriminatory use of information. ComReg believes that non discrimination is the only remedy which can directly target these competition problems and therefore ComReg considers that an obligation of non discrimination is necessary to ensure that eircom does not discriminate in favour of its own retail arm.
- 6.36 ComReg is empowered, where appropriate, to impose non discrimination where access obligations exist. ComReg therefore proposes to impose a non discrimination requirement for each of the access obligations set out in Section (A) of proposed remedies, above. This means that eircom must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and must provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners.
- 6.37 In particular information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to eircom’s retail arm and associates. In taking up LLU, there should be no unreasonable delays, no undue bundling, and no undue contractual terms. In particular, it is important that information gained by eircom as a result of their

provision of LLU services to another operator is not used by eircom's downstream arms in any manner.

- 6.38 ComReg considers that an obligation of non discrimination may not be sufficient in all cases as eircom may not avail of the same services that another operator may require. For example, eircom retail is unlikely to avail of all LLU services and hence it is not possible to base SLAs on eircom retail's experience. Therefore, ComReg proposes that obligations of access and transparency should be applied. It will also be necessary to impose obligations of transparency and accounting separation to monitor non discrimination.

Q. 9. Do you agree that an obligation of non discrimination should be imposed on eircom? Please elaborate your answer.

Transparency

- 6.39 Regulation 2887/2000 required eircom, as the notified operator under that Regulation, to publish a reference offer for unbundled access to the local loop and related facilities. eircom published such a reference offer and, through lengthy and detailed industry workshops and ComReg interventions this Access Reference Offer (current version 1.18) has been amended over time and augmented with a series of manuals published as 'Industry LLU documentation' on eircom's website.
- 6.40 Following the imposition of access and non discrimination obligations, ComReg believes that it is proportionate and justified to impose an obligation of transparency. This ensures that alternative operators have sufficient information and clear processes to which they would not otherwise have access. This assists their entry into the market and hence promotes competition. Transparency also provides a method of ensuring compliance with a non discrimination obligation, as the information needed to measure this would not otherwise be available. Therefore ComReg considers an obligation of transparency directly targets the nature of the problem.

Q. 10. Do you agree that an obligation of transparency should be imposed on eircom? Please provide a detailed answer.

- 6.41 Regulation 10 provides for the regulator to require the SMP operator that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. This should include 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. The Schedule provides the minimum list of items to be included in a reference offer for unbundled access to the twisted metallic pair loop. ComReg believes that eircom's current publications including their Access Reference Offer [version 1.18] and Industry LLU documentation are consistent with this requirement and therefore proposes to maintain this obligation.
- 6.42 Regulation 10 also provides for ComReg to require an operator to make public (in relation to any access obligation imposed under Regulation 13) specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. ComReg is of the view that most, if not all, of this information is currently provided by eircom in their Access Reference Offer (version 1.18), Industry LLU documentation, or on request.⁵⁴
- 6.43 However ComReg is mindful that Regulation 10 (3) states that ComReg may specify the precise information to be made available, the level of detail and the manner of publication

Q. 11. Do you believe that ComReg should require eircom to make public any further information? Please specify if you believe this should be made available in the Reference Offer or otherwise published. Please provide support for your answer.

Accounting Separation

- 6.44 The provision of financial information by Operators designated as having SMP has always been an essential part of regulation in Ireland. Indeed ComReg has required those Operators to supply financial information to ComReg either on-demand to support investigations and pricing reviews and/or on an annual basis in order to support ComReg's regular monitoring of its decisions since deregulation of the market.

It has been outlined in an earlier section of this document, how the obligation of non-discrimination is important in order to contribute toward the remedy for a number of identified competition problems. An obligation of non-discrimination can require, *inter alia*, the imposition of financial reporting regimes in order to monitor eircom's compliance with such an obligation. With regard to eircom's designation as SMP in this market and the identification of the obligation of non-discrimination as a means to remedy the competition problems discussed earlier, ComReg believes it is

⁵⁴ Information provided on request as part of the generic information set includes the cd of bulk data and the collocation survey library

appropriate to impose an obligation of accounting separation upon eircom in this market.

- 6.45 ComReg is proposing that eircom should have an obligation not to unduly discriminate because where eircom is a vertically integrated undertaking, it has an incentive to provide wholesale services on terms and conditions that discriminate in favour of its own retail activities in such a way that may have a material effect on competition. The obligation of accounting separation will support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services. ComReg intends to implement accounting separation on a by service and/or product basis. ComReg believes it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level.
- 6.46 As was discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, must encourage access to the network in order to ensure efficient and sustainable competition and must contribute towards maximising consumer benefits. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of discrimination. In this regard, ComReg believes the imposition of accounting separation upon eircom to be justifiable and based upon the nature of the problem identified.
- 6.47 ComReg proposes to consult further on accounting separation and cost accounting methodologies supporting separated accounting. In the interim ComReg is proposing that it maintains the existing level of accounting separation on eircom until such time as any further consultations are completed.

Q. 12. Do you believe eircom should have an obligation of accounting separation? Please elaborate your answer.

Price control and cost orientation

- 6.48 Regulation 14 (1) of the Access Regulation allows ComReg to impose obligations relating to cost recovery and price controls on access services where a lack of effective competition means that the SMP operator might sustain prices at an excessively high level to the detriment of end-users. The metallic access network is characterised by a lack of competition, and the high barriers to entry mean there is little likelihood of future competition. In the absence of effective competition eircom have little incentive to reduce costs and operate in an efficient manner as they can pass through inefficient costs as excessively high prices to customers who have no alternative to choose from. In this context ComReg believes that it is appropriate to impose an obligation of cost orientation and wholesale price control.
- 6.49 Regulation 6 imposes on ComReg the obligations to promote efficiency, promote sustainable competition, and give maximum benefit to end-users. Given the absence of current, and prospective, competition the objective of price regulation

must be to make available to competing operators access to the metallic network and related facilities at prices that would have pertained if the market had been competitive, while allowing eircom a reasonable rate of return on adequate capital employed.

- 6.50 ComReg has considered the option of imposing cost orientation of prices for access to the metallic access network and related facilities on the basis of Full Distributed Historic Costs (FDHC). However, ComReg does not believe that that this would satisfactorily remedy the competition failure of excessive pricing. Excessively high prices resulting from the absence of effective competition does not necessarily mean that an SMP operator is making supra-normal profits, rather the SMP operator in the absence of the incentives provided by competition may be operating inefficiently. An obligation to offer cost oriented prices on the basis of FDHC would address the issue of supra-normal profits, but it does not necessarily address the issue of inefficient operations and therefore is not consistent with ComReg's obligations under Regulation 6 of the Access Regulations.
- 6.51 ComReg proposes to impose an obligation on eircom to offer cost oriented prices for access unbundled local metallic loops on the basis of Forward Looking Long Run Incremental Costs (FL-LRIC). FL-LRIC is a widely used cost accounting methodology that estimates the efficient costs caused by the provision of a defined increment of output, taking a long run perspective, assuming that some output is already produced. The 'long run' means the time horizon over which all costs (including capital costs) are variable.
- 6.52 ComReg believes that this methodology fulfils the objectives laid down in Regulation 6, and whilst it can be a more burdensome obligation than cost orientation of prices on the basis of FDHC it is proportionate, appropriate and necessary in order to achieve the objectives legitimately pursued by ComReg in relation to its obligations to promote efficiency and sustainable competition and maximise consumer benefits and that it does not impose an excessive burden in relation to those obligations and the objectives sought to be achieved.
- 6.53 ComReg proposes to maintain the obligation on eircom to offer prices for the related facilities, including collocation and process charges associated with unbundled local loops on the basis of bottom up costing estimates that are consistent with the objectives of the LRIC methodology.
- 6.54 In assessing the cost orientation of prices for LLU and associated facilities, ComReg will have regard to Regulations 14(3) and 14(4) of the Access Regulations and may take account of prices in comparable competitive markets and in calculating the cost of efficient provision, ComReg may use accounting methods independent of those used by eircom. Where appropriate, ComReg may require prices to be adjusted.
- 6.55 ComReg believes that certainty about future prices significantly promotes competition. Therefore it is considering the merits of a wholesale price-cap regime and may, subject to further consultation, at some point in the future propose such an obligation for wholesale price control.

Q. 13. Do you agree that eircom should be subject to a cost orientation obligation? Do you agree that FL-LRIC is an appropriate methodology? Please provide details in support of your answer.

Cost Accounting Systems

- 6.56 A cost accounting system will be necessary where an obligation has been imposed on an operator in relation to cost oriented pricing, price controls, recovery of costs and/or retail tariff controls. With regard to this particular market, the obligation of cost orientation has been proposed as an appropriate obligation to be imposed on eircom and therefore ComReg is obliged to impose a further obligation with regard to cost accounting systems on eircom⁵⁵.
The detailed application of this obligation will be included in the future accounting separation consultation, where issues with regard to maintenance of accounting records, on-demand reporting, audit and timeliness with regard to supply of data will be discussed.
- 6.57 ComReg proposes to consult further on cost accounting and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing that it maintains the existing level of cost accounting obligation on eircom until such time as any further consultations are completed.
- 6.58 ComReg also notes its obligation to cause to be published a statement by eircom of compliance with relevant cost accounting systems.

Q. 14. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please elaborate your answer.

⁵⁵ Access Regulation 14(5): The Regulator shall ensure that,, where implementation of a cost accounting system is imposed under this Regulation in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall, at the choice of the Regulator, be verified by the Regulator or by a suitably qualified independent body.
Access Regulation 14(6): The Regulator shall cause to be published annually a statement concerning compliance with any cost accounting system imposed under this Regulation.

7 Regulatory Impact Assessment

- 7.1 The Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with S13 of the Communications Regulation Act, 2002) published in February 2003, directs:

“The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic Communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.”

- 7.2 ComReg is obliged under Regulation 9(6) of the Access Regulations to impose obligations ‘ based on the nature of problem identified, proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations’
- 7.3 ComReg will conduct a Regulatory Impact Assessment which will form part of the decision making process and would invite comments on the proportionality of the remedies list in section 6 of this consultation and the justification of the remedies listed.

Q. 15. Respondents are asked to provide views on whether the remedies in section 6 are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impacts of these remedies on end-users, competition, the internal single market and technological neutrality

8 Submitting Comments

- 8.1 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.
- 8.2 The consultation period will run from 11 December to 30 January during which the ComReg welcomes written comments on any of the issues raised in this paper.
- 8.3 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. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.
- 8.4 Having analysed and considered the comments received, ComReg will review the wholesale unbundled access market review and publish a report on the consultation which will inter alia summarise the responses to the consultation.
- 8.5 In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.

Appendix B – Consultation Questions

- Q. 1. Do you agree with the scope of ComReg’s review of wholesale unbundled access? Please elaborate your response. 12
- Q. 2. Do you agree that the relevant geographic market for wholesale unbundled access is Ireland? Please expand in your response. 21
- Q. 3. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response..... 21
- Q. 4. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response. 25
- Q. 5. Do you agree with this analysis of competition problems? Are there any further competition problems which you believe ComReg should consider? Please elaborate your response 31
- Q. 6. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies? 34
- Q. 7. Do you agree that an access obligation should be imposed on eircom? Please provide details in support of your answer 35
- Q. 8. Do you consider that all existing access obligations set out in Section (A) of proposed remedies, should be maintained? Are there any further access obligations which should be imposed? Please detail any further comments... 37
- Q. 9. Do you agree that an obligation of non discrimination should be imposed on eircom? Please elaborate your answer. 38
- Q. 10. Do you agree that an obligation of transparency should be imposed on eircom? Please provide a detailed answer. 38
- Q. 11. Do you believe that ComReg should require eircom to make public any further information? Please specify if you believe this should be made available in the Reference Offer or otherwise published. Please provide support for your answer..... 39
- Q. 12. Do you believe eircom should have an obligation of accounting separation? Please elaborate your answer. 40
- Q. 13. Do you agree that eircom should be subject to a cost orientation obligation? Do you agree that FL-LRIC is an appropriate methodology? Please provide details in support of your answer..... 42
- Q. 14. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please elaborate your answer..... 42
- Q. 15. Respondents are asked to provide views on whether the remedies in section 6 are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in

terms of the impacts of these remedies on end-users, competition, the
internal single market and technological neutrality 43

Appendix C – Network Diagrams

Figure 1: Unbundled Local Metallic Path

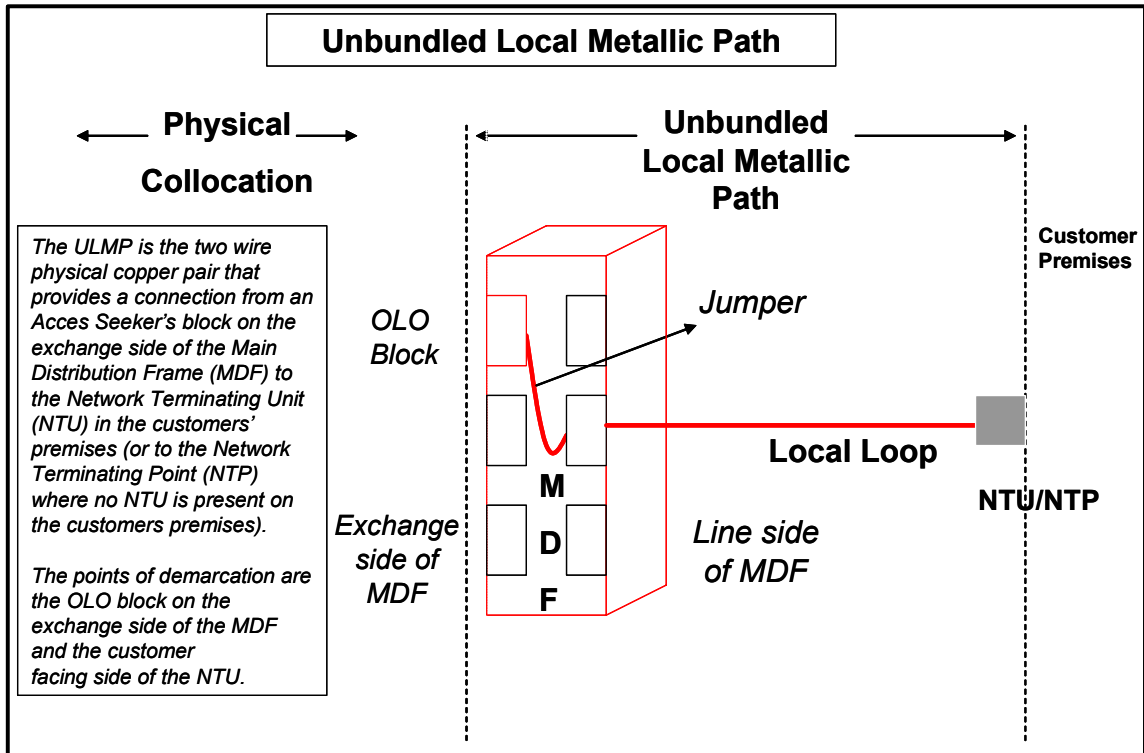


Figure 2: Line Sharing

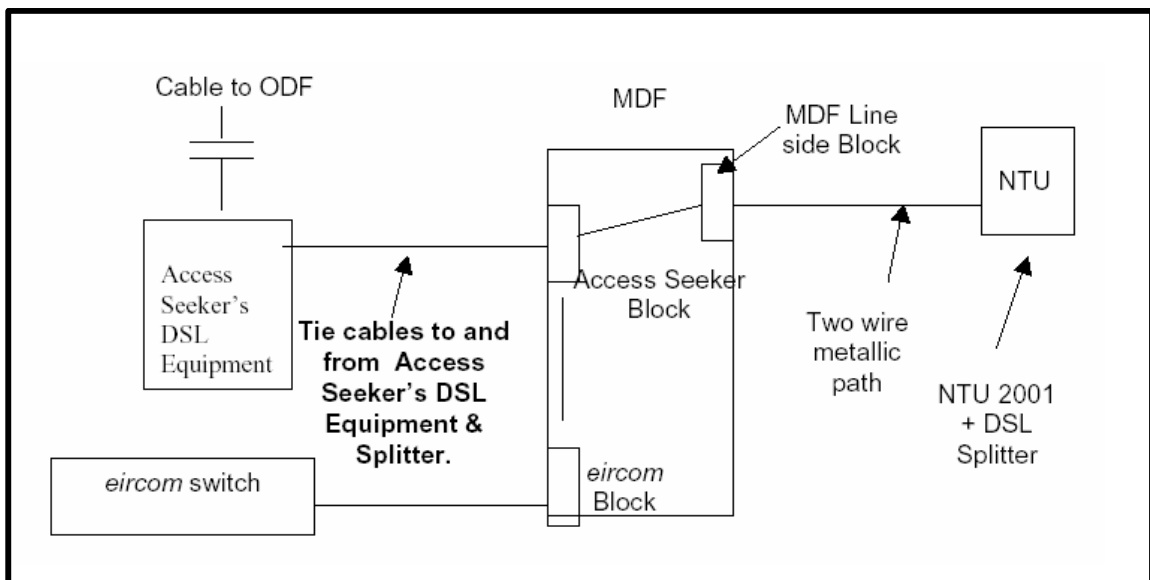


Figure 3 – Sub Loop Unbundling

