Market Review: Wholesale High Quality Access at a Fixed Location

Submissions to Consultation 16/69

Submissions to Consultation

Reference:	ComReg 16/104s
Date:	30/11/2016

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Section

1. AirSpeed Communications Limited (Airspeed)

Airspeed response to WHQA consultation

Received by email 13 October 2016 from Airspeed

Subject: Response to ComReg Document 16/69

Dear Mr Vidziunas,

On behalf of Airspeed Telecom this is a response to ComReg's Consultation Document and Draft Decision: Market Review of Wholesale High Quality Access services provided at a fixed location (ComReg Document 16/69).

A large number of premises throughout Ireland, including in Dublin and other urban areas, only have a sole viable option for fibre access i.e. eir. We would be very concerned if fibre access to these premises was left to an unregulated monopoly. This could mean that Airspeed Telecom and operators other than eir may be unable to quote for and provide service to those premises. In addition to potentially eliminating our ability to compete for those premises this could disqualify us from supplying services to multisite customers where some of the sites only have a sole viable option for fibre access.

Fibre is different to wireless and wireless based services are far from a complete substitute for fibre based services. Many customers specify that services must be fibre based.

Therefore we disagree with the statement that "it is considered unlikely that any SP has SMP in the MI WHQA Market".

Yours sincerely,

Brendan Martin

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2. Alternative Operators in the Telecommunications Market (ALTO)

alto

alternative operators in the communications market

Consultation: Market Review: Wholesale High Quality Access at a Fixed Location Consultation and Draft Decision - Ref: 16/69

Submission By ALTO

Date: October 14th 2016

ALTO is pleased to respond to ComReg's Consultation: Market Review: Wholesale High Quality Access at a Fixed Location Consultation and Draft Decision – Ref: 16/69.

ALTO welcomes this opportunity to comment on this complex consultation and Draft Decision and would like to make the following preliminary remarks before addressing the questions in detail.

Preliminary Remarks

ALTO is concerned about a number of matters arising on foot of the Consultation and supporting documentation published by ComReg. We would also like to point out that as much of the supporting material relied upon throughout the consultation has been redacted, thus our views are based on limited information, which is only shared between Eir and ComReg. We are therefore constrained in this regard.

Substantive matters at issue are:

1. ComReg's proposals appear to suggest deregulation of key circuits that remain required and that are clearly required to be under regulation for another period of time in order for our members to effectively compete with Eir and achieve ComReg's competition objectives as set out in Statute;

2. ALTO is concerned by ComReg's remarks in the consultation where limitations on the data means ComReg cannot come to a conclusion on '*reachability*' analysis.[1] There is a high level of ALTO member dependence on Eir network across the country, a matter of concern given ComReg's thinking on the matter and clear deficiencies in the analysis accompanying this consultation paper and its supporting documentation;

[1] In particular at paragraph 5.211

3. ComReg appears to have improperly considered the geographic dominance of Eir in the Market Review;

4. The viability of removing regulation in circumstances where new entrant operators still experience access issues in the absence of ubiquitous access in Ireland is a problem for ALTO members; this is against a backdrop of repeated denial, and degradation, and delay of products and services which has led to various investigations being taken by ComReg including the on-going review of Eir's Governance Model;

5. ComReg appears to have considered that eNet,[2] a body mandated to govern the Metropolitan Area Networks – MANs, is now operating in fact as a competitive wholesale operator, rather than a body solely designated and intended by the State to intervene under the auspices of the Managed Services Entity – MSE, contract put in place by the Department of Communications some years ago. It is ALTO's submission and experience that eNet is operating at the 1. Commercial User; 2. Wholesale and 3. State (intervention) provision of access within the market and its various levels;

6. If ALTO is correct in its assessment of ComReg's views about eNet, then the entire Market Analysis exercise may now have been undertaken again utilising a '*green field*' approach to a proper competitive assessment of Market 4. Dark fibre purchases possibly should be included within the ComReg assessment of this market review, rather than superimposing eNet network into other operator network element calculations. Dark fibre should not be considered as own network, as it distorts the market review and market share data negatively;[3]

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[2] Page 60 – 3.60: "*enet are a wholesale only operator, who under the terms of their MSE award must provide access on a non-discriminatory basis to all authorised operators, including retail LL providers.*"
[3] See Ofcom publications relating to assessment of this issue.

7. It is also striking that connections into data centres and business parks accounted for within ComReg's thinking, are currently out of synchronisation with market statistics that have been more widely reported at this time.[4]

8. The Draft Decision Instrument published by ComReg appears to mandate what are legacy remedies, rather than forward looking remedies that ALTO members have become used to expecting from ComReg with the on set of Next Generation Access – NGA, and other developments in Markets 3a and 3b. ComReg itself has recognised this distinction in its pricing decision D3/16[5], of which our members have been advised by the Department of Communications, Climate Action & Environment – DCCAE, to take account and indeed to engage with ComReg in interpretation of it.

9. The duration of ComReg's proposed *sunset* period for deregulation appears to be too short. It must be a minimum of 2 years in time;

10. There are insufficient transparency requirements proposed on Eir as well as on ComReg. For example, paragraph 10.9(ii) [6] of the consultation enables ComReg at its own discretion to revise the timeline by which Eir must notify the industry of intended changes. It is critical that all remedies on Eir are clearly set out and not subject to bi-lateral agreement between ComReg and the incumbent; and

11. In the absence of seeing the proposals ComReg intends to publish later with regard to NGA, Market 3a and Market 3b, there are significant concerns that ComReg's thinking around infrastructure access and new entrant access may pose difficulties for ALTO members. This obviously results in market uncertainty, could potentially create unnecessary barriers to entry and

[4] See for example www.daft.ie Irish commercial property reports.
[5] Pricing of Eir's Wholesale Fixed Access Services: Response to Consultation Document 15/67 and Final Decision, Document 16/39, May 2016
[6] "*Eircom shall notify ComReg in writing with the information to be published at least five (5) days in advance of any such publication taking place, that is, three (3) months and five (5) days prior to any amendments or changes coming into effect. The periods referred to in this Section may be varied with the agreement of ComReg or at ComReg's discretion*."

jeopardise inward investment in the market. This is a serious risk to our members' business models.

ALTO notes entirely separately that some of the figures utilised in ComReg's assessment of Market 4 may not be in-fact reflective of the actual position as it is today in the market. This does not appear to have been examined, taking into account current market shares and trends.

ALTO submits that while the Market Review is obviously dealing with a limited number of circuits, but that should not detract from the required prospective competition dynamics under Market 4.

ALTO submits that its members have grave concerns that certain behaviours exhibited by Eir. In particular those behaviours highlighted in and by reference to the Eir Regulatory Governance Model – RGM, *Styles Reports*, and other repeated breaches of regulatory obligations that give rise to concerns as to the future viability of operating in the network access market in Ireland for certain ALTO members. ALTO notes that some 6 non-compliance findings remain published by ComReg as against Eir, but none of those non-compliance findings have been subject to enforcement action at this time. This behaviour by both actors in the market specifically in terms of their governance, history of non-compliance and ability to raise wholesale prices at will shows Eir have the ability and incentive to disrupt markets to further increase their dominance – without the now apparently required stringent compliance action.

Response to Consultation Questions:

Q.1. Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for

your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

A. 1. ALTO agrees with ComReg's assessment of the main developments in the market. ALTO submits however that the geographic nature of the investment being made by alternative operators is a matter of significance in this review.

ALTO notes with concern that no one operator has been able to replicate Eir's ubiquitous access. This is with supposed regulatory intervention since ComReg's inception; yet is still not a fact in practice.

At paragraph 3.59 ComReg states that some service providers have developed *quasi*-national footprints. ALTO disagrees with this assessment. Market experience suggests that while competition might exist on a *quasi*-national basis, facilitation of services remains heavily reliant on providers who aggressively compete for end-user and business customers. ComReg has focussed in particular on large multinational customers and data centres. The two mainstream wholesale operators invariably have previous, advanced and often specialist knowledge of the end-user connectivity requirements, when later approached by new entrant ALTO members to facilitate connectivity and services to certain high financial worth and customer locations. In other words, members have rightly been focusing their resources on high demand areas, but this means that in many cases there are very often no options for members but to use Eir and possibly eNet for access. It is only with this access that members can compete. This is a matter that concerns ALTO members greatly given ComReg's deregulatory proposals contained within the consultation. If competition has not flourished under the auspices of regulation, how can it be managed without further and retained regulation, and its proper enforcement acting as a deterrent to bad behaviour?

Q. 2. Do you agree with ComReg's assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant

factual/empirical evidence supporting your views.

A. 2. ALTO broadly agrees with ComReg's assessment. ALTO is concerned though that various redactions in the Consultation paper make it extremely difficult for ALTO to constructively comment on the ComReg proposals and thinking. In particular, ALTO notes that some of ComReg's assessments on substitutability are not supported by ALTO; for example, the demand side arguments made by ComReg in relation to wireless and wired are incorrect. ALTO submits that ComReg's thinking does not properly consider:

1. Network use;
2. Network price; and
3. Anticipated service levels.

These are all issues that detract from any substitutability arguments made by ComReg with regard to wireless versus wired services. Our members can cite numerous examples of where this has been an issue in customer choice.

Q. 3. Do you agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 3. ALTO does not agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA markets. Based on the evidence presented to ComReg, ALTO notes that the assessment undertaken might appear on a simplistic and only *prima facie* assessment to be correct. ALTO submits however that ComReg has clearly failed to take account of Eir's ubiquitous network access in it's thinking as presented. ALTO is concerned by ComReg's remark at paragraph 5.211 where limitations on the data means ComReg cannot come to a conclusion on '*reachability*' analysis. There is a high level of ALTO member dependence on Eir network across the country, a matter of concern given

ComReg's thinking on the matter and quite clear deficiencies in the data analysis as mentioned.

ALTO submits that ComReg appears to have failed to properly assess the existence or otherwise of sub-national markets. There are usually reasons for investment in certain areas, as opposed to others. ComReg's should consider revising it's thinking in this regard prior to changing the Regulations as they are presently.

Q. 4. Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 4. ALTO submits that it generally cannot agree with ComReg's SMP assessment at this time, as the Consultation paper and supporting publications do not appear to be underpinned by proper and correct data. This assessment as presented does not appear to comply with the SMP assessment guidelines[7] as available to ComReg in the circumstances. In particular, ComReg has not assessed sub-national markets properly, or at all.

Specific areas for comment:

LB TI – ALTO agrees with ComReg's competition and SMP assessment for this part of the WHQA market on the basis that Eir have a ubiquitous duct access network providing them with the infrastructure to viably meet customer demand. Absent the wholesale service from Eir it is unlikely this 2Mbit/s and sub 2Mbit/s service would be viable for a new customer build unless linked to a wider commercial deal.

HB TI – ALTO acknowledges that this technology is becoming more and more obsolete, and that customers are migrating to Ethernet as demonstrated in the study. ComReg reports there are only 250 circuits left in the market. On this

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711(02)&from=EN

basis we are not opposed to ComReg conclusion to deregulate this sub-market, however we are concerned that customers using these high capacity products cannot accept the risk of de-regulation and the potential destabilisation of supply from Eir. We partly agree with ComReg's proposed approach going forward but with an important change as discussed below.

a. We agree with ComReg that the obligations for new supply etc. could be de-regulated immediately (this allows the SMP provider to trade commercially on new supply) as this is an obsolescent product with minimal new demand.

b. Obligations for Existing Supply – To prevent the de-stabilisation of supply to large companies, multi-nationals and Government <u>a sunset of at least two years should be set for the SMP provider</u> to continue to support existing services on the same regulated terms (service instances live at the date of the decision). After two years the SMP provider can take its own commercial choices for the service. Such an approach mitigates the risk of disruptive behaviour and provides a responsible transition from SMP regulation to no SMP regulation. This is provided for in the current Regulations where Eir may not withdraw access to facilities already granted.

MI all speeds – ALTO members are seriously troubled by the conclusions reached by ComReg. An experienced view of the market must question how Eir's market share can be so low. ALTO submits the following comments:

a. ALTO members continue to purchase considerable amounts of circuits from Eir. ALTO would be surprised if the market were not purchasing considerable amounts of circuits to meet their needs. It is expected that Eir Retail (the biggest supplier in the Retail market) also purchases from Eir thus ALTO is concerned as to the accuracy of the results and particular what has been excluded. Oxera appears to have undertaken some checks in its study as published, but there is little detail of what data was included in the study and what was excluded – Some ALTO found it very difficult to follow ComReg's approach to data inclusions and exclusions for their own submissions. ALTO submits that it is almost impossible to accept that conclusions derived within that study.

b. ComReg's data as presented does not pass a basic and cursory sanity check hence we are unable to accept the data as correct without a full account of what is included and what is excluded (with totals).

c. ALTO is surprised that ComReg has taken a view of the whole country should be deregulated into such a sub-market. Whilst the markets may vary between Dublin and the rest of the country, it is very difficult to believe that the ComReg can consider there to be high levels of wholesale competition for the less urban areas. ALTO notes that ComReg have studied business parks but what is less clear is the competition to businesses that do not reside in such. ComReg has failed to provide robust evidence for the non-business part scenario. We are also concerned that ComReg maybe continuing its previous approach from the previous leased line decision that the presence of an operator in an area assumes all locations are accessible. ALTO submits that this is a wrong conclusion as the costs of digging across a town can be prohibitive, as can be evidenced by the on the ground experience of our members. Hence we believe ComReg has not provided clear and demonstrable evidence for the national deregulation of the market and we still do not have confidence in the data.

Q. 5. Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 5. ALTO submits that it is clearly not viable to dig out to customers to provide 2mbit/s circuit whether for TI or MI and would only exceptionally do this as part of a much larger deal. The existing Eir copper network is ubiquitous and technically proven to serve such a base efficiently and we agree with ComReg's position to keep this part of the market regulated – otherwise the availability of the service will disappear. Hence we would tend to agree with ComReg's conclusion in the LB TI WHQA market.

ALTO submits that Eir has, and continues to demonstrate, that when there is no proper *ex ante* controls, and compliance programmes with these controls, in place, that Eir's behaviour continually seeks exploit and to leverage obvious network dominance to the disadvantage of customers and competitors. Recently certain wholesale price increases made by Eir on Broadband products exemplify ALTO's point. The increases were simply unjustified and demonstrated a clear ability to price randomly and to add operating costs to competitors. The increases in question equally exemplified Eir's positioning with regard to clear and constructive regulatory decisions and their ability to set prices at will by increasing port prices exactly in line with a reduction in copper based WLR.

ALTO members have serious concerns around the proposed decision to deregulate the main WHQA markets (despite partial agreement with some of ComReg's stated conclusions).

Q. 6. Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO agrees with ComReg's approach to imposing access, non-discrimination, transparency, price control and costing accounting separation remedies. ALTO submits that it is notable that ComReg has currently an open Regulatory Governance Model – RGM, review open with regard to clear and admitted negative behaviours on the part of Eir. Furthermore, we note that an SLA dispute remains unresolved between Eir and certain ALTO members.

However it is noted that ComReg have not sought the views of operators on transitional arrangements proposals. Our members would ask ComReg to request inputs from SPs on the move from obligation withdrawal and transitional arrangements. These are highly complex and are normally multi-year arrangements with end customers so to make such a change in a matter of months would be disruptive and indeed anti-competitive.

ALTO submits that in the absence of functional separation as a remedy, the market demands that at a minimum Equivalence of Input – EOI, must be mandated for all regulated services and not the significantly out-dated Equivalence of Output – EOO, mechanism which thus far has failed the Irish industry. EOI should be for all aspects of the service, i.e. orders through the same (exactly the same) gateway, same provision and same assurance, same pricing etc.

ComReg knows what the industry views and requirements are for robust EOI now for some time. ALTO demands that both process and regulatory change mandating robust EOI within the market be forthcoming. This is in order to easily manage both end-user and industry expectations as well as to review operator behaviours in the market. Of course full functional separation as a regulatory remedy would bring about better behaviour and a renewed vigour in the communications market generally.

Q. 7. Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

A. 7. ALTO makes the following observations with regard to the Draft Decision instrument.

1. **Clause 5.3:** ALTO does not agree with Market Assessment that the MI WHQA market is effectively competitive for the reasons discussed throughout this response;
2. **Clause 7.4(i):** ALTO considers that negotiation in good faith[8] must be strengthened to include truthful negotiation as the Eir Regulatory Governance Model – RGM, highlights to us that the industry was misled over many years and this must stop;
3. **Clause 8.2:** While ComReg's proposals are helpful, industry experience suggests the proposals will fail in the absence of clearly defined and set deadlines for the industry to conclude agreement and the automatic adjudication of the failure to conclude agreement by ComReg. A period of 6 months may be appropriate. ALTO notes that ComReg has not updated the SLA text to include the regulatory remedy issued in the FACO decision. We refer ComReg to years it has taken to progress SLAs within the industry groups – and they are still not fully updated. ALTO submits that in fact the SLA regime must be reviewed so that all products have clearly defined rules and strictly applied consequences in the event of failure;
4. **Clause 9:** The proposed obligation of Non-discrimination published is now out-dated. The Eir Regulatory Governance Model – RGM, model proves that this does not work. The remedy in question needs to be updated and ALTO suggests that the NGA Decision[9] is considered as the baseline. ALTO is also hopeful that the new 3a and 3b would also be able to advise of an up-to-date and functional remedy;
5. **Clause 10:** Transparency is fundamental to making the non-discrimination regulation work, and again it is disappointing that the regulatory remedy for transparency is dated and does not address either Internal Reference Offers

[8] In fact, "*good faith*" can take for ever and then the conclusion is no. So there should be defined timeline for responsibilities, otherwise there is no proper means of pinning down systemic failure.

nor Statements of Compliance properly or at all. Without such its virtually impossible to detect non-discrimination. Hence we are seeking either an Internal Reference Offer Scheme or the publication of Statement of Compliance. The text in the NGA Decision as published by ComReg provides a good basis for Statements of Compliance Regulation;

6. **Clause 12:** The requirement for Accounting Separation is and remains ineffective. ALTO submits that there should be mandated historic or current cost accounting – H/CCA models deployed;
7. **Clause 12.4**: The Weighted Average Cost of Capital – WACC, set by ComReg should be the actual rate of return, instead of a reasonable rate of return. ALTO notes that actual returns have been far higher than expected by ComReg in most recent reporting on the subject. ALTO notes that this is subject to changes in regulatory and economic conditions, but the market requires certainty in respect of this remedy;
8. **Clause 14** – the "*Sunset Clause*" – as highlighted in our response ALTO agrees generally with the proposal of a sunset clause. However 6 to 9 months is inconsistent with capital based and possibly multifaceted products whereby large customers are generally signed for in excess of 2 years or more. The sunset period needs to be set at 2 years minimum.
9. ALTO disagrees with the proposal to de-regulate the MI market and thus the issue of a sun set clause should not arise for the MI market.

Q. 8. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 8. ALTO submits that given the stark inconsistencies highlighted in this response, and considering the oblique nature of the SMP assessment undertaken

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[9] 31st January 2013

by ComReg, that ComReg maintains the remedies that are in place for the time being, until such time as a more thorough assessment can be undertaken.

1. By reference to the various options for the 2Mbit/s solution ALTO suggests that an Option 5 that is similar to Option 4 be considered by ComReg, but with modern regulatory remedies including EOI. Please see our comments to the Draft Decision instrument. ALTO submits that it is quite clear that current and future remedies need to include both EOI and Statements of Compliance signed off by a senior official within Eir, as is already in place for NGA broadband services.

2. By reference to paragraph 10.51 – as indicated in our earlier responses and to the Draft Decision, a 6 to 9 month sunset is too short for existing services as fixed contracts extend beyond this period and the actions of ComReg leave existing customers of Eir at risk of their supply being destabilised through product withdrawals, price changes or other service changes. Experience of negotiating contracts with Eir is often protracted.

3. By reference to paragraph 10.55 onwards and as per our previous answers we disagree with the de-regulation of Wholesale Ethernet services for the reasons already articulated.

4. In general, we believe ComReg need to assess the impact of withdrawing obligations through more engagement with operators and stakeholders and end-users, none of which feature to any great extent in the analysis produced by ComReg in support of this entire market review.

ALTO

14th October 2016

3. BT Communications Ireland Limited (BT)

BT Response to ComReg consultation: Market review: Wholesale High Quality Access at a Fixed Location

Issue 1 – 14th October 2016

Non-Confidential Version

1.0 Overview

1.1 Summary Position

Whilst recognising that this particular market review is covering a market which is complicated in its structure and encompassing many technologies and end-customer groups, BT considers that the Consultation has not addressed some fundamental underlying commercial realities from the economic analysis and as a consequence, the proposals are not correct. Our principal concern is the proposed withdrawal of regulation of MI services on the incumbent, the consequence being that BT will face significantly ✂; customers will see a marked reduction in choice and effective competition. We have the following concerns:

1.2 Simple review ('Sanity Checking') of the key Market Numbers

BT has operated in this market for many years and is very familiar with the operation of the market, of the bids it has won and those that it has lost and the general market dynamics through experience. This is also augmented by other sources such as ComReg market reports, published customers, wins etc. BT is also an infrastructure operator and as highlighted in this document is fully knowledgeable of where it has built network as well as having a reasonable view where others are present. Hence as detailed in Annex A, ComReg's estimated market service share of eir simply does not correlate with our basic understanding. We are aware that a number of possible reasons could cause this disparity and we discuss these in Annex A. The fact that our positions are so far apart is however a cause for serious concern which affects the entire basis of the findings that no operator has SMP for MI services in any part of Ireland at all which is very far from our experience.

1.3 Business Park Study

The consultation suggests that ComReg's conclusion has a significant dependence on the study of 291 business parks absent good access data; however we consider that the majority of businesses will exist outside of business parks suggesting that more research is required to justify the conclusions.

1.4 Comparison with UK BCMR

Whilst it is not the case that parallels can easily be drawn for any market across country boundaries, nevertheless there is a striking difference between ComReg proposals and Ofcom's recently concluded equivalent BCMR[1]. In the UK, dark fibre is emphatically within the relevant economic market and indeed Ofcom has imposed it as a universal remedy on the incumbent (BT) outside a narrow small part of London with the finding that BT is dominant across the entire product

[1] Ofcom BCMR Final Statement 28 April 2016. Available from the Ofcom website..

bandwidth[2]. In Ireland, ComReg is finding a similar chain of substitution across the bandwidth scale but argues that dark fibre is outside the relevant market and the incumbent (eir) does not have SMP anywhere at all. Yet common industry views would be that the UK has one of the most competitive marketplaces in the world. It is therefore something of a paradox that such divergent outcomes could co-exist from economic analysis based on exactly the same principles.

2.0 BT View of the Economic Analysis

2.1 General

BT believes that for Ireland, the economic analysis suffers from a number of flaws which partly at least derive from insufficient data both on the customer demand side to establish whether or not there is a chain of substitution but more critically on the supply side and the establishment of the relevant geographic markets. Effectively, Oxera has adopted national markets at the product and geographic levels in the absence of compelling evidence for sub-national markets, although we note that they caveat their findings in this regard[3].

Divergence from marketplace realities

Fundamentally, BT considers that Oxera has misinterpreted the strategies of OAOs:

2. Market operator data shows that OAOs supply most of their volumes on-net (including the terminating segment), suggesting that they predominantly use their own infrastructure (see Table 8.3 and Table 8.4). This suggests a strategic approach to OAO build-out serving the majority of business customers in all locations, rather than a case-by-case build-out based on services supplied by third-party tails.

Emphatically this is not the case and we provide clear empirical evidence that the strategic approach not only of BT but we believe other OAOs is indeed precisely on a case basis utilising third party tails. We do not see how Oxera could possibly infer otherwise from the information which we have supplied to ComReg.

Why BT's market view and the Oxera economic analysis appear to differ

A great deal of relevant and important information has been redacted from the Consultation which has greatly hampered our response but we believe that an explanation for such a wide divergence from our position (which we feel is likely common with other OAOs) and ComReg/Oxera is as follows.

To derive its conclusions on market boundaries, ComReg (Oxera) makes a series of simplifying assumptions on the product and geographic market in sequence following a standard methodological approach. However, this has a well-known weakness in that it will likely fail to find smallest possible combinations of services and areas which could be classified as economic markets. Under such circumstances, attention typically turns to an assessment of effective competition i.e. an SMP assessment.

In turn, this is heavily reliant on high quality statistics on service shares augmented by a thorough appreciation of prices and pricing strategies. We do not believe that either the underlying statistics

[2] Dark fibre is considered to be 'in the market' in that Ofcom recognises that both CPs and some end-customers are making use of direct fibre to replicate active services. The dark fibre remedy therefore is considered to be an economic substitute for active services as an upstream remedy and Ofcom believe may allow the withdrawal of active regulation in the future.

[3] Section 8.1.2 and 8.2.4. We note that Oxera presents the case for homogeneity in conditions at 8.2.7 as a counterfactual against the evidence for heterogeneity in conditions.

(which we are not able to verify and have considerable doubts as mentioned above) are adequate, nor do we consider that there is a correct appreciation of pricing options particularly at the wholesale level. As discussed below, there is a particularly acute issue here because of the treatment of dark fibre where as noted, we feel that Ofcom takes a different stance from ComReg at the conceptual level as to whether or not it is in the marketplace and this is one reason why the SMP findings in Ireland are so dramatically different from the UK.

In short, the conclusions of a national market and no SMP anywhere are not at all robust and certainly not in keeping with our understanding of the marketplace.

A more detailed but still simplified exposition is as follows.

(i) The treatment of dark fibre at the wholesale level

ComReg makes a prior assumption that purchases by operators of dark fibre are counted as equivalent to owned-access when assessed at the active layer. This has a parallel with how Ofcom undertook its data analysis in the UK but Ofcom was clear that at the conceptual level, this did not constitute owned infrastructure by the CP and that any SMP assessment using service shares at the active level ought to take this account[4].

(ii) The prior assumption that markets are likely national

There is an assumption that both retail and wholesale markets are more likely than not to be national. There are two points here. First it is accepted that tendering is widespread and the ability of OAOs to make a tender will be highly affected by the ability to purchase tails outside their own access infrastructure. Second, published 'list' prices are not a good guide to prices at the retail level. The combination of these two factors means that much more granular analysis is needed to show how many network operators are able to make offers absent SMP regulatory obligations to supply access services. We do not think this has been done in practice by Oxera as discussed below.

(iii) Absence of any formal SSNIP tests at the product level

Whilst there is a retail consumer survey, in practice the evidence gleaned on price sensitivity is very restricted and there is no substantive or real quantitative analysis to check directly whether there is a bandwidth break or not. The fact that it is not possible to discern a break from any of the published price schedules says nothing about market boundaries[5]. The Commission has frequently stated that the conditions to show a chain of substitution are extremely demanding[6]. The EC Guidance on market definition states that:

> *"From a practical perspective, the concept of chains of substitution* ***has to be corroborated by actual evidence****, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well."*[4]

[4] Ofcom has of course mandated a dark fibre remedy as an upstream substitute for the active service suggesting it is very much 'in the market'. Putting to one side whether or not this is an appropriate remedy, it is difficult to see why something as basic and fundamental as this would differ between the UK and Ireland.

[5] One could similarly observe a smooth range of prices from the price lists of new cars from the smallest car up to the most luxurious but it would be a very strong assumption that no range of cars at any level at all could not constitute an economic market. In fact, the potential for breaks from published prices is neither a necessary nor sufficient condition for there in fact to be separate economic markets.

[6] Commission notice on the definition of the relevant market for the purposes of Community competition law (97/C 372 / 03).

ComReg cannot prove a chain of substitution without applying consistently and comprehensively the SSNIP logic; this requires testing at each and every step the outcome of the price response question (qualitatively and insofar as its ability to design market research allows, quantitatively). Each service at each bandwidth has to be price constraining on each other and each sub-group of bandwidths must also fail to be a relevant market in its own right.

We do not believe that Oxera has undertaken this analysis.

The Commission has also suggested that many NRAs have in fact found that there is a bandwidth break for leased lines[7].

The implication of a single chain, is that all circuits at all bandwidths are added together at the SMP stage; however a more disaggregated analysis could likely show a very different outcome of service shares[8].

(iv) Absence of a disaggregated geographic analysis

We observe that it has not been possible to attempt a geographic breakdown of the kind undertaken by Ofcom in which postal sectors are examined for evidence of competitive supply. We note that Oxera caveats its findings of uniform competitive conditions and emphatically we do not accept that analysis of business parks is adequate[9].

The consequence of these assumptions or limitations in analysis, is that we have the highly counterintuitive finding that MI services are supplied competitively in all areas and all bandwidths. We do not accept this is correct in itself and further it is not compatible with the presumption that there are captive customers on TI services; it is comparatively simple to change interface; the fact that the industry has moved technology is unlikely to have changed the underlying assessment of market power. If there is still residual market power in TI services there almost certainly will be the same market power in MI services; supplying networks will not in general be different from interface alone.

BT position is that by working on ‘averages’ across both bandwidth and geography, ComReg (Oxera) has completely mischaracterised the underlying competitive landscape at the wholesale level. Our ability to effectively develop this position has been materially hampered in this case by the very widespread redaction of key numbers which would likely have illustrated what we are arguing. Put simply, if a different ‘cut’ of the data were made, then a different picture would likely emerge.

2.2 The treatment of E-Net in the Consultation

In principle, there is no reason why a State-Aid backed network such as E-Net cannot be designated with SMP. Nor is there any reason why two entities cannot be designated with SMP. Product market definition should not be affected by state aid or greenfield considerations[10].

We suggest that whilst eir through its ubiquitous access network has the dominate position throughout the national market as can be seen by any network map of Ireland. Outside of Dublin E-Net, whilst having a far more skeletal metropolitan presence than eir, is still far ahead of the limited access of any other operator. It is most surprising and disappointing that the ComReg data analysis is not giving adequate prominence or attention to this; more generally the approach taken by ComReg

[7] Commission 2014 Explanatory Note on Market Definition section 4.2.2.3 page 51.
[8] This is one of a number of issues currently under Appeal in the UK following Ofcom 2016 BCMR Statement.
[9] Reference.
[10] It may be the case of course that state aid comes with some price controls which might affect the identification of the competitive price level in a SSNIP context but this does not seem to be the case here.

towards dark fibre ownership (assumed to be the infrastructure of the active purchaser) is not reflecting the prominence of E-Net in the market. To demonstrate this point we have included in Annex A pictures of key locations across Ireland with various networks superimposed. This in itself demonstrates the considerable difference in network roll-out and why we are unable to accept ComReg's conclusions.

Hence in reality, our view is that eir have a status of SMP nationally with the possible exception of some small parts of Dublin and some data centres and business parks and outside of Dublin there is really only one other choice which is E-Net. ✂. Hence outside of Dublin there are really only two main access suppliers – eir and E-Net.

✂

If ComReg had not presumed that there is a chain of substitution across the bandwidth chain, then it is even more likely that eir would be found to have SMP in MI services up to and including 1G in many areas outside parts of Dublin. By the same parallel, it may well be appropriate for ComReg to also designate E-Net with an SMP status in a relevant market and review whether the terms and conditions for access to this network are sufficiently stringent. In practice we do not consider they are at all adequate.

2.3 BT's view on economic markets

Our preliminary assessment is as follows, positioned at a 'high' level.

The wholesale market is distinguished by geography with the following as candidate geographic/product markets[11]:

- In Dublin eir have full ubiquitous access to virtually all of Dublin through its existing duct access network and we believe this has been enhanced through the deployment of many additional fibres to the cabinet infrastructure as part of the broadband rollout. Part of the industry leased line planning rules is for eir to offer standard fibre leased line services from the cabinet. BT, Digiweb (T50), Virgin Media, Airpeed and potentially others have skeletal access in parts of Dublin and limited or no access to other parts of Dublin.
- Data Centre Market – We consider the market review has incorrectly given little attention to this sub market which consumes hundreds if not thousands of OAO circuits. In our view this could be considered a competitive market segment, but we are concerned this could also be seriously distorting ComReg's data in the MI market for the Dublin area (and even at a national level) given presence of large data centres in Dublin. We are not sure that ComReg has addressed this sub-market correctly[12].
- The metropolitan areas of presence of E-Net in providing dark fibre outside Dublin where we consider eir and E-Net have joint dominance.
- All other area where eir has SMP at up to and including 1G/s Ethernet service.

3.0 SOME SPECIFIC OBSERVATIONS

3.1 BT position on remedies being proposed

[11] Additional localised detail are required to specify these properly.
[12] Ofcom has specifically identified data centres as relevant for deregulation in the UK as set out in the 2016 Statement. It should be noted that the circuits at data centres do not enter the service shares of BT or other operators as the centres are then classified as network nodes not customer sites. It is not clear to BT whether this is in the redacted information in this Consultation.

Without prejudice to our position on markets and SMP assessments as set out above, we have the following observations to make on the remedies being proposed.

3.2 The treatment of backhaul services

We note that ComReg has stated [5.21] the self-supply of Mobile backhaul is a captive market. Meteor is part of the MOSAIC Netshare with 3 Ireland, ✂. ✂.

✂

3.3 Quality of Data

ComReg appears critical [A.327 and Table A3.1] of the industry for the quality of the data it keeps. Given that the last leased line consultation was in2007 [Decision issued 2008 [1.29]] which was conducted in a substantially different way, and that no indication was given warning operators of the likely need to retain certain data (beyond which they need to operate their business) for this market review - there was no obvious need to hold such data in the formats required. We like other OAOs had to make major investments in time and resource for the data but we remain concerned that the overall standard of information for the industry may not be very high.

We note that the existing ComReg regulation provides for backhaul services such as Wholesale Ethernet Interconnect Links (WEILs), and LLU Backhaul which are used to support other regulated markets. In particular WEILs are multi-purpose carry both leased lines and broadband traffic simultaneously over the same infrastructure. Hence ComReg needs to address how a circuit (and some other obligations) that is carrying both a regulated and non-regulated product will be treated.

4.0 Response to the Detailed Questions

Question 1: Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

As background to our comments below, we note that Oxera (section 1.1) defines leased lines as 'high-quality permanent connections used by businesses and OAOs to deliver dedicated transmission capacity between fixed locations, often with symmetric upload and download speeds. Dedicated capacity means that the service is not impeded by the activity of other users'.

We believe that this is in fact a good definition but one which is subtly different from a definition which is centred around whether it is contended or uncontended. The technical definition of contention is not in fact straightforward as it can be defined in more than one formal way. This is because packet switching networks work by using packet queues to feed packets into the common bearer and with contention, it is not always clear how much buffering in the queue is allowed in order for the services to be uncontended. Using the strictest interpretation of 'uncontended', the buffer would be essentially empty the whole time.

It is important to recognise that the capacity of the path through the network although being permanent and dedicated – is <u>not</u> allocated when it is configured. (The key benefit of this is that it is possible to ‘overbook’ capacity on bearer lines and as network operators have rather different network structures there will not be a common definition across the industry.)

ComReg [1.7] however explicitly introduces the notion of ‘dedicated transmission capacity between fixed locations’. We do not feel there is complete alignment here. The principal role of leased lines is to enable a company to have a private network with firewall which is separate and secure from any public network.

There are a number of other observations we wish to make:

(i) The Market research [3.49] shows that some customers buy leased lines alone. This indicates that they must be capable of replicating functionality of bundle from own resources.

(ii) The production chain to construct for example a VPN can be done in very many different ways. This includes use of dark fibre by intermediaries such as systems integrators and even some end. We do not accept the argument that dark fibre should not be considered in the market. There is strong evidence from UK that there are companies who are selling dark fibre to both other network operators and directly to end-users.

(iii) The importance of E-Nett. As discussed in Sections 2, 3 and Annex A we consider there are errors in the analysis leading to an incorrect conclusion as to the level of competition.

(iv) Role of NGA and broadband. Can be adequate for some sites all depends. Experience in UK is that three sectors of business access, LLU backhaul and MNO backhaul – are sharply different in their requirements.

Question 2: Do you agree with ComReg’s assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

BT Response 2

We note the Overall Preliminary Conclusion on Retail Market Assessment is to assess the scope of the retail market absent competition regulation and would generally agree with this approach. However we are concerned that changes at the wholesale layer will in fact seriously impact the supply of Retail Services particularly in areas outside of business parks and away from more densely populated areas. A particular concern will be how to address customer’s off-network should wholesale access services be effectively withdrawn from the market in these areas either through refusal or constructive refusal to supply. For example an operator with passive infrastructure such as ducts for PSTN or broadband supply will be able to supply fibre more cheaply and quickly than another party that will have to dig to the customer. ComReg in de-regulating wholesale high speed M4 services will accentuate an existing market problem.

We are aware eir will not allow leased line usage in broadband access ducts (except potentially NBP funded projects) which excludes most operators and for ComReg to withdraw M4 regulation around active supply above 2Mbit/s has the impact of restricting the market. Absent active regulation in M4 to provide leased lines, and the non-availability of upstream remedies ComReg are effectively preventing any OAO use of the incumbent’s ubiquitous network for leased lines absent commercial agreements. . If such is not addressed in this market we are concerned at how ComReg will address in the market 3a or 3b market.

Hence ComReg are creating a downstream retail problem with its approach to the Wholesale upstream regulatory remedies and we consider this to be significantly detrimental and significantly market distorting.

We note that the conclusion that Dark fibre is not considered to be an effective substitute for retail leased lines due to the investment and expertise needed to provide retail Leased Lines using passive infrastructure. Whatever the merits of this position, this should not be the basis for treating active services based on dark fibre by OAOs as constituting owned infrastructure access network.

We offer the following additional comments here.

A. Product market

(i) We feel it is unwise to place too much on technical differences between technologies (Table 3) as often they can be ameliorated in other parts of the network and/or are not critical in any case except for a few specialised applications. For example resilience can be supported by the customer themselves via software design. This is confirmed by survey 4.133; only real issues are total bandwidth and delay ('latency') which cannot be subsequently recovered, along with availability (SLAs). The critical technical feature is delay which cannot be recovered ('latency') and contention is important to the extent that it in turn affects latency.

(ii) We agree with the ComReg approach and conclusions on P2P wireless.

(iii) We fundamentally disagree with the treatment of dark fibre as discussed above and below. On a related aspect we therefore disagree with Oxera 2.3.4 about dark fibre and their interpretation of role of CID suggesting that duct access will never be a competitive constraint[13].

(iv) ComReg defines the focal product as a technologically specific definition [4.103] which means that the definition becomes 'endogenous'. In practice we note that ComReg includes optical services [4.203] but one is the underlying bearer and the other is the end-to-end path.

(v) We agree [4.121] that bespoke prices and tendering are very important and needs to guide analysis. The most important factor will be the number of offers which are available when the wholesale inputs are supplied at competitive price levels.

(vi) On the broad issue of interface, in our view this is generally not critical (also discussed at 4.165) and in fact –the costs of bandwidth migration are much greater than changing interface. We agree with ComReg [4.158, 4.173] that proper characterisation of TI services is of one-way substitution to Ethernet. Here the issue of remedy is more important than market boundary classification. It is also true at the wholesale level [5.80] that it is not purposeful or useful to speculate too much when there is underlying substitution.

[13] There may be some circumstances when duct access could be economic for infrastructure operators for example to extend a local network and assuming a very unrestricted offering were made in effect allowing an operator to 'dig in and out' in a manner which did not follow the architecture of the incumbent's network.

B. Geographic market

(i) We believe that there are very big variations in Ireland in demand conditions and also in supply.

(ii) We have raised concerns on the impact of deregulation nationally – see answer to Question 1 above.

Question 3: Do you agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

We fundamentally disagree with both the product and geographic markets. Fundamentally we do not believe that the retail product markets can be characterised as a single chain of substitution.

Regarding the evidence of a single product market, there is no evidence for chain of substitution across all bandwidths and is highly unlikely to be true. As discussed above, Oxera has not been able to perform tests as to whether the chain exists or not and the requirements are highly demanding[14]. The features and scenarios set out at 5.98 are generally neither necessary and certainly not sufficient to establish a chain of substitution. The price sensitivity analysis from end-user (not OAO) surveys did not include relevant questions to establish the degree of switching. The fact that prices may appear to be comparatively 'smooth' shows nothing. Instead we believe that the focus should be on the alternative analysis of competitive conditions identifying bandwidth as a rough proxy for site value.

Regarding the geographic market, fundamentally we do not believe that Oxera was able to conduct a proper granular analysis and simply relying on business parks will be quite inadequate; by definition they constitute the likely targets for competitive infrastructure and are similar in that way to data centres. Outside these points there is very little infrastructure competition as we show in Annex A.

We believe that there is a misleading representation at 5.233 as the scope of on-net itself can be highly geographic and there is an incorrect treatment of the dark fibre purchased from E-Net across the entire industry as self-owned infrastructure when in fact it is not.

We would like to offer the following additional comments.

1. Trunk market. – It is clear there are a number of core national networks but in fact they all generally follow the topology of the rail network. Outside of the core routes there is far less coverage by operators and little available in the more western regions of the country and concern must exist concerning the reach of competition into towns in the west of Ireland. See Figure A1.3 in the Oxera report.

[14] See Commission notice on definition of relevant market for the purposes of Community competition law (97/C 372/03) paragraph 58'; Commission decision of 19.07.2000 in Case no COMPO/M.1882 – PIRELLI / BICC

2. Access – The Oxera maps (A1.1 and A1.2) show parts of the State where there is little infrastructure and this begs the question why ComReg consider the market competitive. We conducted our own exercise of our presence as discussed in Annex A ✂. We consider ComReg overly reliant on the business park study as we would expect a number of operators to be sharing infrastructure – either eir or E-Net in these locations.
3. We agree with ComReg's conclusions that there is a 2Mbit and sub 2Mbit TI market as the number of circuits in this market is still very high and that it is not generally viable to supply such services without an existing ubiquitous copper access network which eir own and control.
4. We agree with ComReg's conclusion [5.171] that there is a high speed Traditional Interface (TI) market and note customers are migrating towards Ethernet.
5. We also agree with ComReg's conclusion [5.238c] that there is a high speed Modern Interface (MI) market although as above and we consider the definition of Ethernet as a leased line needs to be improved and that there is the strong possibility of a bandwidth break at 1Gbit/s.

Question 4: Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 4

We would like to offer our views to the ComReg SMP assessments in the relevant WHQA markets as below:

1. LB TI. We agree with ComReg's competition and SMP assessment for this part of the WHQA market on the basis that eir have a ubiquitous duct access network providing them with the infrastructure to viably and at incremental cost to meet customer demand. Absent the wholesale service from eir it is unlikely this 2Mbit/s and sub 2Mbit/s service would be viable for a new build unless linked to a wider commercial deal.
2. HB TI. We acknowledge this technology is obsolescent and customers are demonstrably migrating to Ethernet as demonstrated in the study and secondly ComReg are reporting there are only 250 circuits left in the market. On this basis we are not opposed to ComReg conclusion to de-regulate this sub-market, however we are concerned that customers using these high capacity products cannot accept the risk of de-regulation and the potential de-stabilisation of supply from eir. We partly agree with ComReg on the approach going forward but with an important change as discussed below.
    a. We agree with ComReg that the obligations for new supply etc. could be de-regulated immediately (this allows the SMP provider to trade commercially on new supply) as this is an obsolescent product with minimal new demand
    b. Obligations for Existing Supply – To prevent the de-stabilisation of supply to large companies, multi-nationals, the Emergency Call Handling Answering Service (ECAS) and Gov't a sunset of at least two years should be set for the SMP provider to continue to support existing services on the same regulated terms (service instances live at the date of the decision). After two years the SMP provider can take its own commercial choices for the service. Such an approach mitigates the risk of disruptive behaviour and provides a responsible transition from SMP regulation to no SMP regulation.

3. MI all speeds. We do not concur with this finding at all and are very surprised to see that ComReg believes eir's market share can be so low. Please see Annex A of this response for a detailed analysis of our concerns.
   a. We are also concerned with the assertion [5.21] that the Mobile Backhaul market is captive, and we take from this that this huge part of the market was not included in the study. We certainly do not agree that mobile backhaul should be excluded, ✂. We also not that Meteor's Access Network is part of a Netshare arrangement with Three Ireland which is controlled by Mosaic and not eir – please see our earlier discussion on this.
   b. In summary, we are very surprised and disagree with the view that the whole country should be deregulated in this sub-market.

Question 5: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 5

We consider it non-viable to dig out to customers to provide 2mbit/s circuit whether for TI or MI ✂. We would expect others to also make similar cost-benefit studies and reach a similar conclusion. The existing eir copper network is ubiquitous and technically proven to serve such a base efficiently and at incremental costs. We agree with ComReg's position to keep this part of the market regulated, otherwise the availability of the service will disappear from competitors to eir. Hence we would agree with ComReg's conclusion in the LB TI WHQA market.

Question 6: Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 6

We agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and costing accounting separation remedies as these are part of the modern set of regulatory remedies. However, these are only part of the regulatory tool kit and given eir's poor behaviour towards compliance as demonstrated in ComReg non-compliance notices and the eircom Regulatory Governance Model (commonly known within industry as the Styles Report); we are clear that stronger remedies are required. We consider that non-discrimination is essential and supported by very strong transparency regulation including <u>published</u> compliance statements by a Senior official of eir. We consider that the compliance notices should be published so that market players and provide their operational expertise to judge whether the compliance notice is valid. We believe this would have brought the Eircom Regulator Governance Model issues to the market sooner and avoided ComReg being caught in the long delay before such was eventually presented to industry. If exceptions are genuine, we then question as to why there any latent fear of publishing.

Absent functional separation the service should meet the minimum requirement of EOI and not the outdated COO mechanism that has failed the Irish industry to date (as indicated by the Styles report) and non-compliances published on the ComReg site. We consider this change is long overdue. This EOI should be for all aspects of the service, i.e. orders through the same (exactly the same) gateway, same provision and same assurance, same pricing etc. Given recent events of non-compliance notices and the RGM (Styles report) the monitoring of compliance should now be active and not ComReg's traditional passive approach of waiting for complaints.

Notification of service changes etc. should be along the lines of the procedures in the ComReg NGA Decision D03/13 of 31 January 2013 – updated with any improvements being drafting in the new Broadband consultation. Given the protracted issues negotiating SLAs with eir, we consider it appropriate that all new services should launch with acceptable and fit for purpose SLAs and such should form part of the formal notification process.

Question 7: Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

BT Response 7

We would like to offer the following comments to the draft Decision Notice.

a. Reference Appendix 8 Clause 5.3 – We do not agree with Market Assessment for MI WHQA that the market is effectively competitive for the reasons discussed throughout this response.
b. Reference Appendix 8 Clause 7.4(i) – We consider that negotiation' in good faith' poorly defined in the regulatory environment in Ireland and potentially not enforceable. Given events over the past few years there is now a requirement that that ComReg need to update this terminology to language that is enforceable.
c. Reference Appendix 8 Clause 8.2 – Whilst the proposals are helpful, experience suggests they will not work without set deadlines and we support ComReg recent regulation to set a 6 month deadline in the FACO Decision D05/15 for the industry to conclude agreement. We refer ComReg to the years it has taken to progress SLAs within the industry groups – and they are still not fully updated.
d. Reference Appendix 8 Clause 9 – Obligation of Non-discrimination – the remedy contains outdated text which the eircom Regulatory Governance Model in our view proves does not work. This whole remedy needs a complete update and we suggest that the NGA 31st January 2013 Decision is considered as the baseline and we would be hopeful that the new 3a and 3b Consultation should suggest further updates.

e. Reference Appendix 8 Clause 10 – Transparency is fundamental to making the non-discrimination regulation work, and again it is disappointing that the regulatory remedy for transparency is dated and does not address either Internal Reference Offers or Statements of Compliance. Without this it is virtually impossible to detect non-discrimination hence we are seeking either an Internal Reference Offer Scheme or the publication of Statement of Compliance. The text in ComReg Decision D03/13 31 January 2013 gives a good base for Statements of Compliance Regulation.
f. Reference Appendix 8 Clause 12 - Accounting Separation – The requirement is ineffective and basically incorrect. Accounting separation should be either historic or current cost accounting – HCA or CCA.
g. Reference Appendix 8 Clause 14 Sunset Clause – as highlighted in our response we agree with the proposal of a sunset for the TI high speed services, however 6 to 9 months is inconsistent with a capital based product where large customers are signed for 2, 3 and more years. The sunset needs to be 2 years minimum. We disagree with the proposal to de-regulate the MI market and thus the issue should not arise for the MI market.

Question 8: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

BT Response 8

We would like to offer the following comments to the Regulatory Impact Assessment:

a. With Reference to the various options for the 2Mbit/s solution we would suggest an Option 5 which is similar to option 4 but with modern regulatory remedies including EOI. Please see our comments to the draft decision as the draft regulatory remedies are at best dated and the eircom Regulatory Governance Report has indicated problems with their effectiveness. It's clear that the remedies need to include EOI and Statements of Compliance by a senior official of the Company. This should be familiar to Eir as such is already in place for NGA broadband services D03/13.
b. Reference clause 10.51 – as indicated in both our earlier responses and to the draft Decision, a 6 to 9 month sunset is too short for existing services as fixed contracts extend beyond this period and the actions of ComReg leave existing customers of eir at risk of their supply being de-stabilised through product withdrawals, price changes or other service changes. Experience of negotiating most things with eir is often protracted.
c. Reference 10.55 onwards and as per our previous answers we disagree with the de-regulation of Wholesale Ethernet services for the reasons already articulated.

Annex A - Infrastructure competition analysis

Background

1. This Annex provides additional evidence and discussion on the following.
    a. Market Realities - eir remain the only economic option to serve customer sites. For Ethernet, ✂
    b. The role of E-Net. We believe that the Consultation does not correctly assess the role and impact of the State Metropolitan Area Networks (MANs) operated through the Managed Service Entity (MSE) E-Net.
    c. Treatment of dark fibre. ComReg makes a prior assumption that purchases by operators of dark fibre are counted as equivalent to owned-access when assessed at the active layer. This has a parallel with how Ofcom undertook its data analysis in the UK but Ofcom was clear that at the conceptual level, this did not constitute owned infrastructure by the operator and that any SMP assessment using service shares at the active level ought to take this account[15]. We consider that ComReg's ownership approach leads to multiple counting of network existence distorting the totals and making network deployments look far more comprehensive than they actually are in reality.
    d. Business parks. We are most concerned that ComReg has taken an over reliance of presence on business parks for competitive presence more generally as better data are available for Parks. We consider this incorrect.

✂

The eir network enjoys three critical advantages in the leased line market

1. It is owned by an operator with a significant share of the retail market
2. It is by far the most extensive network, and offers near ubiquitous coverage
3. It is the sole serving network to a large percentage of the market geographies (where those geographies are understood by customer site, or by street.

If eir were not required to provide equivalent access to wholesale customers like BT, the impact would be

✂

[15] Ofcom has of course mandated a dark fibre remedy as an upstream substitute for the active service suggesting it is very much 'in the market'. Putting to one side whether or not this is an appropriate remedy, it is difficult to see why something as basic and fundamental as this would differ between the UK and Ireland.

The role of enet and treatment of dark fibre

In 2005 the European Commission approved State Aid for the Irish Gov't to develop the Metropolitan Area Networks to address competition concerns outside of Dublin. According to ComReg, (Clause 5.207 page 171 of the consultation) there are now 94 MANs located nationally outside Dublin and other major cities. This is especially important given the approach of ComReg to treat dark fibre as 'outside of the market'; it creates the misleading impression that commercial network operators have all built significant networks as the MAN infrastructure is being treated as owned by the commercial providers which is factually incorrect.

Taking this approach the Networks of competitors to eir are being considerably exaggerated outside of the Dublin area giving the impression of large deployments. The significance of this approach is completely lost in the study and the consultation. To show the inherent error of this approach it is instructive to view the actual physical picture of what is really in place and this highlights very clearly that infrastructure competition is not widespread; OAOs are heavily dependent on access to the networks of eir and E-Net.

We provide below examples of access infrastructure in Wexford, Kilkenny, Sligo and Letterkenny. They are unambiguous in demonstrating that both eir and E-Net are the critical infrastructure in these areas which extend way beyond BT's network for example.

Key To the Pictures

1/ Although the eir network is not directly shown it can be assumed they would have access to the PSTN duct network at the street level and have ubiquitous access to virtually all premises.

2/ Yellow Lines– this is the E-Net duct network although we do not know how much is fibred.
Blue – This is the actual BT Network ✂

3/ Explanation of the pins

Green Spot = eir Ethernet
Red Diamond = eir PPC
Orange Triangle = E-Net Ethernet

Wexford

✂

Kilkenny

✂

Sligo

✂

LetterKenny

✂

Business Parks

✂

ComReg has e carried out a fairly detailed analysis of 291 business parks nationally as it has been able to rationalise industry data with separate business information for these areas. ComReg has also stated that at least two operators are present in all of these business parks however the redaction of data means we are unable to determine whether these are largely been served by the same two physical networks. Whilst we consider the business Park Study helpful it, does not actually indicate the presence of actual networks to businesses outside of these areas. We note that the Central Statistics Office[16] in Ireland (2012) had 185,500 registered businesses and whilst many may not use leased lines it does challenge whether the sample size of business parks is significant. We therefore consider it inappropriate to try to extrapolate the business park findings to the wholesale national market. This is supported by the pictures show above of the locations of competitive networks as they do not reach most businesses including, Garda Stations (all eircom supplied for example), petrol stations and most other businesses and branches.

✂

Even within Dublin, it is apparent that there are very large areas which are not competitively served by alternative infrastructure as shown below.

Dublin – Showing Multiple Operators

16 http://www.cso.ie/en/media/csoie/releasespublications/documents/multisectoral/2012/businessinireland2012.pdf

✂

In reality it is clear to us that the Eir ubiquitous national access network provides eir with a very substantial ability to access business customers quickly and (on an incremental cost basis) more cheaply than other operators other than where limited on-net network is available. ✂. Where E-Net is present and has network close to the customer this would potentially provide a 2nd opportunity. ✂. This leads us to the conclusion that there are in reality one main player in Dublin which is eir and two main players in the market outside of Dublin which are eir and E-Net.

End

4. Cogent Communications Holdings Incorporated (Cogent)

Cogent response to WHQA consultation

Received by email 13 October 2016 from Cogent

Subject: Response to ComReg Document 16/69

Dear Mr Vidziunas

Cogent provides high speed Internet service to businesses in Ireland. While Cogent has its own long-haul network we depend on others to provide off-net connections from the business premises of many of our customers to our network.

We understand that large numbers of premises throughout Ireland, including Dublin, other cities and towns and rural areas only have a sole viable option for fibre access. We would be very concerned if fibre access to these premises was left to an unregulated monopoly. Therefore we disagree with the statement that "it is considered unlikely that any SP has SMP in the MI WHQA Market".

Because Cogent offers its customers interconnection speeds of 100 Mbps and above wireless services cannot substitute for terrestrial wired connections.

Yours sincerely,

Robert Beury

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Robert N. Beury Jr.
Chief Legal Officer
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5. Eircom Limited (Eircom)

eir

Response to ComReg Consultation Paper:

Market Review: Wholesale High Quality Access at a Fixed Location

Consultation and Draft Decision

ComReg Document 16/69

14th October 2016

DOCUMENT CONTROL

Document name	eir response to ComReg Consultation Paper 16/69
Document Owner	eir
Last updated	14th October 2016
Status	Non-Confidential

Executive Summary

eir welcomes the opportunity to comment on ComReg's market analysis and preliminary conclusions. In this submission:

- We agree that the markets for Modern Interface Wholesale High Quality Access (MI WHQA) and High Bandwidth Traditional Interface Wholesale High Quality Access (HB TI WHQA) are competitive and must be de-regulated.
- The analysis presented by ComReg, including market shares since 2013 is compelling in this regard and strongly suggests that the MI market has been competitive for some years now and had ComReg completed this review earlier unjustified regulation would already have been removed.
- We urge ComReg to move quickly to conclude this review and remove unjustified regulatory obligations with immediate effect. Given the delays in the conduct of this market review, some 8 years after completion of the previous one, and the competitive nature of the market, there is no rationale for any transition period.
- In the interests of even-handed and fair exercise of its powers, and to allow for the operation of proper competitive activity, ComReg should desist from the idea of a 6 to 9 month transition period. The imposition of such a delay is likely to mean that an already competitive market continues to suffer from over regulation and the consequent distortion up until the end of 2017 / early 2018.
- With regard to the Low Bandwidth Traditional Interface Wholesale High Quality Access (LB TI WHQA) market, we note that these services are legacy services in a market that is in decline. We expect the TI circuits to continue to migrate to MI equivalents as end-users recognise the benefits of more efficient, better performing and more cost effective broadband and MI equivalents and would look to ComReg to provide incentives for this to occur.
- eir has advised ComReg of its intention to retire the legacy MARTIS network and a detailed plan will be shared with ComReg and other stakeholders in due course.
- The market-led migration should be allowed to continue and therefore we do not agree that Bottom Up Long Run Average Incremental Cost plus (BU-LRAIC+) cost models should be developed further. The existing costs models are not fit for purpose and would require substantial resources from ComReg and eir to improve them. The significant effort required cannot be justified in the context of a declining market.
- To the extent to which ComReg is concerned by the risk of abusive wholesale pricing its goals can be effectively achieved through a safeguard wholesale price cap set at current levels. Migration incentives for end-users in legacy markets are in line with the European Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment[1]. Full migration to Next Generation Networks (NGNs) is both of benefit to consumers and economically efficient.
- ComReg has failed to consider the implications of its proposal to maintain Accounting Separation obligations. As we highlight in this response there is no justification for the continuation of separated regulatory accounts in respect of the Low Bandwidth (LB) TI market.

[1] http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

Response to Consultation

Question 1 Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

ComReg considers the following trends in chapter 3:

3.68 Having regard to the discussion in paragraphs 3.1 to 3.67 above, ComReg is of the preliminary view that the most notable retail trends since the 2008 Decision of potential relevance to the review of the WHQA LL market(s) are:

- *a) a significant shift from TDM and analogue LLs towards more modern interfaces such as Ethernet and xWDM technologies. However, there remains a significant cohort of end-users who remain on analogue and TDM based LLs.*
- *b) the demand for retail LLs from non-commercial sector, in particular, the public sector, has also grown since the 2008 Decision.*
- *c) an increase in the use of wireless P2P radio links to deliver retail LL services.*
- *d) retail LLs now being used to support an increased range of ICT services including cloud storage/computing, data, voice and other services; and*
- *e) There is evidence of increased availability of fibre infrastructure, not only from Eircom, but also a number of other SPs, with a large proportion of retail LLs being delivered by SPs on their own networks (rather than via wholesale LLs purchased from other SPs).*

eir agrees in principle that the aforementioned trends are some of the most notable retail trends of relevance to the Wholesale High Quality Access Leased Line (WHQA LL) markets as identified by ComReg. However, the market for leased lines services has changed dramatically since the last market review and while eir agrees that increased demand for Ethernet-based services, increased demand from the commercial sector, advances in wireless technology, the shift towards cloud-based service along with increased availability of competitor fibre are all important developments, there have been a number of other developments which have changed the way in which network solutions are now deployed. ComReg has failed to give such developments due consideration. In eir's view broadband substitution, the increased availability of dark fibre, market consolidation and the growing importance of global services have also played an instrumental role in reshaping the market. However, none of these factors change the validity of ComReg's conclusions on competition in the leased line market.

Broadband Access Technologies

A range of broadband technologies such as xDSL (x Digital Subscriber Line), FTTx (Fibre to the x) and DOCSIS are being leveraged by operators as a substitute to leased line services. In addition to fibre products designed for business there is extensive use of domestic broadband, particularly by small and medium businesses. The bandwidth such technologies deliver has increased to the point that downstream bandwidths of broadband services typically greatly exceed the bandwidths of copper-based TDM (Time Division Multiplexing) leased lines and asymmetric bandwidths provided by broadband technologies generally reflect the bandwidth usage required by businesses at branch locations. In addition, the cost base of these services is considerably lower than that of conventional leased lines. These factors have created the opportunity for broadband services adapted to meet the private data networking needs of businesses. This has happened in two ways:

1. Operators have specifically designed network services, typically Multiprotocol Label Switching (MPLS) type Internet Protocol Virtual Private Network (IP-VPN) services, which use the broadband services as an access technology, and
2. End-users, often assisted by their IT providers, have created virtual private networks over standard broadband Internet access products using secure technologies such as Internet Protocol Security (IPsec).

✂ These products were typically targeted at organisations with large branch networks such as the retail sector. Technologies such as DOCSIS have also been deployed by organisations such as Virgin Media to deliver a substitute for leased lines. eir also notes that Sky is now a significant provider in the retail SME market.

Availability of fibre infrastructure

The increase in the availability of fibre infrastructure has to be considered alongside the availability of extensive competitively supplied dark fibre in Dublin and the other large centres, Wholesale providers such as ESB Telecom, Aurora Telecom and enet offer dark fibre. ✂ Traditionally such networks would have been based on leased lines (LLs) but dark fibre is continuing to replace leased lines within the wholesale sphere.

In terms of scalability, an operator can carry hundreds of Gigabits of traffic on a single fibre pair resulting in low incremental costs for additional bandwidths. The availability of dark fibre infrastructure from one provider can therefore facilitate intensive competition among multiple operators both at a wholesale and retail level.

Market Consolidation

The market has seen the consolidation and expansion of a number of operators over the past few years which have had a significant impact on the competitive landscape.

- Vodafone has acquired Cable & Wireless, Complete Telecom and Interfusion. These acquisitions have positioned it strongly in the national and international data communications market. In addition, Vodafone’s joint venture with ESB (SIRO) will further expand Vodafone’s reach.
- Digiweb acquired Smart Telecom, a leading Irish provider of voice, data and media services to residential, government and corporate customers in 2009. This was followed by a merger with Viatel in 2013.
- enet have expanded their networks, including the purchase of a fibre network from Irish Rail and the Verizon fibre network in Dublin. In addition the owners of enet, Granahan McCourt, acquired Airspeed in 2014 and last year completed the integration of the Airspeed and enet networks.
- The acquisition of O2 by Three has created an organisation with significant ambition and capability in the business market. O2 have previously provided data communications services to Government bodies, the retail sector and others.

As a result the market is no longer characterised by a large number of small operators with a single large provider. Rather, it consists of a smaller number of larger players, each with their own network infrastructure and most of whom are extremely well resourced and form part of very large global multi-nationals.

Importance of global services

The significance of International data networks and operators is constantly increasing and recent growth has occurred among the multi-national sector and globalised Irish businesses, such as the Food and Agri-Business sector. In this context, many procurement decisions are made on a global basis and typically contested by global operators including BT, AT&T and Colt. As a substantially national operator eir is excluded from such bids.

eir notes that ComReg has recognised the move towards Ethernet and other modern interfaces, the increasing importance of cloud computing and data centres, the growth in demand from the non-commercial sector and the extent to which wireless solutions are now used in the provision of leased line services as important developments in the market. However, eir would add to this as follows.

Ethernet-based networks

eir agrees that there has been a migration towards Ethernet-based services and that in the LL market where business is once again growing, Ethernet is outstripping legacy products. For many years now, fibre-based Ethernet has been the primary delivery for symmetric business data communications services to customers' premises. eir notes that it would be expected that we will see further migration over the term of the review provided that the appropriate migration incentives i.e. price signals which encourage users to move to more efficient MI and broadband solutions exist. Of particular concern is the stance that ComReg takes with regard to the supposed importance of TI-based retail services. In addition the lack of familiarity of this customer base with Leased Lines would call into question the reliability of survey responses.

3.31 Figure 7 below (taken from the 2014 Market Research) shows that TI based retail LL services are the most common type of services purchased by businesses in Ireland with 6% of businesses purchasing Digital (i.e. TDM) LL services and 5% of businesses purchasing Analogue LL services. Only 3% of respondents indicated that they purchase Ethernet and other LL services. Thus, the 2014 Market Research further highlights the continuing importance of Analogue and TDM based (TI) LL services.

This conclusion would appear to be contrary to consumer preferences and the data presented in terms of circuit volumes for TI versus MI LLs. The data presented includes responses from 794 micro enterprises (1-10 employees), of which only 9% purchase leased lines and which are unlikely to require the higher bandwidths provided by MI LLs. As such their inclusion in the calculation of average purchases of each of the various types of LL services is likely to skew the data. Such users are unlikely to be a driver for demand in the retail LL market considering their costs and the fact that many are likely to view business broadband as sufficient to meet their needs.

Wireless Services

eir agrees that there has been an increase in the use of wireless point-to-point microwave links (P2P radio links) to deliver retail LL services. This can be seen in the extent to which HEAnet have opted for Fixed Wireless solutions in the provision of LLs for the 'Schools 100 Mb/s High-Speed' programme. ✂ Taking this as representative of wider trends within the market, wireless has been considered an effective substitute for a number of years and as such has provided a competitive constraint in the market over such a time. This is discussed in further detail in the response to Question 3. In addition, we believe BT, Virgin Media and Vodafone routinely use Fixed Wireless solutions in response to tenders. eir Retail also uses such wireless technology where fibre delivery is not practicable. It purchases such services on a wholesale basis.

Cloud Computing and Data Centre Consolidation

Cloud computing and the establishment of data centres has transformed the market. Data centres have become major telecommunications hubs and part of the core networks of telecommunications operators, both national and international. Currently there are 17 colocation data centres in Dublin with an additional colocation data centre in Galway and Cork respectively[2]. Because they are typically served by many operators with extensive fibre infrastructure, the provision of services into Data Centres is extremely competitive[3].

Non-Commercial Sector

With regards the growth in demand for retail LLs from the non-commercial sector, eir would like to note that in 2013 as part of a report commissioned by eir, Analysys Mason conducted interviews with a number of public sector organisations. The overarching message was that such bodies were technology agnostic, with all recognising the emergence of wireless technology as an alternative to fixed networks. Costs for microwave radio equipment have fallen significantly over the past few years whilst capability has increased and with geographic capability on a national scale as well as increases in competition at both the retail and wholesale level, Fixed Wireless provides a cost effective and economic alternative for public sector organisations.

Question 2: Do you agree with ComReg's assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

eir agrees that the retail markets consist of the LB TI Retail Market, the HB TI Retail Market and the MI Retail Market as defined by ComReg. In general products are substitutable where the bandwidth achievable is greater than or equal to the substituted bandwidth, which indicates that the separation of markets by bandwidth as well as whether the circuits are provided on legacy technologies or otherwise, is logical.

However eir does not agree with ComReg's views on Asymmetric business broadband and Dark Fibre. ComReg is of the preliminary view that Business Broadband (xDSL, FTTx, broadband over cable, mobile Fixed Wireless Access (FWA) and satellite) is not considered an effective substitute for retail LLs, based on the differing characteristics of broadband versus LLs and the emphasis and importance that end-users have placed on each. However eir is of the view that Business Broadband is an effective substitute for retail LLs, especially in the case of Small and Medium Enterprises (SMEs). eir feels that advances in copper technology and the expansion of fibre have enabled broadband substitution for some leased lines. The availability of broadband products has grown over the past number of years and the bandwidth they deliver has increased to the point that downstream bandwidths greatly exceed the bandwidths of copper-based TDM leased lines. These

[2] http://www.datacentermap.com/ireland/
[3] Examples include BT and eir

technologies are capable of delivering service bandwidths of 100Mbps and higher. While the key driver of these services was to deliver cost-effective high-speed consumer broadband, they have also been adopted as access technologies for business communications networks. In fact a range of broadband technologies are being leveraged by operators as a substitute to leased line services[4].

Business customers are keenly price sensitive. Over the last number of years RED C has conducted churn research for eir. The latest research included responses from a sample of 500 customers (of which 300 were customers of eir and 200 were customers of competitors) and covered the April – June 2016 period. The results indicated, as in previous reports, that Small and Medium Business (SME) churn is extremely price driven. SMEs typically require single site, single line and quasi consumer services and rarely purchase leased line services but rather broadband services. Even for multi-site networks, customers may have the option of using broadband products as an alternative to leased lines. In fact a high percentage of leased line services that have been substituted by broadband services serve branch locations of an organisation as opposed to the larger sites where leased lines are used. Typically the requirements at these locations are relatively simple. So the market is not as simple as ComReg portrays it to be.

The cost base of products based on business broadband is significantly lower than that of conventional leased lines and while these products do not always have the full characteristics of leased lines, their significantly lower costs have prompted many customers to adopt them as an alternative. In addition although products based on broadband may not have a Service Level Agreement (SLA) that is equivalent to that of leased lines, in many cases the effective SLA is enhanced through the use of 3G/4G Data links to act as a fail-over back-up if there is a problem with the primary service.

In particular the use of broadband as a substitute for a leased line should be considered in the face of the declining LB TI retail market and the migration incentive that exists for customers who could potentially switch to a retail broadband product, especially those end-users who do not require SLAs, symmetry etc. In addition some retail broadband products do offer SLAs which coupled with cheaper broadband prices will make these products an attractive prospect for a number of end-users. In short eir believes that business broadband is an effective substitute for LLs in the case of a cohort of end-users, especially at the retail level. This however does not detract from the competitiveness of the market, rather it indicates that the market is dynamic and the degree of competition is intense.

Passive infrastructure e.g. dark fibre, is not considered by ComReg to be an effective substitute for a retail LL due to the investment and expertise needed to provide retail LLs using such passive infrastructure. ComReg concludes that, due to the fact that end-users need to provide additional inputs as well as additional operating resources, dark fibre cannot be considered an effective substitute. An analysis of end-users suggests that this is only suitable for very large, sophisticated users. eir is of the view that although this may be true at the retail level, this is certainly not the case at the wholesale level where purchasers of wholesale LLs may prefer to use dark fibre to build out their networks. This point is covered in more detail in our response to Question 3.

eir agrees that EFM (Ethernet First Mile) is an effective substitute for retail Ethernet LLs. eir would like to add that such products may be especially attractive to purchasers of LB TI LLs who value product characteristics such as SLAs, symmetry etc.

eir would like to reiterate the extent to which P2P radio links are an effective substitute for wired retail LLs. The use of Fixed Wireless in the provision of retail LLs cannot be underestimated. The availability of low-cost wireless Ethernet technology has had a significant impact on the leased line market. This technology delivers point-to-point symmetrical connectivity at bandwidths of up to 800

[4] Examples include eir, Vodafone and Virgin Media

Mbps. The reduced cost has led to the technology being deployed as an access mechanism for data communications networks. Wireless services have been widely deployed to deliver retail and wholesale leased lines across all geographies and not just in urban and suburban areas. Indeed, wireless technologies have proved particularly competitive in rural areas because, unlike fibre-based services, their cost does not increase significantly with the distance of the link. Other wireless operators have focussed on the delivery of services in urban areas[5].

As discussed in Question 1, the extent to which wireless solutions constitute a substitute for conventional leased lines can be seen in the results of the tenders under the HEAnet Post Primary School Framework ✂. eir has conducted additional analysis in this regard on the 2013-2016 “mini competitions” run by HEAnet and the results of this are presented in response to Question 3.

Question 3: Do you agree with ComReg’s preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eir agrees with ComReg’s preliminary conclusion that the Relevant WHQA Markets are national in scope. However eir has a number of concerns in relation to the product assessment of the Relevant WHQA Markets.

ComReg does not consider that Wholesale broadband products are an effective substitute for Wholesale LLs as there are significant differences in terms of product characteristics, pricing, as well as the intended use of these services by end-users. Although business broadband products do not represent a complete substitute at the wholesale level, eir is of the view that they are a credible alternative in some circumstances and that this is most definitely the case at the retail level in many instances, as previously discussed. In its analysis ComReg should be aware of the fact that competitive constraints may not arise in the same manner in the retail and wholesale markets as each market operates in a distinct manner and is characterised by a range of different market players and products which cater to various end-users and their corresponding preferences. This is of note especially in the context of the use of dark fibre in the provision of downstream leased line products. However eir agrees that both the wholesale and retail markets are competitive and that they will become even more so in the coming years. The level of substitutability of business broadband only serves to increase the level of competition within these already highly competitive markets.

In ComReg’s view dark fibre services are not considered an effective substitute at the wholesale level as there are substantial capital and operating costs associated with using dark fibre to provide an active LL product. ComReg also makes the point that wholesale volumes of Dark Fibre services are low enough that it is unlikely that wholesale LL purchasers would switch in the event of a price increase. eir does not agree that dark fibre does not constitute an effective substitute in some parts of the market. Wholesale providers such as ESB Telecom, Aurora Telecom and enet offer dark fibre services enabling a range of providers to compete for the provision of business connectivity services and the provision of dark fibre has enabled alternative operators to construct their own networks. In Dublin and the other large centres in particular, extensive competitively supplied dark fibre is available and that is one reason why the market is so competitive.

A key aspect to dark fibre infrastructure is the scalability it offers. Technology allows an operator to carry hundreds of Gigabits of traffic on a single fibre pair. The incremental cost of additional bandwidth is very low. This means that dark fibre infrastructure from one provider can result in

[5] For example Host Ireland provides symmetrical wireless services at bandwidths up to 1Gbps in the greater Dublin area

intensive competition among multiple operators both at a wholesale and retail level. In relation to leased lines, self-supply by purchasing dark fibre provides a cost-effective way to deliver point-to-point connectivity.

ComReg is of the view that the relevant markets are national in geographic scope. eir strongly agrees and eir notes that the use of Fixed Wireless solutions for the provision of leased lines has been a major development in this regard. The cost-effectiveness of wireless services has created a competitive alternative to fibre-based services in all geographies. Indeed, they are the most economical solution in a great number of cases, as can be deduced from their prominent use in tendering for and winning bids under the 100Mbps Schools Broadband Programme.

There are over 700 post primary schools in the Republic of Ireland. Over the past 3 years, HEAnet have been running “mini competitions” in which operators who successfully qualified for the “Framework”, were asked to submit bids for 100Mb circuits. Contracts were awarded for a three year term. open eir participated in the last Framework. That three year Framework ran from 2013 to 2016

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Table 2 below shows the market share for each operator for each county. We have highlighted those market shares in excess of 25% in pink. From the results it is clear that ✂ has the highest market share across the country with 33% of circuits; ✂ have 29% market share; ✂ have 19% market share and eir a 12% market share with ✂ and ✂ having 4% each. eir is ranked 4th in national market share.

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Table 3 shows the number of counties in which each operator has a share greater than 25% of the circuits to post primary schools. It can be seen that the total of these “>25% market share(s)” is 43, considerably in excess of the 26 counties. This is because a number of counties have more than one operator with greater than a 25% market share.

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✂ have in excess of 25% market share in 18 of the 26 counties. ✂ have greater than 25% market share in 11 counties while ✂ have in excess of 25% market share in 9 of the 26 counties and eir has greater than 25% market share in only 5 counties.

We know that the ✂, ✂ and ✂ solutions are based on wireless technology and that all the other operators bid based on a fibre solution. Table 4 below is based on Table 2 and shows the market shares for Fibre and Wireless for each county. Overall, wireless and fibre technology have broadly equivalent market shares, which in eir’s view is representative of the level to which wireless solutions constitute an effective substitute for wired leased lines.

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Dublin County

Current regulation defines any circuit within a competitive node (intra-node) as being a Terminating Segment and therefore subject to regulation. The data set provides details across 51 exchanges and 222 schools. Table 5 below provides a summary of the circuits across the various exchanges and the winning operators

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Table 6 below provides a summary of the market share of each operator for each exchange area in Dublin.

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Those operators with a market share of more than 25% in any one exchange are highlighted in pink. Overall, ✂ has a 72% market share, followed by ✂ with 11%, ✂ at 9% and eir at 5%. Wireless operators account for 74% of the Dublin market.

Table 7 below is based on Table 6 above and shows the number of exchange areas in Dublin in which each operator has greater than 25% market share. The total of 65 is greater than the 51 exchanges areas because some exchange areas have more than one operator with a market share in excess of 25%. The table shows that ✂ has greater than a 25% market share in 42 of the 51 exchange areas, followed by ✂ with 9, ✂ with 7 and eir with 4.

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The data provides conclusive evidence as to the level of substitutability between wireless and wired retail LLs. Additionally when taken as a representation of demand in the market and eir's position within such it shows that eir does not possess market power in Ireland as a whole and definitely not in Dublin. It shows the strength of competition across all of the counties of Ireland. It shows that eir has a ✂ market share across Ireland, and a ✂ market share in County Dublin. It demonstrates how eir has approximately ✂ of the market share of Digiweb (a wireless provider) and ✂ of the market share of enet. eir's low market share across urban and rural communities (both commercial and residential) demonstrates that eir has not had Significant Market Power (SMP) for some time and that the sunset clause being proposed by ComReg is completely inappropriate and unwarranted. The case for immediate de-regulation is clear.

Question 4: Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eir welcomes ComReg's assessment of the MI WHQA market and its proposal to remove existing ex-ante regulation in this market. However eir has a number of concerns relating to the LB TI WHQA and HB TI WHQA markets and also strongly objects to the proposed 6 to 9 month sunset period that ComReg had proposed for the withdrawal of existing regulation, which is unnecessary, unreasonable, disproportionate and contrary to the interests of consumers.

In its analysis ComReg has presented market shares for each of the relevant markets for 2013, 2014 and 2015. It would follow that a retrospective view of effective or otherwise competition within the markets as defined by ComReg can be considered over this timeframe.

1. The Low Bandwidth Traditional Interface Wholesale High Quality Access Market (the LB TI WHQA Market)

   While eir notes ComReg's intention to impose regulatory remedies in the LB TI WHQA Market, eir considers that ComReg has not paid due consideration to the nature of the market which is characterised by declining demand. eir's increasing market share within this context would indicate that the second largest provider of such services, BT, appears to be exiting the market and is likely to be migrating customers to other services, such as EFM, which may be considered a substitute for lower bandwidth LLs. This may also provide a reason for the more slowly-eroding base of customers for eir. The proposed imposition of cost based pricing obligations using a BU-LRAIC methodology would only serve to exacerbate this issue and further slow the rate at which customers migrate.

While there remains an installed base of TI LL services, they are very rarely sold now, and, as a result, eir is no longer investing in this technology. These lines are outdated in terms of the bandwidth they deliver and are not considered cost effective business transmission solutions. They are retained at present largely due to customer inertia and because customers are not ready to update internal networks and customer premises equipment (CPE). Over time eir expects to see more customers making the decision to migrate away from such legacy services. To ensure that this is done efficiently incentives to migrate must remain. ComReg has previously recognised this in its Decision on current generation wholesale access services (D03/16) where it acknowledged that *“There is also a risk that setting wholesale prices that undervalue the active assets would discourage migration from a declining wholesale FRA and PRA service to newer and more efficient replacements (e.g., IP-based solutions). Setting prices below the efficient level of costs may also undermine investment incentives in newer technologies that are capable of providing similar services. This risk is compounded if the resulting prices are so low that they result in the stranded investments by other wholesale operators trying to compete with Eir in this market.”* We would urge ComReg to use the same approach here.

2. The High Bandwidth Traditional Interface Wholesale High Quality Access Market (the HB TI WHQA Market)

As of 2015 there were less than 250 existing HB TI WHQA LL circuits in Ireland. Over the past few years circuit volumes and demand in this market have been declining, with a 23% decrease in the number of LLs between 2013 and 2015. Demand in this market is expected to continue to decline over the period of the review with users migrating to more modern technologies to meet their bandwidth needs. eir cannot be considered an operator with SMP in this market for the 2013-2015 period referenced. As per SMP guidelines undertakings with market shares below 25% are unlikely to enjoy a single dominant position on the market. In addition, according to ComReg’s market analysis, BT is considered the largest provider of services in this market with a market share that has remained relatively stable since 2013. The inclusion of figures relating to this market since 2013 would indicate that ComReg consider that competition in this market has been in existence since at least such a time.

The last leased lines market review in Ireland was in 2008. In the review ComReg identified the relevant product market as the market for the Wholesale Terminating Segments of leased lines. eir was designated as having SMP in this market and as such SMP obligations were imposed. With the subsequent greater delineation of markets (which is consistent with eir’s experience of the market) eir is subject to SMP obligations in a market where it does not in fact have SMP and in which there has been effective competition since at least 2013 and probably earlier, This can be seen in the ratio of eir’s total revenue as a proportion of the calculated “LL & Managed Data Revenue” published by ComReg in its Quarterly Reports, which is presented in the context of the MI WHQA market below. As such the imposition of a 6-9 month transition period proposed by ComReg would be neither proportionate nor appropriate. Instead all existing regulations should be withdrawn as of the effective decision date rather than just certain existing obligations as proposed by ComReg in para 2.12.

3. The Modern Interface Wholesale High Quality Access Market (the MI WHQA Market)

   Based on the market shares presented as well as the developments in the wholesale market such as *“increased infrastructure based competition via enet’s managed Metro Area Networks (‘MANs’) on which other SPs have interconnected and taken duct and dark fibre access”* (para 2.37)[6], this market has been effectively competitive since at least 2013.

   From Q1 2009 to Q3 2012 the ratio of eir’s total revenue as a proportion of the calculated “LL & Managed Data Revenue” published by ComReg in its Quarterly Reports fell from ✂ to ✂ indicating that eir had far less market power in 2012 than it had in 2009, eir is of the view that this serves as a suitable proxy for the measure of competition within the WHQA market and that along with the market shares presented by ComReg, demonstrates that the market has been effectively competitive for a number of years now. The level of competition within the market over the last few years is also evident in the HEAnet winning bid data presented in Question 3. When taken as representative of the competitive landscape of the total leased lines market, it demonstrates that eir does not possess market power in Ireland and has not done so for many years. According to the data eir has a ✂ market share across Ireland, and a ✂ market share in County Dublin. eir’s low market share across urban and rural communities (both commercial and residential) demonstrates that eir has not had SMP for some time. As such the proposed transition period is not necessary and is entirely unjustified. In fact if ComReg had conducted the review in a timely manner, deregulation would have already occurred, and this delay on the part of ComReg has resulted in eir continuing to suffer unwarranted regulatory restraints in a competitive market. Any imposition by ComReg of a sunset period would serve simply to extend and exacerbate this unacceptable situation and further distort the market.

   In terms of SMP, market shares are only one such indicator of market power. In addition, the presence of economies of scale/scope as well as easier access to capital markets should also be taken into consideration. ComReg should also not ignore the State investment which has enabled enet to expand its business in the way it has. eir also notes that many of its competitors compete on a global scale and are extremely well resourced. In addition the significance of international data networks and operators is constantly increasing. Growth has occurred over the last number of years among the multi-national sector and globalised Irish businesses. In this context, many procurement decisions are made on a global basis and typically contested by global operators including BT, AT&T and Colt. Newer significant market entrants such as Vodafone and Liberty Global (Virgin Media) are also well placed.

   As noted above ComReg proposes to fully de-regulate the MI WHQA market following a transition period. From the date the Decision is made it is proposed that the wholesale access and price control obligations be maintained in respect of HB TI and MI WHQA markets. It is welcome that onerous and unfair obligations such as the Margin Squeeze Test (MST) will fall away on the date the Decision is made. However, as outlined in some depth elsewhere in this response, eir does not agree that it is appropriate to maintain any obligations beyond the Decision date.

   We urge ComReg to move quickly to conclude this review and remove unjustified regulatory obligations with immediate effect. Given the delays in the conduct of this market review, some 8 years after completion of the previous one, there is no rationale for a transition

[6] 28 MANs were completed under Phase I In 2009 the company was awarded the Phase II MANs. In 2010 enet completed the handover process of Phase II MANs.

period. Market players are well aware of the reduction in eir's market share as demonstrated by ComReg's own data and would not be surprised with its conclusions. They have had long enough to plan for the future, and it would be entirely inappropriate on the part of ComReg to extend its delays, and allow other market players to enjoy continued regulatory advantage at eir's expense in markets that ComReg have found to be competitive, and that, in reality, have been competitive for many years already.

Regulation 27(6) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, obliges ComReg to carry out a new market analysis within 3 years from the adoption of a previous measure. Regulation 27(6) reflects and gives effect to the provisions of Article 16(6) of Directive 2002/21/EC (as amended by Directive 2009/140/EC) and is thus an obligation of EU law. The obligations set out in ComReg Decision D06/08 were imposed on 22 December 2008 (almost 8 years ago) and, accordingly, should have been reviewed not later than 21 December 2011. While Regulation 27(6) provides that this 3 year period may be exceptionally extended for up to 3 further years in certain circumstances and subject to certain conditions, eir is not aware of such extension having been proposed by ComReg at any stage and, even if there had been such an extension, the extended period would have expired not later than 21 December 2014. As such ComReg should have concluded by 2011 and certainly should have been no later than 2014. As noted earlier in this response the evidence demonstrates that the market was effectively competitive at least in 2013 and probably earlier. If ComReg had fulfilled its duties and undertaken at least one forward looking review in the 2011 – 2014 period it would have been clear that the process to de-regulate the relevant markets should have commenced a number of years ago.

Regulation 27(3) requires that "Where the Regulator concludes that a relevant market is effectively competitive, it shall not impose or maintain any of the obligations referred to in paragraph (2). In cases where an undertaking had previously been designated as having significant market power in such market and such obligations already exist, the Regulator shall, after giving reasonable notice to any parties which it considers to be affected by such withdrawal, withdraw such obligation from the undertaking concerned."

We do note the requirement to give reasonable notice but that period of notice would normally start with the previous market review. The hiatus in reviews in this market indicates that this has not been done. However we would submit that both the availability of ComReg's data on competition in this market and the period of time before ComReg intends to make its decision in this market review would constitute reasonable notice. As such we do not believe there should be a 6 to 9 month transition period as proposed by ComReg. This would effectively result in a competitive market being subject to counterproductive ex-ante regulation at least up until the end of 2017 and perhaps beyond if ComReg is further delayed. Furthermore the requirement to give **reasonable** notice has to be considered in the context of the specific markets. The relevant markets have been effectively competitive for some years and it is therefore **unreasonable** to maintain any obligations beyond the Decision date.

The proposed imposition of this "sunset period" by ComReg is highly unusual, if not unprecedented, in the context of a market that has been effectively competitive for some years. In any event this consultation has effectively served notice of the withdrawal of regulation from the relevant markets so additional time beyond the Decision is not justified. eir's competitors have benefited from the over-regulation of eir in recent years and it would be inappropriate and punitive on eir to perpetuate an uneven playing field.

Question 5: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

In the context of the LB TI WHQA market ComReg is of the view that there is a range of potential anti-competitive behaviours that eir could engage in absent regulation including;

- Excessive wholesale pricing
- Vertical leveraging of market power into the downstream retail LL market (refusal to supply, information asymmetries, discriminatory provisioning and assurance practices, unnecessary tying / bundling).
- Horizontal leveraging and exclusionary practices

ComReg also makes reference in 7.8 to the fact that competition problems may arise where a SMP operator seeks to "exclude or delay investment and market entry in the LB TI WHQA Market (and ultimately downstream markets)". eir does not agree that this in addition to vertical or horizontal leveraging is of any particular relevance in a declining market, where by its very nature market entry is limited and the prospect of new investment is highly unlikely. ComReg itself states that

6.42 ComReg's preliminary view is that as the LB TI WHQA Market is declining with trivial numbers of new circuits being ordered, there is no incentive for alternative SPs to invest in expanding their infrastructure in this market as any such investment is likely to be stranded

The sole concern then would become pricing. eir is of the view that a safety cap at current price levels would provide an appropriate remedy if there is considered to be an issue, which eir would submit there is not.

ComReg concludes that the full range of existing remedies should be maintained with the one exception of the Margin Squeeze Test (MST) which is to be removed. eir is of the view that in particular the proposed pricing remedies are disproportionate in the face of a market characterised by declining demand. This is discussed in the context of Question 6.

Question 6: Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Obligations (other than price and accounting):

ComReg proposes to regulate LB TI WHQA Partial Private Circuits (PPCs) – comprising End User Link and Transport Link (CSI or ISI). ComReg proposes that, with the exception of the MST, current obligations will be retained in respect of PPCs. eir agrees that the MST obligation should be removed. We also agree that the continued regulation of analogue and digital leased lines would be disproportionate as access seekers can utilise PPCs to support the delivery of a leased line service.

ComReg intends to maintain the Equivalence of Outputs ('EOO') standard – "*8.105 ComReg considers that this EOO standard is appropriate in the context of LB TI WHQA products, services and facilities, particularly given that the existing provision of LB TI WHQA products, services and* *facilities is largely over a legacy network and legacy systems. ComReg considers that adopting an Equivalence of Inputs ('EOI') standard would not be proportionate at this time. In particular, the OSS and wholesale interfaces that are in place and used for the provision of Eircom's suite of existing legacy LB TI WHQA products, services and facilities have already been developed. These OSS and wholesale interfaces would require likely substantial investment in order to upgrade or replace them to meet an EOI standard. This would not be justifiable or proportionate in the circumstances of the LB TI WHQA Market as it would likely involve costly systems re-development, the incremental benefits of which would not likely be substantial.*" eir agrees that it would be disproportionate to impose an Equivalence of Inputs (EOI) obligation taking into account the costs of amending existing systems and processes relative to the potential benefits in a market with declining demand and no prospect of new market entry.

Pricing and Accounting Separation:

The imposition of obligations in respect of Price Control and Accounting Separation has to be considered in the context of a declining market. Of particular concern is the approach taken to Price Control.

*8.152 ComReg is required to consider whether price control obligations are appropriate for the above and, if so, what type of price control would best meet the regulatory objectives to **promote effective competition** for the ultimate benefit of end-users.*

In our view ComReg has applied the wrong test where it seeks to encourage market entry in a legacy market that will cease to exist. Prices act as a signal to consumers and producers with consumer preferences for a product or service determining how much they are willing to purchase at a given price. In this manner, price controls can encourage inappropriate economic activity. There is much discourse around the effect of access pricing on investment incentives for new technologies as well as on the migration from old to new technologies. Regulation can affect the adoption of innovation especially in highly regulated industries. As network infrastructures are expected to be a strong contributor to economic activity and growth, a fast transition from old network technologies to new ones is a key challenge for policy makers. As such full migration to NGN is both socially and economically desirable.

The European Commission also sees a switch off of the copper network as a means of providing proper investment incentives to operators[7]. Recital 3 refers to an analogy – copper;

The present Recommendation seeks (i) to ensure a level playing field through the application of stricter non-discrimination rules, (ii) to establish predictable and stable regulated wholesale copper access prices, as well as (iii) to increase certainty on the circumstances which should lead to the non-imposition of regulated wholesale access prices for NGA services. Increasing legal and regulatory predictability in this manner should further help to trigger the investment needed in the near to medium-term future.

Declining demand, and its implications for regulation, is an especially prevalent feature of telecommunications markets, which are characterised by technological development and accompanying innovation, as well as changing consumer preferences. Demand for certain services, which utilise the fixed telecommunications network appear to be in a permanent state of decline. Such decline can be identified in the sense that it is not temporary but rather has been sustained over a number of years and is expected to continue and that it is not isolated to specific geographic areas. In the face of such decline it is important to consider how best to balance short-term allocative and long-term dynamic efficiency goals.

[7] http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

The traditional pricing objectives in existing or emerging markets will include the following;

(a) Cost recovery: according to which the maintenance of investment incentives in sunk costs on the part of the regulated incumbent, requires a commitment by the regulator to allow the recovery of future costs.
(b) Efficient entry: according to which prices should be at a level which encourages efficient entry and discourages inefficient entry.
(c) Consumer welfare: according to which end-users are not subjected to price levels which constitute exploitation by a monopolist

This is broadly in line with the considerations in para 8.11 that ComReg has stated it has taken into account throughout its approach to specifying and implementing remedies, namely;

(a) the investment made by the SMP operator which ComReg considers relevant and allows such an operator a reasonable rate of return on capital employed, taking into account any risks involved specific to a particular new investment network project; and
(b) ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition and maximise consumer benefits

In addition ComReg identifies the following competition problems (para 7.8) that could arise in the LB TI WHQA market in the absence of regulation when an SMP operator seeks to;

- *Exploit customers or consumers by virtue of its SMP position*
- *Leverage its market power into adjacent vertically or horizontally related markets with a view to foreclosing or excluding competitors in downstream and/or upstream markets; and*
- *Exclude or delay investment and market entry in the low bandwidth TI WHQA Market (and ultimately downstream markets).*

However in a market facing declining demand, such as the LB TI WHQA market, the issues relating to market entry and investment in that market are less of a concern. Assuming that economic regulation remains appropriate in the declining market then the regulatory approach may need to adapt to take into account that in such a scenario traditional objectives are supplemented by 'transitional' goals and objectives and as such due consideration should be paid to the following;

- Distributional effects: Declining networks can create both costs and benefits and regulators may need to consider how best to distribute these among market participants e.g. in the case of eir, alternative operators have gained to the extent that they have been able to displace business from eir in the transition to MI WHQA markets. However a range of other parties potentially benefit from the changes including non-captive customers, new service providers, equipment suppliers and providers of alternative financing services.
- Investment in NGNs: Encouraging investment in Next Generation Access networks (with their new prospects for infrastructure competition).
- Efficient migration: ensuring a desirable transition by creating appropriate incentives on the part of operators and consumers to switch. This will include providing appropriate incentives for both incumbents and access-based entrants to switch customers from legacy products to new products to limit the period of inefficiently-duplicated running of two access products

In the case of the declining LB TI WHQA market, real market impacts should therefore be assessed. In this regard it is important to consider the effect that an obligation of cost orientation would have on the market. This would particularly be the case if this obligation is interpreted as a control setting prices at the historic cost of a fully depreciated obsolete platform. Where prices are being maintained at a particular level which would not otherwise hold in the absence of such regulation, artificial demand is being created in a market where the products supported are at end-of-life. The normal retail pricing strategy for such services would be to increase prices to encourage migration to modern products that deliver greater stability and value. In the particular context of the LB TI WHQA market there are now many alternatives available to the retail end-user prepared to upgrade their (equally obsolete) CPE. These include wireless solutions, fixed broadband solutions, and symmetric Ethernet solutions – all of which offer better value in terms of cost per Mbps than LB TI WHQA services. So, ComReg must resist any temptation, in the context of maintaining an SMP designation in a withering market, to artificially extend the life of service that is no longer supported by vendors and is only sustained by cannibalising retired equipment for spares. eir has recently written to ComReg to flag the intention to retire a range of copper delivered services. Following this eir will shortly announce that no new sales of LB TI WHQA services will be supported at the retail or wholesale levels. A forced price reduction for the PPC variants of LB TI WHQA service would therefore send entirely inappropriate economic signals at this time.

If all remaining end-users are captive this would suggest that in a market where the complete suite of regulatory obligations apply and will continue to apply over the term of the review, there would be an expectation that alternative operators would remain within or even enter the market to capture such demand. However, eir agrees with ComReg that there is very little likelihood that any operators will enter the market during the course of the review and evidence in para 6.26 suggests that BT appear to be exiting the market in anticipation of further declining demand and end-user migration.

In addition ComReg states as follows;

5.173 It should also be noted that none of respondents to ComReg's Qualitative Questionnaire indicated that they are considering launching a new TI WHQA LL services over the period of this market review.

7.27 ComReg considers it unlikely that existing Access Seekers would expand the network footprints given the risk of non-recovery of investments in a declining market.

The concern then becomes less about access and more about protecting users without creating an incentive for users to continue using legacy products. In addition the continuing use of the standard pricing approach in the telecommunications industry has been called into question in the context of non-temporary decreasing demand for fixed line services. Long Run Average Incremental Cost (LRAIC) reflects the level of costs that would occur in a competitive or contestable market. Contestability ensures that existing providers charge prices that reflect the costs of supply in a market that can be entered by new players using modern technology. However in the face of declining demand this logic breaks down. This is because, on one hand, efficiently incurred sunk costs face the risk of not being recovered and on the other, LRAIC based prices imposed on legacy technologies would disincentivise migration to new technologies. Given this, we propose that a price cap at current price levels would provide a better balance between allocative and dynamic efficiencies, which should be of key concern to ComReg at this particular juncture. This method would also benefit from increased ease of application as opposed to a strict cost-orientation pricing obligation based on bottom up cost models.

ComReg considers five options before proposing that cost orientation informed by cost modelling is the preferred approach. ComReg's reasoning is circular in that it dismisses various approaches on the basis that ComReg already has a cost model in its possession. ComReg's proposed approach is flawed from both a methodological and a practical perspective. As highlighted above it is not appropriate to rely on a BU-LRAIC+ costing methodology in a declining market. BU-LRAIC+ is designed to encourage efficient investment and market entry. However, the promotion of efficient entry has no economic basis given that, as ComReg admits, there are no prospective entrants in the LB TI WHQA market. BU-LRAIC cost models provide steady-state costs assuming full demand and full asset replacement. However, in a setting of declining demand, such as the one eir is facing, an efficient operator has only a limited ability to adjust capital (by reducing asset replacement or cannibalising retired equipment).Therefore we do not think that these cost models reflect the forward looking path of costs of an efficient operator in a context of declining demand and worryingly, this approach risks reducing eir's ability to recover efficiently incurred sunk costs. As such, continuing to impose cost orientation based on a BU-LRAIC costing methodology is detrimental to investment and ultimately also detrimental to end-users, which should be of concern to ComReg.

From a practical perspective we note ComReg's observation at paragraph 8.173 that "*This cost model is considered by ComReg to be a robust and effective BU-LRAIC+ cost model that is representative of appropriate and efficient costs incurred by Eircom*." We disagree that the current BU-LRAIC+ cost model is representative of efficient costs incurred by eir, given that the model and its recent update by ComReg takes no consideration of the issue of recovery of sunk costs in the currently declining demand conditions. In effect, ComReg's update of this cost model was primarily limited to re-optimising capital on the basis of updated service volumes. We therefore do not believe that the cost model is fit for purpose, given that it does not model the costs efficiently incurred by an operator in a context of falling volumes.

Recognising that PPCs are legacy (and not properly catered for by BU-LRAIC) ComReg proposes to use a modified current cost accounting (CCA) approach to asset valuation. "*8.217 Manufacturers' supply chains have over time migrated to next generation technologies and no longer support legacy systems. In this context ComReg is of the view that a modified current cost approach should be adopted. This approach considers the cost trend for legacy infrastructure and extrapolates that forward from the last supply price provided by suppliers prior to market exit. Using the last available cost and the extrapolation based on noted cost trends, it is possible to determine equivalent market costs for comparable technology assets that would apply currently.*" We disagree with this approach given that ComReg's primary concern should be to ensure that efficiently-incurred sunk costs are recovered and that incentives to capital maintenance are preserved to the benefits of end-users and not to provide an efficient modern equivalent capital level which can incentivise entry. ComReg's proposed approach based on an extrapolation from cost trends results in capital levels that are arbitrary and has no sound economic justification or basis, given that the problem it seeks to address is non-existent as there are no prospective entrants.

Nor is it appropriate to develop a top-down model because the inputs cannot be relied upon as highlighted by ComReg at paragraph 8.171: "*Given LB TI WHQA product volumes are in slow decline and costs associated with the residual numbers of these products may be non-representative. Costs associated with LB TI WHQA services infrastructure contained in the accounting records of SPs can also be distorted by a number of factors, including:*

(a) *Low product volumes in conjunction with high residual costs can indicate unrepresentative unit cost profiles;*
(b) *Assets directly associated with TI LL infrastructure may be fully depreciated also distorting the average unit costs for TI LL;*
(c) *Costs associated with small numbers of TI LL may become so immaterial relative to other business activities of SPs that the business integrates the costs and revenues for such products into the activities of more material product groups; and*
(d) *The inability of SPs to establish current cost values for legacy infrastructural elements which are no longer supplied by manufacturers.*"

If ComReg wishes to rely on a cost model we see little option but for ComReg, working with eir, to build a new model if it is possible to identify an appropriate and workable costing methodology. Developing a cost model from first principles would consume substantial resources from eir and ComReg and the consumption of such resources is questionable against the backdrop of a legacy market in terminal decline.

eir notes ComReg's view (8.196) "*There is also a need to balance a number of objectives, including the promotion of competition; incentivising infrastructure investment; ensuring appropriate cost recovery for Eircom; and ensuring the interests of end-users.*" Whilst we would strongly question the logic of maintaining an objective to incentivise infrastructure investment in the LB TI WHQA market, we believe that the other objectives can be efficiently achieved through a safeguard price cap.

With regard to the proposed Accounting Separation obligations eir currently publishes a Wholesale Leased Line Statement in its Regulatory Accounts, which details the Revenues; Costs and Mean Capital Employed for the following main services; Wholesale Ethernet Leased Lines; Leased Lines > 155mb ; Leased Lines < 155mb; Partial Private Circuits > 155mb; Partial Private Circuits < 155mb and Leased Line Connections.

ComReg does not provide any detail in the consultation document regarding its proposals to maintain accounting separation obligations however it appears to be ComReg's intention that eir is obliged to continue to prepare Separated Accounting and Cost Accounting data for the LB TI WHQA market and for Wholesale Ethernet Interconnect Links (WEIL). It is not clear from the proposed direction as to where this information is to be provided. D08/10 defines Separated Accounts; Additional Financial Statements and Additional Financial Information. eir proposes that these disclosures are provided as part of the unaudited Additional Financial Information file submitted privately to ComReg on the 31st January each year. eir proposes that LB TI WHQA Services and the WEIL services are included in the published HCA (historical cost accounts) Separated Accounts under the Wholesale Other Residual Regulated Market.

The justification for not breaking these out in the Separated Accounts is that it will prove costly and problematic to achieve the "Presents Fairly" audit opinion with this level of materiality at the market level, given current revenues and the pace of decline. The LB TI WHQA market is a subset of the current "< 155mb Leased Line" and PPC disclosures. The overall revenues for the year ended June 2015 for the "< 155mb" PPC/Leased Line were ✂ of which ✂ was sold to eir's subsidiaries and downstream Retail business. PPC <155mb external revenues decreased from ✂ to ✂ between the financial years 2013/14 and 2014/15.

In summary given the rapid decline in these products and the fact that the active elements of the relevant network platforms are largely depreciated we question the value of publishing this data. eir does not accept that HCA Cost Accounts are an appropriate basis for setting prices for legacy Wholesale products.

In terms of the proposed maintenance of the Accounting Separation and Cost Accounting obligation for WEILs we believe that this will be difficult to achieve given the immaterial nature of this product to date. Revenues for the financial year ended June 2016 were ✂**.** eir has agreed to provide an AFI for the 2015/16 accounts and suggest further discussion is required before any further obligations are proposed.

Key Performance Indicators (KPIs):

ComReg proposes to maintain some of the existing KPIs

8.83 ComReg also proposes to set as a condition of access that Eircom should comply with a set of key performance indicators ('KPIs') to ensure Eircom is delivering products, services, features or facilities that are fit for purpose. This is discussed in more detail in paragraphs 8.138 to 8.144 below.

While the imposition of such existing KPIs may not be considered onerous as noted in 8.85[8], eir would like to note that the statistical significance of the KPI outputs will deteriorate as the volume of circuits in scope declines. This statistical effect needs to be recognised in ComReg's Decision.

Question 7: Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

eir has the following comments in respect of the text of the Decision Instrument. These comments are in addition to the drafting changes that will be required in light of our substantive comments in this response, for example, the re-specification of the Price Control obligation in section 12 and the removal of the sunset provisions in section 14.

Paragraph 6.1 should be further clarified to ensure there is no ambiguity as to which services the regulatory obligations will apply. We propose that the following wording be added at the end of this paragraph – "*products from that Market. In this Part II references to the Low Bandwidth TI Wholesale High Quality Access Market shall at all times exclude such products*."

The wording of Paragraph 7.4 (iv) suggests that the scope for the application of the obligations extends beyond what is specified in paragraph 6.1, which should be the definitive position. Therefore Paragraph 7.4 (iv) should be amended to read – "*pursuant to Regulation 12(2)(h) of the Access Regulations, provide Access to OSS or similar software systems necessary to ensure fair competition in the provision of services (~~including~~ being those products, services and facilities described in this Section 7)*."

In the interest of clarity we would suggest that paragraph 8.2 (vii) be amended to read: "*~~ensure that~~ the ~~SLAs include~~ Performance Metrics, ~~the latter~~ shall be~~ing~~ the measure of performance levels to be achieved by Eircom within a specified period, as calculated in accordance with the methodology and service parameter definitions as set out in the relevant SLA*."

In paragraph 9.1 reference to "*Sections 7 and 8*" should be replaced with "*Section* 7". Section 8 does not set out any products, services or facilities. This amendment needs to continue throughout the section.

Paragraph 9.2 specifies that Access shall be provided on at least an Equivalence of Outputs basis. This renders sub paragraphs (i) and (ii) of paragraph 9.1 redundant and the sub-paragraphs should be deleted.

In paragraph 9.3 "*undertaking*" should be "*Undertaking*" as this is a defined term.

In the interest of clarity paragraph 11.1 should be amended to read "*Pursuant to Regulation 11 of the Access Regulations, Eircom shall have an obligation to maintain separated accounts in respect of the products, services and facilities falling within both the scope of this Decision Instrument and the Low Bandwidth TI WHQA Market. All of the obligations in relation to accounting separation, set out at Annexes 1 and 2 of ComReg Decision D08/10, applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, and relating to products, services and*

[8] *"The majority of the above conditions are currently imposed upon Eircom through its existing regulatory obligations as principally imposed in the 2008 Decision and the 2011 KPI Decision".*

facilities falling within the scope of both this Decision Instrument and the Low Bandwidth TI WHQA Market shall be maintained in their entirety."

As noted previously it is eir's strong view that section 14 relating to sunset provisions should be deleted in its entirety but to the extent it remains it should only apply to "*existing contracted services*" which is a clearer articulation of scope than "*services or facilities in the High Bandwidth TI WHQA Market or in the MI WHQA Market to which access was previously granted pursuant to*". Paragraph 14.3 is not appropriate and should be deleted for all the reasons set out in this response, in particular because sufficient notice has already been given of the withdrawal of obligations and such notice would have been given over 3 years ago had ComReg fulfilled its statutory obligation to conduct this market review when it was required to do so. It is also disproportionate in any event to require the continued maintenance of cost models during a transition period and any possible price changes in a competitive market. The purpose of a sunset clause is to maintain the status quo, not to alter it.

Question 8: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

The ultimate aim of a Regulatory Impact Assessment (RIA) is to ensure that all measures are appropriate, proportionate and justified. As such they should include a detailed examination of costs, benefits and impacts on stakeholders as well as consideration of the use of alternatives to regulation. ComReg feels that the current set of regulatory proposals does not constitute such a scenario as to justify conducting a cost-benefit analysis.

10.8 In determining the impacts of the various regulatory options, current best practice appears to recognise that full cost-benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review may be undertaken by ComReg when necessary and appropriate.

Although it may not be proportionate to conduct a full cost benefit analysis, there has not been enough assessment in terms of the impacts of the proposed regulatory regime. To state that additional costs will be "*relatively contained*" (10.25) or "*minimal*" (10.36) does not provide any indication as to the level of such costs and the burden they impose on eir. Simply stating that they are such and dismissing them on this basis is a fundamental flaw in the analysis. No objective standards or benchmarks have been established as to how costs and benefits should be assessed.

The assessment completed is cursory in nature and does not address the burden that will be placed on eir in terms of continued compliance costs. Benefits and costs associated with regulatory regimes should be quantified where possible. On a forward looking basis and in terms of future RIAs it may be useful to consider that where there is difficulty in monetising the effects, multi-criteria analysis can provide a useful tool with which to look at benefits and costs from a cumulative perspective and determine how well each option meets the most important criteria identified. This has been recognised in the 2009 Revised RIA Guidelines[9].

In addition ComReg references consideration of other options which in actuality do not appear to have been assessed in the course of the RIA.

[9] See "Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis", June 2009, available from: http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf.

10.10 ComReg now conducts its RIA having regard to its proposed approach to impose (or not) regulatory remedies identified in this Consultation, along with a consideration of other options.

Alternative options would be taken to mean those such as self-regulation and co-regulation. However neither of these options, or similar, is discussed in any measure. Although it may be necessary for ComReg to apply at least one of the regulatory measures described (Access, Non-Discrimination, Transparency, etc.) in the case of SMP being established within a particular market, it would appear that insufficient consideration has been given as to how one or more of these measures may work in conjunction with alternative measures or the effect of applying only one of them. In addition ComReg have not given due consideration to the likely impact of ex-post competition law in achieving the same objectives.

RIAs should seek to identify any negative impacts of regulation and therefore seek to minimise unintended consequences, e.g. promotion of the use of legacy technologies at the expense of MI penetration. Real market impacts should therefore be assessed. In this regard it is important to consider the effect that the obligations will have on the LB TI WHQA market. If prices are being maintained at a particular level which would not otherwise hold in the absence of regulation, artificial demand is being created in a market where the products are end-of-life. This could potentially impede the migration of customers to modern interfaces as would otherwise occur. This can be seen in BT’s continuing withdrawal from this market. Demand in this market will therefore not imitate the natural retail and wholesale trends that would be observed under a deregulated market.

The RIA is neither comprehensive nor thorough and merely represents a subjective and qualitative assessment of costs. It does not sufficiently address relevant costs and benefits in a manner that identifies the potential burdens on business and as such ensures that they are not onerous. The measure(s) chosen to address the issues identified should be the least intrusive means possible which places the minimum burden on business, so that the least burdensome effective remedy that best meets the objectives can be selected. In terms of ComReg’s analysis it does not appear that it has fully committed to identifying the measure which best meets these criteria. Instead it has simply kept to the status quo. As we highlight earlier in this response it is not appropriate to rollover existing obligations, imposed 8 years ago, in the LB TI WHQA market which has fundamentally changed since 2008 and is in terminal decline.

6. e-Nasc Éireann Teoranta (Enet)

enet response to ComReg's Consultation Document and Draft Decision: Market Review of Wholesale High Quality Access services provided at a fixed location (ComReg Document 16/69)

enet is pleased with this opportunity to provide its comments in response to the Consultation Document and Draft Decision issued by ComReg on its market review of wholesale high quality access (WHQA) services provided at a fixed location (ComReg Document 16/69).

In this response, enet provides some overview comments before briefly responding to each of the consultation questions posed by ComReg in the Consultation Document.

Overview

In summary, enet is gravely concerned at ComReg's conclusion that the provision of wholesale high quality fixed access services[1] should no longer be subject to regulation. enet is of the firm view that such a move would be massively retrograde, both for competition and for the interests of end-users of leased line services. It would, in effect, lead to the re-monopolisation of the vast bulk of both the retail leased lines market and the upstream WHQA market by the incumbent, eir.

While enet appreciates the level of detail into which ComReg has gone in undertaking its analysis of competition for WHQA services, enet is of the strong opinion that, despite doing so, ComReg has missed a number of important facts about how the WHQA market operates and what trajectory it is likely to take if regulation is withdrawn. This, in enet's view, has meant that ComReg has drawn erroneous conclusions about the current state of competition in the market. If allowed to stand, these conclusions will effect irreparable long-term damage to competition in the WHQA market and onward into the wider economy as well.

[1] enet notes the distinctions made by ComReg in the consultation document between circuits provided over traditional interfaces (TI) and those provided over modern interfaces (MI, essentially Ethernet) and the sub-division of TI services between low capacity (i.e. sub-2 Mbps) and higher capacity (i.e. >2Mbps) links. [redacted], the use of the term 'WHQA' in this response may be taken to mean the MI-WHQA segment of the market, except where otherwise indicated.

Process

In responding to ComReg's Consultation Document and to ensure focus, enet is restricting its comments to a number of high-level observations about ComReg's analysis in its market review and the impact its proposal to deregulate the market would have in practice. In enet's view, it is more useful for it to frame its response in this way so that these high-level concerns remain in focus and are not diluted by delving too far into the detail of ComReg's analysis. Notwithstanding this, we also provide responses below to each of the questions posed by ComReg in its Consultation Document.

enet's ability to comment in detail on ComReg's analysis is further undermined by the significant amount of market data and analysis which ComReg has chosen to withhold from public scrutiny in this consultation. While enet appreciates that commercial sensitivities need to be respected, enet cannot recall a single other instance where so much crucial information has been redacted from a market review of this kind in the past. The level at which ComReg has done so in this instance has made it all but impossible for enet to respond on points of detail in the Consultation Document. As a result, this raises serious concerns about due process in relation to the operation of this market review.

Key concerns

The picture of the WHQA market that ComReg lays out in its market review is one where, for much of the country, there are multiple suppliers of WHQA services and where barriers to market entry are low, in particular for the supply of WHQA services via wireless technologies. This view of the market simply does not accord with the reality on the ground. Specifically:

- **Outside those specific business locations where multiple operators have a network presence, eir remains the sole supplier of WHQA services.** By placing undue focus on those business locations where competing infrastructures have been deployed, ComReg is as a result according insufficient weight in its analysis to the large tracts of the country where businesses are solely dependent on the eir network to obtain high-speed, fibre-based leased line connections. These customers are not just businesses based in more remote parts of the country: many end-users in Dublin and other urban centres are similarly dependent on eir alone for their leased line needs. If regulation over eir's provision of WHQA services is withdrawn, eir will no longer be obliged to offer WHQA regulatory products to support the provision of competing retail services to such customers and, as a result, retail and wholesale leased line services are at significant risk of being re-monopolised by eir.

- **While competition for retail leased line services will, in theory, remain vigorous in those parts of the market where competing suppliers have a network presence, the withdrawal of WHQA regulation across the market as a whole will have a significant dampening effect on competition.** This is because retail leased line (and underlying WHQA) services are typically sold on a multi-site (and multi-product) basis. [redacted] In a deregulated market, eir will quickly come to the realisation that, if it withdraws its supply of wholesale services [redacted] it will then become the only provider in a position to fulfill multi-site retail orders. Such an outcome points clearly towards the re-monopolisation of the leased lines market, at both retail and wholesale levels.

- **Wholesale backhaul services will also be subject to insecurity of supply in a deregulated WHQA market.** enet operates [redacted] MANs around the country[2], with backhaul services from [redacted] of these locations provided via its own network ([redacted]) and by [redacted] and other carriers. [redacted] If the market is deregulated, eir will no longer be obliged to continue providing wholesale backhaul services [redacted] Such an outcome [redacted] would also have a hugely negative impact on end-users in these locations and on regional economic development generally. Most importantly, though, such an outcome would destroy the

[2] 94 of these MANs are operated under concession agreements with the Department of Communications, Climate Action and Environment.

delicate competitive balance that has developed in this market and return control to eir, except this time as an unregulated entity.

- **Wireless-based services cannot be viewed as a like-for-like alternative to fibre-based WHQA services.** While wireless has an important role to play in the provision of fixed capacity services to business – in particular in regional locations – this role can only be seen as a secondary one. Wireless has a number of technical limitations [redacted] and so wireless cannot be seen as a like-for-like substitute for fibre in every instance. ComReg's analysis – detailed as it is in so many respects – is strangely mute on these drawbacks. In addition, [redacted] it is the case that many tenders issued by end-users specify that only fibre-based solutions will be considered.[3] As a result, it is enet's firm belief that ComReg's conclusion that wireless services reside in the same market as fibre-based services is not based on sound reasoning. enet would urge ComReg to re-examine this part of its market analysis.

Negative impact of deregulation

enet has grave concerns about the following negative competitive outcomes if ComReg proceeds with the deregulation of the WHQA market. Specifically:

- Continuity of supply of WHQA services from eir will be imperiled, either in whole or in part, as eir will no longer be under any obligation to support wholesale orders should it not wish to do so;

[redacted]

[3] In this regard, the example of HEANet referenced by ComReg in the Consultation Document (Para. 3.64) is, [redacted], the exception rather than the norm, in that most end-users have a clear preference for fibre-based solutions.

[redacted]

[redacted]

In addition, enet has a number of questions about what would happen post-deregulation in relation to the supply and pricing of WHQA services provided by eir, including:

- Will the current price of active services provided by eir remain at current levels?
- Will the current price of active services provided by eir rise or fall for wholesale customers?
- Will eir retail be governed by any pricing rules in relation to the provision of retail leased line services?
- How will the competitive position of alternative operators providing multi-year contracts to end-users be protected if eir is in a position to alter the price it charges for active WHQA services within a short notice period?
- Will operators such as enet be obliged to negotiate price agreements with eir for the provision of WHQA services? If so, has ComReg considered the significant time and resources that will be required (by both parties) to do this?
- Will eir be allowed to target the order books of other operators including enet? How will privacy be maintained and what safeguards will be put in place to ensure that eir does not engage in the kind of anti-competitive win-back activity already witnessed in other areas, e.g. bitstream and fixed voice services?
- Will eir be free to discriminate between which wholesale customers it decides to sell to and which it does not? Specifically, would eir be in a position to refuse to sell WHQA services to enet in relation to specific routes, specific locations or to specific customers?

Conclusions

As outlined above, enet has serious concerns about the implications of ComReg's proposals in this Consultation Document, in light of its likely impact on its own business, on competition at both retail and wholesale levels and on the interests of end-users. enet is greatly concerned that ComReg has underestimated the degree to which eir could, post-deregulation, move to undermine competition for the supply of both retail and wholesale leased lines. enet urges ComReg not to proceed with deregulation in this area until such time as it engages in further consultation with key stakeholders, including alternative operators and end-users, to assess in greater depth the advisability of such a move.

[redacted] This change cannot be allowed to proceed.

enet's responses to the questions raised in ComReg's Consultation Document

As stated above, enet's response to this consultation is deliberately couched in high-level terms, as it is our firm belief that key concerns in relation to future market direction may be lost if too much consideration is given to the minutiae of the analysis undertaken by ComReg. As a result, enet's responses to the questions posed by ComReg are, by their nature, brief and are provided to support the key messages outlined above in our overview response.

QUESTION 1: *Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.*

While enet agrees with ComReg's analysis in relation to technological developments in the supply of retail leased lines and the shift towards the purchase of leased lines as part of a bundle, it is enet's view that ComReg gives too much weight in this analysis to what it perceives to be the weakening of eir's position in relation to the supply of leased lines. While it is the case that wireless-based services are on the increase and it is also true that services are being provided by alternative operators, it remains equally true that in many locations and for many customers eir remains the sole option for the provision of leased line services. This is not just the case for customers based in remote locations but it also true of customers in parts of Dublin and other urban areas. ComReg also fails to take into account the fact that the increasing purchase of leased lines as part of a service bundle is taking place with the purchase of leased lines and related services on a multi-site basis. This trend means that the independence that ComReg ascribes to other market players in providing retail leased line services is not as significant as ComReg asserts, given that for most multi-site orders OAOs will still need to purchase WHQA services from eir for some of the locations involved. As a result, eir's market position in the provision of retail leased line services is, despite the observed market movements, far stronger than what ComReg perceives it to be.

QUESTION 2: *Do you agree with ComReg's assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all* *relevant factual/empirical evidence supporting your views.*

While enet agrees that broadband and leased line services do not reside in the same market, enet does not support ComReg's preliminary conclusion that wireless-based leased line services reside in the same market as fibre-based leased line services. In its analysis, ComReg appears to provide significant weight to the purchasing decision made by HEANet, which opted for a wireless solution for part of the multi-site leased line network it procured, but [redacted] many customers [redacted] do not regard such services as an effective substitute for fibre-based lines.

In addition, ComReg's analysis of this issue does not take into account the very different technical characteristics of wireless and fibre as a delivery medium [redacted] these factors make it highly questionable that wireless-based services belong in the same market as fibre-based leased line services.

QUESTION 3: *Do you agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

As per our response to Question 2, enet does not believe that ComReg has given sufficient weight to the significant technical differences between wireless-based Ethernet leased lines on the one hand and fibre-based circuits on the other. Had it done so, it is enet's view that ComReg would conclude that wireless- and fibre-based lines reside in different product markets.

In addition, enet questions whether or not ComReg's conclusions regarding the chain of substitution between lower and higher bandwidth TI leased lines and MI lines means that three different wholesale markets exist. Given the declining take-up of TI leased lines, this issue is not of any great significance on a forward-looking basis but enet believes it is of questionable value to be identifying separate markets for the two types of TI lines, given that previously it was ComReg's view that an effective chain of substitution did in fact exist.[4]

[4] ComReg's view on this is also at odds with the position being taken by NRAs in other EU Member States - for example, the MCA in Malta, where a similar market review is currently being held. In its Consultation Document issued on 16th August 2016, the MCA set out its provisional view that leased lines of all bandwidths reside in the same wholesale product

On balance, it is enet's view that ComReg should have defined a single wholesale market for fibre-based TI and MI WHQA services.

QUESTION 4: *Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

enet strongly disagrees with ComReg's conclusion that eir no longer holds a position of SMP within the MI WHQA market. In enet's view, it would have been appropriate to consider SMP on the basis of a market involving both TI and MI fibre-based WHQA services and within such a market eir should have been designated as an SMP operator. Despite eir's falling market share at the wholesale level, there are still a significant number of business locations and customers (even in parts of Dublin city and other urban locations) where eir is the only viable supplier of high-speed, fibre-based leased line services. OAOs wishing to provide competing retail services to such customers are only in a position to do so on the basis of wholesale services provided by eir. Wireless-based services cannot be seen as a like-for-like alternative in every instance and barriers to entry for the deployment of alternative fibre-based infrastructure remain high. As a result, the case for eir continuing to be designated with SMP in the relevant wholesale market remains an overwhelming one.

QUESTION 5: *Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

enet agrees with ComReg's analysis of the competition problems and associated impacts on competition and consumers in relation to the provision of services in the LB TI WHQA market but would point out that the same issues are relevant across all segments of the WHQA market.

QUESTION 6: *Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and*

market. See: http://www.mca.org.mt/consultations/high-quality-access-and-connectivity-services-provided-fixed-location-malta *accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

enet agrees with ComReg's proposed approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies in relation to the provision of LB TI WHQA services. It is enet's strong view, however, that the same regulatory measures continue to be required for all WHQA services and that ComReg's proposal to lift regulation in relation to the provision of MI WHQA services by eir will have a catastrophic effect on the market, at both retail and wholesale levels.

QUESTION 7: *Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.*

enet has no specific comments to make on the wording of ComReg's draft Decision Instrument.

QUESTION 8: *Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.*

In enet's view the RIA as currently drafted is of little relevance, given that it is based on ComReg's provisional conclusion that eir no longer holds a position of SMP for the provision of MI WHQA services. enet's view is that a fresh RIA will need to be undertaken on foot of a decision by ComReg to the effect that eir still holds a position of SMP across the entire WHQA market.

Enet's communication with ComReg

From: Conal Henry
Sent: 18 October 2016 14:58
To: Jeremy Godfrey
Subject: WHQA Market Review

Dear Jeremy

I am a writing to you to follow up on our attached submission made to Comreg pursuant to your WHQA Market review. The nature and impact of this proposal is profound and would, in our view, reverse much if not all the excellent progress made by ComReg in liberalising this market over the past decade or more. Enet is sure that, where you to proceed with this proposal, you would, in effect, present the incumbent with a new and unregulated monopoly for these services in much, if not most, of the country. Furthermore, the networking effect of such a monopoly would to undermine completely those competitive network offerings that do exist by presenting the incumbent with a coverage and quality advantage that is highly liable to exploitation. This will directly result in significant economic damage to Irish and international businesses as we as a wide range of competitive telecommunications providers who may find their business models are no longer viable.

Enet requests a meeting with you and your fellow Commissioners to discuss this issue and to reverse this policy.

I look forward to hearing from you at your earliest convenience.

Best Regards

Conal Henry

Conal Henry
Chief Executive Officer
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WINNER: Ruban d'Honneur Recipient – European Business Awards 2015
WINNER: Project of the Year - ICT Excellence Awards 2014
WINNER: Deloitte Best Managed – 2011, 2012 & 2013
WINNER: Deloitte Technology Fast 50 - 2010 & 2011
WINNER: Telecommunications Company of the Year - ICT Excellence Awards 2009

From: Eric Tomkins
Sent: 20 October 2016 11:42
To: Conal Henry
Subject: RE: WHQA Market Review

Dear Conal

I am following-up with respect to your email to Jeremy concerning the WHQA Market Review.

Firstly, thank you for your additional submission which we will treat as being part of the response enet submitted on 14 October last. We will be in touch separately with enet concerning the confidential status of these enet submissions.

With respect to the request for the meeting, as you will appreciate we have engaged in a public consultation process and it is through this that we solicited views from all interested parties on our WHQA Market Review. We are considering the issues that have been raised in the enet (and other) submissions. In early November, enet are also due to provide further information which has been sought by ComReg using its a statutory information gathering powers.

Having reviewed both enet's responses to the WHQA Market Review and the statutory information request, if we have queries or clarifications, we will be in further contact.

Kind regards

Eric

From: Conal Henry
Sent: 28 October 2016 09:38
To: Jeremy Godfrey
Subject: RE: WHQA Market Review

Dear Jeremy

I refer to Eric's reply to my mail to you dated 18th October, in which I requested a meeting to follow up on our submission in response to ComReg's consultation document on the WHQA market review.

While I appreciate Eric's point regarding ComReg's processes in terms of how it is conducting the market review, I would in response reiterate the point I made in my original email about the potentially profound (and profoundly negative) impact of ComReg's proposal to deregulate the WHQA market. In this regard, I would stress that the request I made for a meeting with you was not one that I made lightly.

I remain of the view that a face-to-face meeting between us on this issue is necessary, given the significantly adverse impact ComReg's proposed move to deregulate the WHQA market would have, both on enet and on competition within the communications market. I know that ComReg's aim will always be to promote competition and to enhance end-user choice and I hope that by discussing the matter directly, you will get to understand fully why we believe this move to deregulate is the wrong one at this point in time and the harm that will be done to competition should the proposal go ahead.

I would hope that you are in a position to accede to this request for a meeting with you so that you can hear fully our genuine concerns on this issue.

Best regards

Conal

From: Gerry Fahy
Sent: 15 November 2016 16:27
To: Conal Henry
Subject: WHQA Market Review Meeting Request

Dear Conal

I refer to your email to Jeremy of 28 October last seeking a meeting in relation to the WHQA market review.

We do not consider that a meeting with the Commission is appropriate.

As you will appreciate, ComReg has engaged in a public consultation process (in accordance with its published procedures) through which it has sought input from interested stakeholders on ComReg's preliminary views on the WHQA market analysis. It is through such consultation procedures that we transparently solicit inputs in a manner which is fair and equitable for all stakeholders.

We are grateful for the response that enet has provided to the WHQA market analysis and, through this, we are fully aware of enet's concerns. The issues raised by enet continue to be considered by ComReg, alongside the information provided by enet last week in response to a statutory request for information. If enet has additional issues that it wishes to raise these could be usefully set out in writing and they will, of course, be considered by ComReg (any such submission would also be published by ComReg subject to any confidentiality considerations).

In any event, the ComReg team managing the WHQA market analysis have a number of clarifications with respect to enet's response to the WHQA consultation (and the response to the information request) and they will be in touch over the coming days on these, with a potential meeting to discuss specific clarification issues also being possible.

Kind regards

Gerry Fahy
Commissioner

7. GTT Communications Incorporated (GTT)

GTT response to WHQA consultation

Received by email 26 October 2016 from GTT

Subject: Response to ComReg Document 16/69

Dear Mr. Vidziunas,

We understand that large numbers of premises throughout Ireland, including Dublin, other cities and towns and rural areas only have a sole viable option for fibre access.
We would be very concerned if fibre access to these premises were left to an unregulated monopoly. Taking this in account we can not agree with the statement that “it is considered unlikely that any SP has SMP in the MI WHQA Market”.
Fibre and wireless services by no means can be considered as identical. Wireless based services are far from a complete substitute for fibre based services.

Thank you for taking our petition in consideration,

Kind regards,
Natalia

Natalia Tkachuk
Manager, Supplier Management
Office: +49 6102-823-5316 I Mobile: +49 152-532-31312
www.gtt.net

8. HEAnet Limited (HEAnet)

HEAnet Response to

COMREG Market Review: Wholesale High Quality Access at a Fixed Location

14 October, 2016

Appendix: 9 Consultation Questions

A 9.1 Below is a list of Consultation questions set out throughout this Consultation.

Question 1:

Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

Response 1:

Agree with a, b, c and d.

In regard to (e), the availability of fibre infrastructure for the delivery of leased lines is typically restricted to the large city centres and business parks. Outside of the large cities, our experience is that fibre infrastructure is only available via *open eir* and *enet*. In smaller cities and towns where *enet* fibre is available back haul fibre infrastructure is still typically only available from one provider, *open eir*.

Question 2:

Do you agree with ComReg's assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

Response 2:

In general, yes. Of concern, however, would be the lack of competition in the retail leased line market for the MI (greater than 300Mbit/s) circuits outside of the main cities and business parks. Typically, SP are very dependent on *open eir* for the provision of MI wholesale circuits to the smaller towns and cities. Our experience is that a small number of SPs will offer MI circuits based on open *eir* circuits.

Question 3:

Do you agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No Response 3:

Question 4:

Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Response 4:

While we agree there is competition in the retail leased line market at the High Bandwidth speeds (>2Mbit/s provided over TDM), we would not agree that there is an appropriate level of competition in the "Modern Interface"(MI) wholesale leased line market, which in turn limits the availability of MI circuits provided over fibre by SP at all locations nationally. The alternate fixed network maps in Appendix 1 are unfortunately redacted, but our experience is that outside of the major cities and large business parks, all SPs are typically dependent on *open eir* to some extent to provide MI circuits.

Question 5:

Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No Response 5:

Question 6:

Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No Response 6:

Question 7:

Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

Response 7:

We agree that *eir* has significant market power in the low bandwidth TI WHQA market, but we disagree that *eir* does not have significant market power in the MI WHQA market. While there is competition in the main cities and large business parks, in the smaller towns and cities, most retail operators are dependent on *open eir* for either backhaul (where backhaul requirements are too high for wireless solutions) or metro solutions where *enet* are not present.

Question 8:

Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

No Response 8:

9. Three Ireland (Hutchison) Limited (Three)

Three Ireland (Hutchison) Limited

Registered office
28/29 Sir John Rogerson's Quay
Dublin 2, Ireland

t +353 (0) 1 5426300
www.three.ie

28th October 2016

Mr. Arvydas Vidziunas
Commission for Communications Regulation
Irish Life Centre
Lower Abbey Street
Dublin 1

Dear Arvydas

Consultation Document 16/69 – WHQA at Fixed Location

I refer to the above consultation document issued as part of ComReg's review of the market for wholesale high quality access.

Three is a significant user and buyer of high quality transmission products. Three is a member of ALTO, and supports the comments submitted by ALTO in response to this consultation. In particular, we note that ComReg has assumed that wireless based services are a substitute for services provided over physical media. Three does not agree with this view. For availability and capacity, there are many use cases where wireless based products are not useable. ComReg should review this aspect of the analysis.

Yours Sincerely

____
Tom Hickey

10. Verizon Ireland Limited (Verizon)

Verizon Enterprise Solutions response to ComReg's Market Review on Wholesale High Quality Access at a Fixed Location

NON-CONFIDENTIAL VERSION

1. Verizon Enterprise Solutions ("Verizon") welcomes the opportunity to respond to ComReg's Market Review on Wholesale High Quality Access at a Fixed Location (the "Review").
2. Verizon is the global IT solutions partner to business and government. As part of Verizon Communications – a company with over $127 billion in annual revenue – Verizon serves 98 per cent of the Fortune 500. Verizon caters to large and medium business and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes.
3. Please note the views expressed in this response are specific to the Irish market environment and regulatory regime and should not be taken as expressing Verizon's views in other jurisdictions where the regulatory and market environments could differ from that in Ireland.

4. Rather than respond to all of ComReg's questions we have set out our views on the key substantive issues raised in the Review.

Market definition

5. In the Review, ComReg sets out its preliminary view that Business Broadband ("BBB") products are not an effective substitute for (retail) Leased Line ("LL") services. While the product characteristics may not be identical, we do not fully agree with this proposition. Since ComReg's last review of this market eight years ago, BBB products have significantly improved in terms of quality, performance and reliability. The technology has also improved and, given the substantial difference in price, many of our customers now consider purchasing a BBB product instead of a traditional LL for some services. In addition to smaller customers, who might naturally be more attracted by a BBB product, this is also increasingly the case with larger more complex companies seeking to save costs, and who see BBB as an acceptable substitute. [CONF]

6. Banks are another category of customer where BBB may be considered a suitable equivalent to a LL in some situations. Whereas historically a bank would naturally have chosen a LL to connect up an ATM cash machine, the improvement in quality and resilience of BBB products means that they are now a genuinely viable substitute for such connections. BBB is being considered by customers more and more and for an increasingly wide range of purposes where before an LL would have been the default choice. Another example is private

networks used by larger customers. Customers would traditionally have used LL services to access MPLS networks, whereas we now routinely see such customers using a BBB service to do so.

7. While ComReg sets out the product characteristics of BBB from page 67 onwards, and seeks to distinguish them from LL, the fact remains that customers increasingly see the improvements in BBB, coupled with the very cheap prices in relative terms, as sufficient incentive to warrant migration away from LL. Indeed ComReg appears to understand this, as it notes that NGA broadband is "broadly similar in terms of bandwidth to a lower bandwidth symmetric LL service".[1] We would therefore urge ComReg to re-consider whether BBB should be included in the LL market.

High Bandwidth TI Market

8. In respect of the High Bandwidth TI Market as defined in the Review ("HBTI market"), although ComReg may consider the market to be small and declining, we have strong concerns about the treatment of those existing circuits in this market if it is de-regulated. ComReg appears to consider that the fact that the market is small and declining means there is no need to continue to subject it to regulation. We disagree with this premise. First, the size of the market should not be the primary basis on which to determine that regulation is not needed. Second, ComReg's proposal will leave the market open to abuse, as the type of customers remaining on services in this market will typically have no desire to migrate.

9. [CONF] Customers using these circuits will typically have sound commercial reasons for remaining on TDM technology, otherwise given the market incentives they would already have switched away to Ethernet-based circuits. [CONF].

10. We are concerned that the end-result of ComReg's provisional decision is that these customers will no longer be protected by regulation simply because they do not wish to migrate their services to newer forms of technology (eg Ethernet-based services). The likely outcome is price rises, poor service and other anti-competitive practices, as there is no incentive on eir to maintain a competitive position.

11. We would urge ComReg to re-consider its position with respect to this market. Contrary to ComReg's assertion at paragraph 2.34 of the Review, we would argue that continued regulation of the HBTI Market is needed to protect users in the market that do not wish to move. This would not be dis-proportionate. Eir has been subject to regulation in this market

[1] Paragraph 4.23

for many years and therefore a finding of SMP and associated remedies would not cause a material change to its current regulatory burden. Given the difficulties that ComReg has encountered with its data collection and analysis, it also seems that there is at least a possibility that eir retains SMP in the markets where it proposed to de-regulate. At the very least, it must be the case that eir is required to continue offering the services in the HBTI Market at least for the period of the Review, and maintain cost transparency and product stability in order for us to provide the necessary level of service to our customers.

Modern Interface Market

12. While on the face of it the Modern Interface Market ("MI Market") may appear competitive, we do not consider that ComReg's analysis paints a full or accurate picture of the competitive environment for the LL market in Ireland. We make the following observations.

13. First, there are only three viable providers of wholesale LL in Ireland outside the main urban centres and business parks – eir, BT and Enet. While carriers like COLT, Vodafone and Virgin Media do provide services to Verizon, they have a very limited footprint and it is not national in scope. There are no other providers in Ireland who have the necessary footprint to offer service on a national basis, i.e. also in more remote areas.

14. Second, eir is very difficult to do business with in terms of purchasing LLs in Ireland. There is a great deal of complexity in the product offering, pricing and quotation process. We have raised this repeatedly with them, however we have seen no substantive improvements. When we do obtain pricing, it is invariably uncompetitive, to the point where we often discount them as a credible option in most instances. For whatever reason, the incumbent in Ireland simply does not offer an attractive service to its wholesale customers. As a pan-European provider, we note that there is a sharp contrast between the ease of doing business with the incumbent in Ireland and those we work with in other Member States. This means that from a competition perspective, we can rarely include eir in the selection of providers able to provision a wholesale LL for us.

15. Third, enet is highly dependent on eir's infrastructure. Where enet cannot offer an on-net solution, i.e. outside their metro area networks, they invariably make use of eir's network. Where eir is involved, for example in providing a terminating segment of a LL on its network, the price goes up very significantly. [CONF]

16. Fourth, the prices of LLs in Ireland compared to equivalent prices in other comparable EU Member States are very high indeed. Table 1 below highlights this clearly, and shows that LL prices in Ireland are simply not competitive from a price perspective when compared to other countries.

Table 1 – Ethernet pricing (in euros) in selected EU Member States 2013 - 2016[2]

Row Labels	2013	2014	2015	2016 1
1 Gbps	**1,861**	**1,634**	**1,477**	**1,343**
Ireland	1,645	1,759	1,452	1,323
Netherlands	1,456	1,181	1,084	1,115
United Kingdom	1,830	1,570	1,301	1,184
10 Mbps	**711**	**572**	**434**	**411**
Ireland	920	831	649	626
Netherlands	552	309	265	231
United Kingdom	624	579	313	306
100 Mbps	**1,109**	**887**	**722**	**596**
Ireland	1,457	1,269	961	685
Netherlands	758	597	496	438
United Kingdom	816	704	594	508
2 Mbps	**353**	**332**	**257**	**250**
Ireland	550	667	453	486
Netherlands	216	113	110	87
United Kingdom	360	300	241	230

17. The table indicates that even with cost orientation obligations in place on eir, LL prices are significantly above the equivalent products in NL and UK at all bandwidths. Verizon as a

[2] Source – Verizon internal Ethernet pricing system known as "E-cost"

pan-European provider therefore has to pay far more to secure wholesale LLs in Ireland than it does in other parts of Europe, at various bandwidths. The LL market in Ireland does not therefore present itself as a competitive one, where the market participants are able to exercise effective competitive constraints on each other, in relation to pricing. De-regulating the HBTI and MI markets sends the wrong message to eir and the rest of the industry. While it may be attractive to ComReg to reduce the amount of regulation, it is a premature move when choice and price are looked at through the eyes of a purchaser.

Geographic market

18. ComReg notes that the majority of providers have concentrated network roll-out in the Dublin area, other cities and business parks.[3] While we might expect to see at least two or three potential suppliers in the major cities, data centres and recognised business parks in Ireland, this is far less likely to be the case in the less urban areas, and locations that are more remote. We are therefore concerned that, if the proposed de-regulation went ahead, eir would no longer have the requirement or incentive to provide wholesale LLs to competitors, or at least not on regulated terms and conditions. ComReg freely admits this,[4] and it is very difficult to reconcile the industry's dependence on eir's continued provision of wholesale LLs with ComReg's proposal to remove their obligation to supply.

19. It is not easy to follow ComReg's logic that because eir has a "national ubiquitous copper network, the geographic scope of the TI retail markets are National in scope".[5] Further, ComReg highlights the differences in LL services that can be purchased in business parks and data centres.[6] It would therefore appear that there is likely to be a clear difference in the degree and intensity of competition in these geographic areas, plus the major urban centres, when compared to the other areas of the State. This is backed up by the views of SPs.[7] We are also concerned that, in any event, the information that ComReg has used to make its determination of competitive conditions may not be sound given the difficulties that it admits it experienced with information gathering.[8] With this in mind we would urge ComReg to re-consider whether there is a separate geographic market where competition is less intense and where de-regulation is not appropriate.

Withdrawal of existing remedies

[3] Paragraph 3.57
[4] Paragraph 4.222
[5] Paragraph 4.231
[6] Paragraph 4.229
[7] Paragraph 4.236
[8] Paragraph 5.218

20. We consider that eir should be obliged to adhere to the regulatory remedies that are currently in place for existing LLs that wholesale customers have bought from them, rather than introduce a sunset period for the removal of such remedies over 6-9 months. This does not allow sufficient time to move circuits away to alternative providers, especially in view of the complexities of working with eir and where there may be a large volume of circuits involved.

21. We would further add that if there is the possibility of certain categories of LL services becoming obsolete, in the absence of an obligation on eir to continue to provide them, we would need a minimum of three years notice in order to ensure our customers were migrated to new services without any disruption.

11. Virgin Media Ireland Limited (Virgin Media)

Virgin Media response to WHQA consultation

Received by email 20 October 2016 from Virgin Media

Subject: ComReg wholesale high quality access market review consultation

Hi Malachy
Just following up on our telephone call last Thursday in relation to ComReg's draft decision on the high quality wholesale access markets. During the call I provided Virgin Media's high-level feedback on the draft. To summarise those views:

- **ComReg's proposed geographic market definition** does not appear to reflect the significant underlying variation in competitive conditions observable in the provision of wholesale high quality access across Ireland. There is a risk that analysing competition on a national basis will not provide sufficient detail for ComReg to identify competition problems that could arise on individual routes.

- **Identification of non-competitive routes.** There are certain routes where Eir is the only provider of high-bandwidth services. For example, Openeir are the only available provider for 10G WUP backhaul services into Ratoath and Ashbourne. Virgin Media is concerned that if regulation were lifted on non-contested routes, then eir, in the absence of a competitive constraint, could increase the price. This could impact on the ability of alternative operators, including NBP bidders, to provide retail broadband in certain areas. From a Virgin Media perspective, price increases on non-competitive routes could undermine the business case for extending the coverage of our high-speed broadband network into new areas.

- **Defining markets based on intensity of competition.** Specific routes could categorised according to number of competing suppliers, with regulatory intervention being confined to non-competitive routes. This would be consistent with the approach used by Ofcom in the wholesale broadband access market. In that case, Ofcom defined markets according to the number of competing suppliers within each *exchange service area* (ESA). Ofcom withdrew regulation in ESAs where several competing networks were present.

- **ComReg should focus any regulation on routes where eir faces no competition, regardless of the bandwidth or technology.**

I also mentioned on the call that Virgin Media would appreciate the opportunity to meet with ComReg in coming weeks to discuss these concerns. Including to provide further details on the potential impacts of deregulating 'thin routes'. Please let me know if and when such an opportunity arises.
Kind regards
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12. Vodafone Ireland Limited (Vodafone)

Vodafone Response to ComReg Consultation Document 16/69

Market Review - Wholesale High Quality Access at a fixed location

Ref. ComReg Document 16/69 Response Date: 14 October 2016

Introduction

Vodafone welcomes the publication of this consultation on the Wholesale High Quality Access market review. Vodafone believe this is a timely review with recent developments on fibre roll out and investment by a number of parties in infrastructure to support growing demand for these services. We have set out in detail below the answers to the consultation questions. It is useful first to highlight some key concerns:

- **Timing of Proposals:** Vodafone has serious concerns that at this time of significant change in the provision of wholesale leased lines that ComReg is proposing to deregulate the key circuits vital for alternative operators to compete against Eir. The exclusion of leased line services, specifically the Modern Interface (MI) Leased lines, from the regulatory net is premature and would have a serious impact on the ability of access seekers to secure access with appropriate SLAs and support. This impacts the ability of Vodafone to deliver circuits to our retail customers on a national basis. It also has a very significant impact on Vodafone's ability to achieve adequate service levels and price certainty on circuits which we need to support the operation of our network and delivery of retail broadband services to customers.

  In the event that the respective markets are deregulated, Eir could withdraw access, refuse to supply, or modify service performance or functionality of the MI product set to the detriment of Vodafone in favour of their own downstream arm. It is clear that absent strong regulatory controls, Eir will have the ability and incentive to behave in this manner. This will have a disruptive impact on the competitive landscape and undo the benefits delivered as a result of regulatory measures currently in place. In fact, Eir's recent behaviour in the market specifically in terms of their governance, history of non-compliance and ability to raise wholesale prices at will demonstrates if regulatory controls are relaxed Eir are prepared to take actions that push cost on to industry (and customers) and to further increase their dominance.

- **Geographic Findings**: Whereas ComReg is defining markets correctly in terms of technological evolution the proposal to deregulate the MI market, with no consideration of the geographic dominance of Eir and the ubiquity of eir's access and backhaul network, is a mistake. No alternative player in the market has a geographic footprint that comes close to the coverage that eir's network provides. The local, regional and local high quality access market is dominated by Eir. Deregulation will have the effect of reducing the range and scope of competing operators able to service FDI Multinational, Government, SME, Soho sectors and risks increasing the price of these services.

- **Wireless Leased Lines:** In relation to the stated increased availability of wireless infrastructure the market for wired and wireless Ethernet services are fundamentally different. There is a different use case and indeed cost base for wireless leased lines and demand is typically driven by restrictions in fibre access or to ensure diversity in back up services. Vodafone is strongly of the view that WLL services do not represent suitable substitutes to wired services in a wide range of cases (HEANet example notwithstanding) and that it is incorrect to include wireless Ethernet services within the same market as WHQA Ethernet products delivered over wired circuits.

- **Transition:** Vodafone considers the proposal to remove regulatory controls is not warranted at this time and it needs to be re-examined by ComReg. Without prejudice to this position if ComReg did decide to implement its proposals then it is clear that the transitional 'sunset' arrangements should be subject to detailed further consultation particularly, but not solely, in regard to the installed base that exists.

  Operators have business critical solutions in place with retail customers, and regulated leased line services are a fundamental component in these contracts. The contracts in existence with retail customers are at a minimum 24 months - clearly well in excess of the 6-9 month transitional period that is being proposed, (and which is wholly inadequate).

The removal of regulatory controls in particular those on the MI WHQA market at this time would be a mistake. It will have end-user impacts, decrease competition and also creates uncertainty for operators looking at future network investment plans.

Please find below the detailed response to the consultation questions. It is Vodafone's intention to raise these proposed changes with Government and the IDA as they pose a considerable risk to FDI strategy and Vodafone's ability to offer competing services to these businesses and to government in the coming years.

Consultation Questions

Question 1: Do you agree that the main developments identified above in the provision of retail LLs are those which are most relevant in informing the assessment of the wholesale LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

Vodafone agrees with ComReg's assessment of the main developments in the sector. Vodafone however would highlight the geographic nature of the investment being made by alternative operators. The investment has concentrated on geographic areas where there is high demand. In the analysis ComReg do not suggest that any one operator has replicated the Eir access network. Vodafone notes and would have issue with ComReg's views in para. 3.59 where it is stated some service providers have developed quasi-national footprints.

Vodafone would not disagree that with support from other SPs some operators have been increasing their footprints since the last market review, however it is noted that ComReg do not offer maps of the network, showing geographically, where wholesale service providers have their own network or where there is more than one operator with wholesale infrastructure capable of offering retail services. We believe the mapping will indicate more clearly the degree to which operators are reliant on the Eir network.

Vodafone provides managed IP networks to a number of customers using wholesale High Quality Access (fibre / ethernet) to deliver the service. Whilst there is a choice in high quality access supply for intra-data centre connectivity or global connectivity from the data centre, the regional/local high quality access market is still dominated by Eir. Where the customer has a presence regionally or nationwide there are no other options but to use Eir for access.

Tables 1 and 2 below provide examples of customers that required nationwide network to run their business. These would be typical of the solution construct that would be required for customers with a dispersed national presence.

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Question 2: Do you agree with ComReg's assessment of the retail LL markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

Vodafone broadly agrees with the analysis conducted by ComReg however there are a number of areas where ComReg do not supply sufficient detail for Vodafone to support the conclusions. ComReg's preliminary view that wireless and wired LL services were substitutable is based on redacted views from operators which ComReg agree in 4.85 are 'differing' but with limited analysis of product quality or actual substitutability. It is difficult to assess ComReg's views when so much of the comments used by ComReg to come to their preliminary conclusions are redacted.

Vodafone believe the demand side arguments made by ComReg in relation to wireless and wired are incorrect. The wired and wireless Ethernet services markets are different market segments. Wireless Ethernet services (microwave) are not a direct replacement for Wired Ethernet (fibre) services due to factors outlined below

1. **The use case** is different to wired – typically wireless services are either used where
    a. There is no fibre access available, or it is not economically viable due to the excess construction charges to deliver a fibre based solution, or
    b. Customers wish to use microwave services as a backup to a fibre primary connection, to ensure diversity of physical / access medium (as noted in section 4.80 of the consultation).

2. **Service levels** are typically lower on microwave solutions, with lower levels of availability and performance versus a wired service.

3. **Pricing** for wireless services is significantly higher than wired services, meaning its use versus fibre alternatives is limited. For example, Table 3 shows typical wholesale pricing available for ethernet access services :

Table 3 – Ethernet Access Wholesale Pricing

Service	Microwave (1 hop reach)	Fibre (OpenEir pricing)	Microwave 'premium'
10MB	€8,000 - €10,000 p.a.	€4,185 p.a (€2,100 physical, €2,085 logical)	191% – 239%
100MB	€12,000 - €15,000 p.a.	€6,016 p.a. (€2,100 physical, €3,916 logical)	199% - 249%

Vodafone believe therefore that wireless products are not substitutes for fixed Ethernet products and need to be defined as separate markets.

Question 3: Do you agree with ComReg's preliminary conclusions on the product and geographic assessment for the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone has serious concerns in relation to the markets defined by ComReg and the approaches ComReg has adopted to define the markets.

Vodafone has concerns that the geographical market definition makes arguments in relation to the relative market shares of operators as a justification for a national market definition. As Vodafone will discuss below ComReg have defined national markets, which on the basis of the evidence presented appears correct – however, in assessing market power ComReg have relied heavily on the market shares in areas of high demand. ComReg have not put sufficient weight on market shares in areas of lower demand or on the level of local competition to Eir's ubiquitous network.

Vodafone is also concerned at the comment in para 5.211 where limitations on the data means ComReg cannot come to a conclusion on 'reachability' analysis. There are other approaches which could have been adopted to assess the level of competition in more remote areas including data supplied by Vodafone which would show the level of dependence Vodafone has on Eir wholesale provision across the country.

Vodafone believe ComReg have not sufficiently assessed the possibility of sub national markets where neither alternative providers nor competition exists. There may be competition in business parks and data centres, where there is a rational reason why investment has taken place. This logic would not extend to other geographic locations where demand is not concentrated.

Question 4: Do you agree with ComReg's competition and SMP assessments in the Relevant WHQA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone have serious concerns regarding ComReg's SMP assessment in relation to the MI WHQA market. Vodafone believe ComReg have not conducted the requisite analysis of market power required by the SMP guidelines and where a limited assessment has been conducted ComReg's analysis is not based on limited data.

Vodafone have the following concerns:

1. **Market definition** as discussed above is flawed in that ComReg have included wireless and wired products in the same market share. Evidence provided above by Vodafone demonstrates that wireless products are not substitutes for wired. Also in relation to market definition ComReg have not taken the opportunity to define sub national markets where clearly competition conditions of demand and supply differ significantly.

2. **Dependency on Eir:** In para 6.118 ComReg argue that Eir's competitors demonstrate a relatively low dependency on Eir MI LL inputs. [Confidential text removed] In all of those cases there is no effective substitute as Eir, in many cases, are the only supplier. We refer to the further detail below regarding our investment in broadband.

3. **Vertical Integration**: In para 6.123 ComReg argue that no SP is able to leverage its vertically integrated position. This is plainly flawed and without foundation. To argue that Eir do not possess an advantage of vertical integration over and above other SPs, given their ubiquitous network, their dominance in related markets like Broadband and Voice markets and their dominance of sectors such as provision of a wide range of services to Government is clearly a concern and needs to be considered as part of ComRegs analysis.

4. **Geographic Strength:** In the remaining analysis ComReg have given no discussion to the relative geographic strength of Eir and their network nationally, their overall size and strength in other related markets, their economies of scale in this market. The market share analysis is not the only criteria ComReg are obliged to review in assessing market dominance and, in Vodafone's view, the analysis of these factors is insufficient to justify a decision that has the potential to undermine the development of a key strategic market for the sector.

Vodafone Fixed Investment

There are also further significant concerns arising in relation to Vodafone's investment in fixed services. In light of the size of Vodafone's NGA broadband base and ever increasing usage costs associated with the Bitstream plus product (aside from recent price increases in their NGA "port" costs),

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Consequently, Vodafone are heavily reliant on these regulated products to deliver our fixed services, to minimise our cost base and ultimately operate effectively in the fixed market.

Removal of open Eir's obligations in relation to the MI services described above could provide Eir with the incentive and means to increase prices which would undermine our investment case and ability to compete.

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In addition, Eir could withdraw access from/refuse access to or modify service performance or functionality of the product set to the detriment of Vodafone and our customers in favour of it's own downstream arm. The sub-letting restrictions inherent in open Eir's ARO colocation product makes it unlikely that Vodafone could switch easily to alternate providers without incurring substantial switching costs at the IT and network layer.

Question 5: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the LB TI WHQA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone agree with competition problems discussed by ComReg. Eir have demonstrated that when there is no proper ex ante controls on their behaviour they will exploit their ability to leverage their dominance to the disadvantage of customers and competitors.

Even in wholesale markets where there are obligations Eir have demonstrated an inability to comply with obligations. The Eir governance process shows that Eir have admitted compliance breaches, there are numerous compliance investigations by ComReg and a range of non-price transparency and access concerns that have been discussed at length by Vodafone with ComReg in recent years. In markets where ComReg are proposing to deregulate, operators relying on regulated services have no confidence that Eir will abide by transitional arrangements or will not take every opportunity to exploit their dominant position to the detriment of the market. Vodafone would have no confidence in assertions made by Eir that they will negotiate commercially and act rationally in a deregulated world. Eir's behaviour towards competitors and their discriminate activity, their recent increase in prices and delay tactics underline the Eir strategy to the fixed markets.

By way of clear evidence for this kind of behaviour ComReg only need to examine the recent price increases by Eir on Broadband products. The increases were unjustified and demonstrated a clear ability to price excessively and add costs to competitors. The increases equally showed their disdain for regulatory decisions and their ability to set prices at will by increasing port prices exactly in line with a reduction in copper based WLR.

Vodafone have serious concerns, and reserve its rights to protect its interests in this market, around the proposed decision to deregulate the main WHQA markets.

Question 6: Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone supports the remedies proposed in the LB WHQA market and the maintenance of obligations generally in this market. It is important that the remedies are prescriptive around key aspects such as SLAs which require review and improvement. There should also be clear definitive timelines on negotiation for SLAs. In addition the requirement would be to ensure that Equivalence of input is an obligation for all regulated services.

In relation to section 9 it appears that ComReg have not sought the views of operators on transitional arrangements proposed. Vodafone would ask ComReg to specifically request inputs from industry on the withdrawal of obligations and in relation to transitional arrangements. ComReg are proposing 6-9 month withdrawal on existing services which does not take into consideration the complex commercial and contractual arrangements where operators have obligations to end users for periods well in excess of 6-9 months. Typical enterprise contracts are in excess of 2 years and to withdraw vital infrastructure and/or increase wholesale costs (where Eir business would have an incentive to disrupt end user contracts to promote churn and new sales for Eir). It is naive in the extreme for ComReg to make such a radical disruptive change to market conditions overnight and not expect significant impact on end users and competition.

Vodafone would request that ComReg consult further and engage with operators (through the product forums) to agree a phased reduction in regulatory obligations in this market. Vodafone disagree fundamentally with the conclusions on the SMP assessment but Vodafone also have major concerns that ComReg have underestimated the disruptive impact of these transition proposals to multinationals and government.

Question 7: Do you agree with ComReg's draft Decision Instrument set out in Appendix: 8, in particular, that its wording accurately captures the intentions expressed in this Section 8? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

Vodafone have no comments on the decision instrument.

Question 8: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Vodafone believe ComReg need to assess the impact of withdrawing obligations through more engagement with operators and stakeholders. There will be a significant impact on Government and FDI companies and this factor has not been discussed.

ComReg have not sought the views of the IDA and other stakeholders who rely on the competitive supply of WHQA services and resilience supply which currently is only available through wholesale regulated access. ComReg have not given other transitional options any consideration. ComReg can decide to maintain SMP obligations to a set date in the future or to retain SMP on the market but with lighter touch remedies.