



Commission for
Communications Regulation

Market Reviews

Wholesale Local Access (WLA) provided at a Fixed Location

Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products

Submissions to Consultation 16/96

Submissions to Consultation Document No. 16/96

Reference	ComReg 16/96sR
Version:	Final
Date:	8 March 2017

An Coimisiún um Rialáil Cumarsáide
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1. Alternative Operators in the Telecommunications Market (ALTO)

alto

alternative operators in the communications market

**Consultation - Market Review: Wholesale Local Access (WLA)
provided at a Fixed Location Wholesale Central Access (WCA)
provided at a Fixed Location for Mass Market Products - Ref:
16/96**

Submission By ALTO

Date: January 30th 2017

ALTO is pleased to respond to ComReg's Consultation – Market Review: Wholesale Local Access (WLA) provided at a Fixed Location Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products - Ref: 16/96.

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

1. ALTO has recently met with ComReg in the context of the recent Leased Lines Consultation Reg. 16/69 undertaken by ComReg. Within that discrete Consultation a number of extremely serious issues became apparent in terms of the potential for the reintroduction of bottlenecks in the Irish communications market. This together with a not fit for purpose PIA offering (ducts and poles) and a serious risk that Ethernet and next generation circuits will become deregulated. This is not an ideal situation for the market to find itself in and it appears that regulation is not working in the manner that it should or that is prescribed by the Communications Regulatory Framework. Some ALTO members submit that it will take a minimum of 5 years to remediate the current PIA offering. ComReg must immediately specify a fit for purpose PIA duct and pole offering and should not make any changes to regulation or decisions in particular under ComReg 16/69 until this serious issue is resolved satisfactorily. This may act to incentivise eir to engage with new entrants and the market properly prior to deregulation of the leased lines market.

2. ALTO submits that the quite apparent delay inherent in ComReg's conduct of the market reviews has a material and significant impact on OAOs interests. ALTO members are very unimpressed by the significant price increases in the WLA market announced in May last year (21% and 35% increases for SA FTTC and POTS FTTC respectively) and those increases have resulted in an unjust financial

transfer from Access Seekers to eir every month this above cost pricing level is maintained.

3. ALTO submits that ComReg's 12 open and significant compliance cases against eir are notable in the context of this consultation and the Leased Lines consultation paper. We note that Cartesian and KPMG were appointed by ComReg in the first instance following on from publication by eir of the RGM Reports – '*Styles Reports*' which documented its failure to comply with its regulatory obligations across multiple markets. The Irish communications market is in a very special, if not unique place. We have an incumbent who has self-confessed to compliance issues, produced evidence in spades, and presented it in two RGM Reports with little or no punitive action save for a required review from the regulator, which the industry awaits with interest. All of these matters culminate in a view that regulation is not operating in the prescribed manner in Ireland.

4. ALTO submits that ComReg must consider a more robust regulatory solution in order to foster commitment from eir to comply with regulation properly (such a solution may include undertakings or functional separation). Eir Wholesale must only be concerned with eir wholesale business and not the group outputs.

5. ALTO submits that a fully deregulated leased lines market (such as that is separately proposed) will undermine ComReg's good work in the regional WCA regulation that has been proposed. eir will likely self-supply by purchasing WLA and using leased lines as back haul i.e., VUA to themselves and then argue that the services are not in the WCA market.

6. ALTO welcomes ComReg's proposed cost orientation price controls which should go some way to prevent a reoccurrence of unexpected and unjustified price rises in Broadband Access and agree that such should prevent the potential for cross subsidisation from the WLA market to the WCA market.

7. ALTO calls on ComReg to commence work on seeking to apply remedies that incentivise compliance in the market with specific reference to ComReg's RGM work and the Styles disclosures. See response to Q. 15 and note the fact of Option 4 being in place, but failing to properly operate.

Response to Consultation Questions:

Q.1. Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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. [Page 71]

A. 1. ALTO agrees that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale Markets. In particular we agree that there remains significant uncertainty around the deployment of the National Broadband Plan – NBP, given various delays and uncertainty as to the State funding arrangements.

Q. 2. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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. [Page 151]

A. 2. ALTO generally agrees with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA Markets, however we submit the following significant concerns as to the detail provided.

1. The ComReg analysis at clause 4.99 appears to be technically incorrect.

The market submits that eir appears to be offering a group of customers within the industry 'pre-qual' file a choice of FTTC or FTTH, i.e., they are not mutually exclusive and when we have checked the industry pre-qual file we have noticed the same address registered twice, once for FTTC and once for FTTH.

2. ALTO submits that ComReg appears to have overlooked the potentially very high connection costs for FTTH for customers that do not have an existing pole access or unbroken duct access into their premises. Open eir have indicated that they will not pay the potentially high cost of bringing the service from the curtilage of the property to the actual building. At this point Open eir either does not know or will not tell us how many customers are exposed to this potentially very high cost. This will make switching more considerably more expensive for an unknown group of customers.
3. ALTO submits that industry is concerned that the analysis of the leased lines does not appear to have considered a key differentiator between leased lines (Market 4) and Broadband which is the Quality of Service levels. Leased line services support 24/7 service coverage including a repair time in hours, whereas Broadband SLAs are at best a working day SLA to repair. For this quality reason and that of symmetrical communication we would argue they are not in same market as Broadband.

Q. 3. Do you agree with ComReg's preliminary conclusions on the WLA Product Market 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 views. [Page 204]

A. 3. ALTO agrees with ComReg's preliminary conclusions on the WLA Product Market assessment and that the market is national in geography.

Q. 4. Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA 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. [Page 205]

A. 4. ALTO agrees with ComReg’s preliminary conclusions on the geographic market assessment for the WLA Market as its clear that Open Eir/Eir has ubiquitous access.

ALTO also agrees that the market is unlikely to change over the period of the review given that certain new entrants have developed and progressed more slowly and face certain technological complications, and the uncertainty surrounding the NBP.

Q. 5. Do you agree with ComReg’s assessment of SMP? 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. [Page 240]

A. 5. ALTO agrees with ComReg’s assessment of Significant Market Power – SMP, and the logical analysis carried out by ComReg.

Price increases over the past two years clearly establish the ability of eir to act independently of market forces as there is no viable alternative supply for VUA services.

ALTO submits that eir lacks a fit for purpose Duct Access offering and have largely curtailed the ability of operators to use upstream eir WLA facilities to climb the ladder of investment that is desirable.

ALTO notes ComReg’s comment at clause 6.57 and support the need for access obligations in terms of non-discrimination, transparency, pricing controls to make the Civil Infrastructure workable in conjunction with eir’s position. Without these competitive enhancements the Eircom Duct Offer is simply not fit for purpose.

ALTO welcomes Cartesian's work and Appendix 10 of the document set and we submit that ComReg should implement the findings contained therein.

Q. 6. Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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. [Page 255]

A. 6. ALTO agrees that the competition problems identified and the associated impacts on competition End Users/consumers identified are those that could potentially arise in the WLA Market, and as an active operator in Ireland it is worrying that these characterise the existing regulated market.

ALTO highlights the myriad of issues raised in the Eircom Regulatory Governance – RGM, *Styles* Report that suggest that current regulation is simply not working properly in Ireland. This is underpinned by eir's view in the second RGM *Styles* Report that regulatory non-compliances will be in single figures going forward highlights a worrying disrespect of the regulator.

ALTO submits that there should be zero non-compliances.

ALTO recognises the work undertaken by ComReg in conducting various Market Review's, however members have concerns that this work is being undermined by slow and poor wholesale enforcement which should be *ex ante* in nature, but appears to be so poorly resourced that the market experiences *ex post* conditions as a symptom of institutional inertia.

Q. 7. Do you agree with ComReg's proposed remedies in the WLA 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. [Page 399]

A. 7. ALTO agrees with almost all of the proposed remedies in the WLA Market which are both comprehensive and to a level of detail which is clearly required given our poor experience of trying to negotiate with eir for SLAs, Ducts and Access Requests such as regional handover that took an excessively long time to resolve.

In ALTO's view various types of problems continue unabated and there is a need for both structural regulation of eir such as Functional Separation and EOI combined with prescriptive regulation to address the detail.

However, we remain concerned that ComReg has such a major problem with enforcement as evidenced by the industry experiencing with delays in dispute and compliant resolution and the extended time to address non-compliances. This is really becoming quite unacceptable to a market that seeks to function properly.

However we do acknowledge the amount of work that has been applied in analysing and developing remedies including the SLAs and Duct products.

ALTO welcome the further developments to the Requirements for a Statement of Compliance. This puts the onus on eir to state non-compliance issues rather than the industry and ComReg discovering such, years later as has happened to date.

ALTO submits that the proposed text needs more clarity than that NGA is only regulated on an EOI basis.

NGA was only launched in 2013 and EOI should have been deployed from inception – it was not legacy in any manner. In 2017 it has become unacceptable that some parts of the regulated network can be EOO without some form of seriously justified position dictating the same treatment.

Given the expanse of issues discovered through the RGM process as published by eir, ComReg should be mandating EOI for all broadband products that will structurally drive out the various differences as a consequence. We also submit that there should be no issue regarding funding as eir is currently making a

supernormal return of in or around 14% whereas ComReg's regulation has set a rate of return of 8.75%. This set of figures makes for extremely poor reading at senior executive level within ALTO.

Q. 8. Do you agree with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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. Page 409.

A. 8. ALTO agrees with ComReg's analysis acknowledging the availability of supplier choice and product speeds is different depending on geographic location. We submit that this should be emphasised more forcefully in the first bullet of the Overall Preliminary Conclusion at clause 9.31. However ALTO also agrees with the second bullet of 9.31.

Q. 9. Do you agree with ComReg's preliminary conclusions on the product assessment for the WCA 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. [Page 456]

A. 9. ALTO agrees with ComReg's preliminary economic theoretical conclusions on the product assessment for the WCA Markets however we are concerned with that for FTTx (FTTC and FTTH). We also agree that the alternative supply of wholesale WCA is wholly dependent on a properly functioning WLA market.

ALTO considers that eir is a difficult and reluctant wholesale provider as demonstrated by the compliance issues highlighted in the eir RGM and at least the 12 non-compliance notices that ComReg has issued against eir in the past two years – none of which have been resolved. ComReg makes its economic

assessment assuming regulation is working – ALTO submits that this is clearly incorrect and ComReg should make its assessment on the basis of ineffective enforcement – i.e., that current regulation is not working.

Q. 10. Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA 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. Page 456

A. 10. ALTO notes that there is a geographic distinction to the markets as highlighted in clause 10.157 as correctly identified by ComReg and that the roll-out is linked to population density and commercial viability.

ALTO also notes that ComReg suggests that it should monitor the development in the regional area given the uncertainty of when the NBP State Aid will be granted.

ALTO notes clause 10.145 that eir has commenced the roll out of FTTx services in the same areas that SIRO is rolling out. ALTO expected this and that eir will cherry pick the most viable locations limiting the return of any new entrant. We note that this approach and the overall eir approach is going to conflict with IPO plans in a manner that may have unintended consequences for eir and ComReg.

Q. 11. Do you agree with ComReg’s assessment of SMP in the WCA 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. [Page 485]

A. 11. ALTO has some concerns over ComReg’s assessment of the SMP analysis in the WCA markets as presented.

ALTO submits that if ComReg is going to increase the opportunities for leverage between markets as proposed by this geographic de-regulation, then the market urgently needs to understand how ComReg is going to improve its wholesale

enforcement regime as its currently not fit for purpose and undermines the work of the ComReg economists trying to fine tune the regulation.

ALTO's view is that any material change should be delayed until ComReg has resolved its wholesale compliance and enforcement issues, including re-gaining its ability to directly fine and/or effective censure for wholesale breaches of regulation.

Q. 12. Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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. [Page 494]

A. 12. ALTO agrees that the competition problems and the associated impacts on competition identified by ComReg are those that could potentially arise in the Regional WCA Market (and related markets). ALTO notes however that some of these issues such as constructive refusal to supply are continuing even when the market is regulated, thus ALTO has major concerns that the remedies and or enforcement measures are not fit for purpose (see above).

Q. 13. Do you agree with ComReg's proposed remedies in the Regional WCA 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. [Page 578]

A. 13. ALTO agrees with ComReg's proposed remedies in the Regional WCA Market. ALTO submits that aligning those remedies with those in the WLA market is helpful.

Q. 14. Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a

six month sunset period? 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. [Page 580]

A. 14. ALTO does not agree that a six-month sunset clause is at all appropriate as a standalone solution. Operators have had significant experience with the recent Regional Handover debacle, after some two years eir seem to have conceded to offer regional handover discounts, and the ALTO members are told that eir don't have capacity at some of the key sites for us to trigger the current generation scheme. There is a real and present risk that ComReg will put the industry in a position where no supply or unreasonable supply may become the norm. Consequently ComReg should at least make provision that eir must make available facilities and capacity (there and then) for operators to move to substitutes such as VUA and regional handover solutions provided that capacity and processes are available – otherwise any proposed sunset period is immediately circumvented.

Q. 15. 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. [Page 623]

A. 15. ALTO addresses each area in turn below:

WLA Market

ALTO notes that the preliminary conclusions for the Regulatory Impact Assessment are structured to consider the impact of increasing levels of regulation, with:

Option 1: applying access regulation only,

Option 2: Access, Transparency and Non-Discrimination obligations and

Option 3: applying Access, Transparency, Non-Discrimination, Price Control and Cost Accounting obligations, with

Option 4: adding accounting separation obligations.

ALTO agrees with ComReg's analysis for the WLA market and the impact assessments as far as they go. However, the existing regulatory environment generally aligns with Option 4 although Option 4 has not worked properly as seen through the RGM reports issued by eir and separately the non-compliances published on the ComReg website.

ALTO submits that ComReg should seek to that create incentives for eir to comply with Option 4 above, and facilitate pro-active intrusive transparency from the outset which would start and seek to foster a wider incentivised culture of compliance with eir. These regulations are in-being now, but not operating in the manner that they should.

WCA Regional Market

The RIA follows the same format as for the WLA market and we submit the same comments as above.

WCA Urban Market

ALTO does not agree that this market should be de-regulated as eir will have the opportunity and motive to drive wholesale competition out of the market that will ultimately limit choice of wholesale carrier for retail providers.

ALTO

30th January 2017

2. BT Communications Ireland Limited (BT)

BT Communication Ireland Limited “BT” Response to the ComReg Market Reviews:

Wholesale Local Access (WLA) provided at a Fixed Location and Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products

Issue 1: 30th January 2017

Introduction

We welcome the opportunity to comment to ComReg’s proposals to update how the Wholesale Local Access (WLA) and Wholesale Central Access (WCA) markets are to be regulated going forward. ComReg has produced a considerable analysis of many aspects of the market to arrive at its proposals and this is appreciated.

BT is an established operator in Ireland and our primary focus in this market would be the provision of wholesale services to retail providers and in the use of broadband access technology to support the supply of some of our retail business products. Our comments are thus focused at the aspects of the market that impact our business.

Whilst we appreciate the positive work of ComReg in this market review we do need to address the wider situation as such impacts how the proposed ComReg remedies will operate in practice. Ineffective operation and enforcement of the remedies can lead to regulatory uncertainty thereby undermining confidence to invest in this market.

- 1. The need for change** - The publication of the Eircom Regulatory Governance Model (RGM) to industry has undermined industry confidence that the regulatory system is working correctly. We appreciate ComReg is working to address this situation and welcome the investigations that ComReg and its consultants are conducting. However, these events lead us to conclude that a transformational change to the regulatory approach is now required in Ireland as there appears to be little in the current regulatory system that would stop a repeat of the current situation. Separately the time it’s taking to progress disputes such as the Service Assurance SLAs and complaints is exacerbating the situation as poor wholesale behaviour is not brought to book quickly. The current wholesale regulatory system urgently needs an overhaul and more of the same as proposed in this consultation will not address the current problems. We have provided our initial suggestions in our response to question 7.
- 2. Market Overlap with leased lines and regulatory loop-hole** – We largely welcome ComReg’s regulatory proposals for the Regional WCA market as it’s not commercially viable for entrants to invest in their own network deployments in these geographic areas. However, we are deeply concerned that there is a loop hole in the proposals that could allow eir to circumvent the WCA regulation through the self-supply of WLA services combined with de-regulated leased lines. It’s clear that the opportunity and motive would exist for eir to self-supply very low

priced backhaul to its downstream businesses to undercut the market, or to generally drive backhaul prices to a low where entrants would no longer invest in supplying or supporting broadband backhaul.

Given the detailed analysis demonstrated by ComReg that ex-ante regulation is required in the Regional WCA market there is a need to close this loop-hole in a robust way. A non-robust solution to closing the loop hole could lead to years of seeking clarity through the courts during which time the market will be at risk of being distorted and damaged.

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3. **Regional Handover** – After some two years of negotiation we find it surprising that ComReg have not specifically listed Regional Handover Interconnection facility within the WLA remedies. We also note that ComReg imply at clause 13.91 that Regional Handover is in the WCA market. This is surprising as the only way to achieve the maximum interconnect discount is on national basis and ComReg are proposing to de-regulate the Urban areas hence we assume such will end in these areas. Also the reality is that Regional Handover is potentially the only economically viable way to interconnect in many regional areas and this facility should be specifically called out as part of the WLA market. I.e. ComReg must add Regional Handover in the legally binding WLA Decision. The proposed de-regulation of the leased lines market (which we strongly disagree with) potentially removes the availability of eir leased lines and wholesale Ethernet to eir’s competitors, further increasing the economic difficulty to reach the regional VUA points. Hence ComReg is mistaken if it considers WLA interconnect is limited to operators reaching VUA exchanges, Regional Handover is in the market and within the regional areas it’s the only economically viable to reach the WLA network particularly if the availability of leased line / wholesale Ethernet could be restricted.

4. **Duct and Pole Remedy** – We welcome the comprehensive work of Cartesian to address the operational issues of the eir Duct and Pole offer and the positive step change approach of ComReg in its regulatory proposals. We note some operators had been requesting improvements to the duct and pole offer for some time. We also welcome that ComReg has been realistic that further access requests and developments may be required to conclude this development. A key concern for BT is how long it will take for eir to deliver a fit-for-purpose operational service. Our view is achieving a fit-for-purpose Duct and Pole offer will be a repeat of LLU with years spent in Conference Room 1 at ComReg trying to resolve operational and process hurdles. The evidence stands before us in the form of LLU, LLU Migrations and more recently SLAs, Duct and Pole Access (18 months already clocked up) and Regional Handover to name some of the key difficult projects. This is not acceptable and incentive style regulation is urgently required to create an environment for a fit-for-purpose solution to be offered quickly.
 In the case of Address Matching we can remember seeking better facilities in the late 2000’s (the infamous use Google for customer address matching being one proposed solution) only to find the RGM report admitting that eir was offering itself a superior service in 2015. We estimate it will likely take five years of hard negotiation, trials and further ComReg regulatory intervention to bring the Duct and Pole service to a fit-for-purpose status.

Separately we now believe that ComReg's view is the Duct and Pole offer will help mitigate the risk of disrupted supply of leased lines if the leased lines market is de-regulated. Whilst we strongly disagree with the proposal to de-regulate leased lines and without prejudice to that view, it's clear that any such consideration would need to specify a 'fit-for-purpose Duct and Pole Offer' which is very different from a 'Duct and Pole Offer'. Without prejudice to our view on leased lines, if that is ComReg's thinking then it should wait until a fit-for-purpose tried and tested Duct and Pole offer is available before concluding the leased lines market review. It would certainly create an incentive on eir to come to the table to offer a fit-for-purpose product. Otherwise ComReg should consider what compensation scheme it is going to put in place to protect the industry. Based on past and current experience of the industry forums it will take five (5) years of negotiation, trials and further regulator intervention to achieve a fit-for-purpose Duct and Pole offer.

5. **Pricing Obligations** – We agree with ComReg on the WLA price control proposals as the eir have implemented substantial price rises in this market which in our view were not justified, particularly those that followed the change in regulation of the WLR services. We would also agree with the ComReg view that there is a need to prevent the potential for cross-subsidisation from the WLA market to the WCA markets
6. **EOI:** As a matter of principle we would note that many aspects of the Irish market are not yet regulated to the higher standard of Equivalence of Input and thus welcome its gradual introduction into more aspects of the WLA and WCA markets.
7. **SLA Remedy** – We welcome the many improvements to the process of requesting and developing SLAs and the proposal for introducing SLAs with new products and new order types is inspirational and should go some way to addressing the difficulties the industry has had negotiating new Service SLAs and the current experience of new order types rendering existing SLAs ineffective. However it's critical that the SLAs are fit-for-purpose from the outset and ComReg will need to ensure this in the current environment given the current extreme difficulty agreeing SLA terms.
8. **Access Request Remedy Improvement** - We welcome the proposed remedies for Access Request timescales and again strong KPIs will be required on eir to ensure EOI and that the timescales are met. I.e. what gets measured gets done – or at least investigated. The difficulty experienced with the Access Request for Regional Handover, even with the use of industry contractual timescales which has a 1 month requirement to clarify and a 2 month obligation to accept or reject the request did not work. Given Regional handover is largely based on simple discount formula and not large amounts of development, it is difficult to see why it has already taken over two years to supply and we understand it still cannot be fully supplied for WLA services due to capacity restraints on the eir network.
9. **Supply of Efficient Services** - Separately ComReg needs to strengthen its regulation that eir should provide efficient services. The recent announcement by eir that operators need to invest in dual interconnects to their networks at some sites due to capacity problems within eir suggest poor planning. The use of a multi-purpose interconnect for data services had been welcomed and quickly

established in the market, thus it was an unwelcome surprise that eir now appear to be moving backwards and opposite to the direction of technology evolution. It is also a concern that eir appear to be splitting bitstream and VUA traffic and to date we are of the view that the reason for this has not be adequately explained.

10. **Sunset Clause** – We consider that without supporting obligations to ensure capacity and facilities are available from substitute products there is a serious risk of ComReg stranding entrant providers. For example after some two years of trying to progress regional handover, we find that eir does not have capacity at some nodes for us to avail of the discounted offered for services. Hence Regional Handover is not yet resolved as we move towards its three year anniversary.

Response to detailed Questions

Question 1: Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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:

BT is not active in the retail consumer market in Ireland and we don't have a deep working knowledge of the retail BB market dynamics, therefore we are not commenting on these aspects of the consultation. However on the specific issue of the National Broadband Plan (NBP), which has wholesale implications, we believe there remains uncertainty around its deployment given the instability in the size of the intervention area. The existence of a minority Government would also appear to increase the uncertainty given the dependency on State funding. We therefore agree with ComReg that NBP should not be considered to have a market impact in this review.

Question 2: Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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:

As for question 1 we are not active in the retail consumer market, however there are a number of wholesale issues that emerge and we would like to comment to those.

- a. The ComReg analysis at clause 4.99 appears to be incorrect as we believe eir is already offering a group of customers the choice of FTTC or FTTH. I.e. FTTC and FTTH services are not mutually exclusive & we have noticed the same address registered twice, once for FTTC and once for FTTH.
- b. We consider ComReg has overlooked in its study the potential very high connection costs for FTTH for customers that do not have serviceable duct or pole access into their premises. & It's not clear who will be covering these potentially substantial costs, i.e. the operators or end customers. There is no

information available to industry as to the size of this issue and the impact on end customers taking up FTTH.

Question 3: Do you agree with ComReg’s preliminary conclusions on the WLA Product Market 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 views.

Response 3:

We generally agree with ComReg’s preliminary conclusions on the WLA Product Market assessment as it aligns with our experience of the market. However we consider that the Regional Handover product forms part of this market as it’s a national product and depends on Interconnects throughout the country to achieve its maximum discount. In many parts of the country it is the only realistic way to interconnect with the eir Network as getting to the local VUA points is uneconomic. The ComReg proposed de-regulation of the leased lines market further increases the need for this handover service to be in the WLA market as leased line and Ethernet backhaul from eir may not be available or viably available going forward. Hence as Regional Handover is an Interconnect Product and as it’s the only viable way to Interconnect for the regions it should be in the WLA market.

Question 4: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA 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.

Response 4:

We agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA Market as its clear eir has national ubiquitous network access to premises in Ireland. We also agree that the balance of market shares is unlikely to change over the period of the review given that the SIRO development has only 1% market share and the installation of FTTH services face additional installation complexity whether SIRO or eir.

Question 5: Do you agree with ComReg’s assessment of SMP? 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 5:

We agree with ComReg’s assessment of SMP for the WLA market and the methodical analysis carried out by ComReg. The WLA price increases over the past two years clearly highlight the ability of eir to act independently of the market as there was in practice no alternative supply for WLA services. We note that eir’s lack of a fit-for-purpose Duct and Pole Access offer has largely curtailed the ability of operators to use upstream eir WLA facilities to climb the ladder of investment. Attempts to move to a Regional Handover Access solution have also proven to be extremely difficult.

We note the ComReg comment at clause 6.57 and support the need for access obligations in terms of non-discrimination, transparency, pricing controls to make the

Civil Infrastructure workable from the eir. We welcome the work of Cartesian detailed in Appendix 10 and ComReg should implement its findings, particularly if leased lines are to be de-regulated (this is without prejudice to our position that we disagree with the de-regulation of leased lines) and further items that we have documented to our response to question 7, for example Micro Ducting needs to be supported.

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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.

Response 6:

We agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA Market and would like to offer the following comments:

- a. As an active operator in Ireland it is of concern that the competition problems characterise the existing regulated market. For example issues raised in the Eircom RGM suggest that the current regulation is not working properly, and Eir's view presented in the second eir Regulatory Report that regulatory non-compliances will be in single figures going forward demonstrates a worrying disrespect of the regulatory system. The aim should be for no non-compliances.
- b. We recognise the good work of ComReg in conducting Market Review's, however we have concerns that this is being undermined with slow and poor wholesale enforcement. For example there are currently 12 unresolved findings of non-compliance against eir on the ComReg website some of which are nearly eighteen months old (an extract of the notices has been provided in Annex A). We also find it takes a considerable amount of time to process complaints and disputes which allow issues to fester in the market and undermines confidence in the regulatory system. There is also a question why ComReg has found itself in a position to run all the markets reviews simultaneously and not use some of its highly skilled expert market review resource to address the compliance issues. This would have assisted a faster resolution of the current compliance investigations, increased confidence in the system and provided a more proportionate work load on operators in what is a relatively small industry compared to other European countries.

Question 7: Do you agree with ComReg's proposed remedies in the WLA 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.

Response 7:

7.1 General

We agree with the micro level remedies suggested by ComReg and we have provided our comments below to these. However, and without disrespect to that good work of ComReg, the Eircom Regulatory Governance Report (RGM) demonstrates that micro level regulation is not satisfactory to address a much larger non-discrimination and compliance problems. It is clear that a different form of regulatory intervention is now required in the Irish market to address what we perceive to be institutionalised and

cultural problems within eir towards non-discrimination and regulatory compliance requiring a transformational change in regulation to address these issues. For example ComReg need to begin to understand and create the right incentives within eir – for example are the employees of Open eir working to benefit eir wholesale or eir? – This is not clear – even the branding has become confusing between open eir and eir with a small open and large eir. We welcome the governance investigations that are underway by Cartesian and KPMG and it is clear to BT that the micro level regulation, whilst well intended, will not address the wider non-discrimination and compliance issues.

The WLA market is important and we consider that to drive the consultation and remedies through without addressing the wider issues will not bring forward significant improvements – and indeed the ComReg leased lines proposal will leave competition in a far worse state.

Here are some initial suggestions to address the higher layer issues that are hampering competition in the Irish Market. However an industry consultation and a considered debate are clearly required to address these wider issues.

- a. A Company commitment – We note ComReg sought CEO commitment for the development of a new Fixed Number Porting Central Data base and this has the effect of achieving a top level commitment and which makes the CEO directly answerable. For a wider set of issues some form of legal Undertaking by eir is now required to create the correct incentives for non-discriminatory behaviour and compliance.
- b. Transparency and monitoring. Transparency underpins any effort to address institutional and cultural issues otherwise statements and initiatives are not believed.
- c. A remedy is needed that creates the right incentive for eir wholesale people to only be interested in the wholesale business and not the group.
- d. A form of system separation (possibly virtual) to give independence to wholesale access and to allow it to develop its own solutions rather than being tied to its retail downstream and other downstream businesses.
- e. Maintain the Statement of Compliance approach and make the statements available to industry. In the absence of wider solutions to the non-discrimination and compliance issues, the current Statement of Compliance approach is valuable, however there is a question as to why it did not work from 2010 when it was introduced through the WPNIA Decision until Dec 2014 when the RGM issues became known to ComReg.
- f. EOI - We welcome that ComReg is moving to Equivalence of Inputs (EOI) for WLA services as the Equivalence of Outputs (EOO) methodology is dated, however the Eircom RGM raises questions as to whether EOI or EOO models are working correctly to prevent non-discrimination and compliance breaches. We welcome the proposals to move CGA WBA services to EOI by 2018 and this should be driven forward but EOO and EOI is clearly not sufficient.
- g. Effective wholesale enforcement – The ongoing delays in ComReg progressing non-compliance notices (now at 12 unresolved cases) is undermining confidence

in the regulatory mechanism and allowing compliance issues to fester. We appreciate these things are difficult and complex but it is our understanding (from eir's confirmation at the presentation of their updated RGM report) that the issues within the RGM first became known to ComReg Dec 2014 and we are now in January 2017. In our view such a serious matter should have been made known to industry at the time, even as just initial awareness. However it took some eight months before the industry was informed of these issues in August 2015. We welcome the investigations into the governance issues and the compliance investigations, but ComReg need to look at its own processes and procedures as to why it took eight months for the industry to be informed of the RGM issues and why it took a year for ComReg to announce its review into the RGM issues on the 7th Dec 2015.

- h. Regional Handover – After some two years of negotiation we find it surprising that ComReg have not specifically listed Regional Handover Interconnection facility within the WLA remedies. We also note that ComReg imply at clause 13.91 that Regional Handover is in the WCA market. This is surprising as the only way to achieve the maximum interconnect discount is on national basis and ComReg are proposing to de-regulate the Urban areas hence we assume such will end in these areas. Also the reality is that Regional Handover is potentially the only economically viable way to interconnect in many regional areas and this facility should be specifically called out as part of the WLA market. I.e. ComReg must add Regional Handover in the legally binding WLA Decision. The proposed de-regulation of the leased lines market (which we strongly disagree with) potentially removes the availability of eir leased lines and wholesale Ethernet to eir's competitors, further increasing the economic difficulty to reach the regional VUA points. Hence ComReg is mistaken if it considers WLA interconnect is limited to operators reaching VUA exchanges, Regional Handover is in the market and should be in the WLA Decision as it's a national product and requirement.

7.2 Comments to the ComReg Remedies

a. Duct and Pole Access

- i. Service Assurance SLAs. We welcome that Cartesian has recognised the key concern of service assurance. The SLA of 1 day to acknowledge receipt of a fault then two days to update on progress is completely inappropriate. I.e. how could a provider invest in using such a product to serve a community (local village or town) of broadband & Voice customers or to a customer carrying business critical services? This raises questions and concerns as to how eir would achieve the EOI or even the lower EOO standard of equivalence. We note that eir wholesale and retail offer 24/7 leased line SLAs and whilst we understand this can be spread across differing issues, a fault fix would normally be expected for these services in hours and not days or weeks. Similarly the Carrier Services Interconnect requirement is a P1 ASAP. BT Ireland is able to fix fibre breaks in a matter of hours hence we are of the view Eir can and must be able to do the same. We welcome the comprehensive ComReg proposals on improving the SLAs in the industry which will ultimately drive a better experience for the end customers.

- ii. Time to achieve a fit for purpose service. ComReg has taken a step change approach in this market review towards Duct and Pole access which is welcomed and we note that many improvements have been proposed to the regulation. We also welcome that ComReg has been realistic in recognising that further access requests may be necessary as discussion and experience progresses. The previous industry forum discussion for Duct and Pole services concluded after circa 18 months with an explicit disagreement that the offer was fit for publication but eir published anyway. To use the saying we are not yet in the same ball park concerning the fitness of this product would be generous, we are not yet on the same planet when it comes to how close we are to agreeing a fit-for-purpose Duct and Pole service.

If we consider the experience of negotiating LLU services and migrations, and more recently SLAs and Regional Handover we expect it will take at least five years of negotiation and considerable ComReg interventions to achieve fit-for-purpose Duct and Pole access services. New macro level remedies are urgently required to create the incentive for the product to develop quickly.

- iii. If the ComReg proposals to de-regulate the leased lines market are carried – something we strongly disagree, then industry jeopardy is being created which will create pressure for a fit-for-purpose solution for Duct and Pole access to partially mitigate this risk. We know there is a significant industry dependence on the eir wholesale provision of wholesale Ethernet and leased lines and ComReg’s proposed de-regulation of leased lines creates a risk that eir would have the opportunity and motive to act to deny supply or constructively withdraw services through pricing, quality or contractual obstructions.

Hence industry is faced with the expensive option of largely building to customers whilst eir has existing infrastructure with largely sunk costs which it could be utilised for it to win bids in terms of price and time to supply. Without prejudice to our view that leased line de-regulation is incorrect, if the Duct and Pole offer were fit-for-purpose and there had been a history of constructive industry discussions with eir, then Duct and Pole access may have offered some mitigation to the risk to supply, however this is not the case and the reality is it could take at least five years of industry negotiation and regulatory intervention by ComReg to achieve this.

- iv. We therefore consider ComReg urgently needs to review the interaction of their work in market 4 with the proposals in market 3A and 3B and this should be consulted. If the ComReg leased line team believe removing the limitations on usages of Duct and Pole is all that is needed then it needs to consider all the 33 recommendations made by Cartesian in its report and the behaviour of eir, past and present, at progressing industry requests. We welcome that ComReg has recognised difficulties in progressing Access Requests as demonstrated by ComReg proposed stronger remedies. – That said these proposals are similar to the existing contract remedies and when we tried to use these for regional handover they proved in-effective.
- v. Other Duct and Pole issues
 - a. Micro Tubing – The consultation lacks detail on the provision of Micro Ducting/Micro Tubing which would appear to be how eir provides leased line services to itself. Given the recent removal by eir of the limitations to

carry services such as leased lines and the proposed ComReg EOI regulation, we consider it is essential there should be an obligation in the Decision to provide Micro-Tubing between the entry footway box/chamber and the customer premises.

- b. Cartesian have identified that a considerable amount of detail is still required on the eir dark fibre offer where the duct is full. We raised this issue at the industry forum some time ago and no progress has been made to develop a fit-for-purpose product. There should be an obligation for this documentation to be completed similar to the approach ComReg took to bring the Duct and Pole remedy forward.
- c. Supply of Duct and Pinch points – At times it may not be possible to install Micro Duct yet there maybe space for other remedies such as direct fibre install before the need to use dark fibre which may not be available. Hence we need a remedy for eir to actively pursue the provision of services where there are Duct and Pole pinch points. Crossing bridges would be a typical example of a pinch point.
- d. Tie Connection – We welcome the tie connection proposal at clause 8.230 as this will be required to connect the fibre carried in the duct with existing co-location equipment in the exchange.

b. Negotiation in Good faith – We welcome the proposals around the remedy to negotiate in good faith and more importantly we welcome that ComReg is starting to addresses the incentives on eir negotiators to act in good faith which in our view is timely and required. In our view industry negotiation has become more difficult and less effective in recent times for progressing market changing industry access requests. A number of separate incidents over recent times including the Eircom RGM disclosures have caused us to challenge that the existing negotiation in good faith remedy is unenforceable as its undefined. ComReg’s interpretation in clause 8.285 helps to resolve this problem but we ask that ComReg check this is enforceable before the Decision is issued.

c. SLA Remedy – The ComReg proposal for introducing SLAs with new products and new order types is inspirational and should go some way to addressing the difficulties the industry has had negotiating new Service SLAs and also the current experience of new order types rendering existing SLAs ineffective. However it’s critical that the SLAs are fit-for-purpose from the outset and ComReg will need to ensure this in the current environment given the current extreme difficulty agreeing SLA terms.

d. Access Request Remedy Improvement - We welcome the proposed remedies for Access Request timescales and again strong KPIs will be required on eir to ensure EOI and that the timescales are met. I.e. what gets measured gets done – or at least investigated. The difficulties experienced progressing the Access Request for Regional Handover, even with the use of industry contractual timescales which has a similar 1 month requirement to clarify and a 2 month obligation to accept or reject the request did not work which gives us a concern whether the ComReg proposal will work without full transparency of all projects, timescales and rate of progress through eir. Given that Regional handover is largely based on simple discount formula and not large amounts of development, it is difficult to see why it has already taken over two years to supply and we understand it still cannot be fully supplied for WLA services due to capacity restraints on the eir network. We therefore seek a

supporting remedy around for transparency of the different timescales being met and justifications for them being missed.

e. Compliance with the ComReg set Weighted Average Cost of Capital.

We note that eir is currently making a WACC of 14% whereas ComReg regulation has set a rate of return of 8.75% and note that there is no proposal or remedy to address what we consider a major non-compliance. Again ComReg not acting on compliance issues creates the wrong culture towards compliance.

- f. Suspension of an SLA –** It is our understanding that contractually there is no existing agreement to suspend SLAs other than triggering Force Majeure. The Industry Process Manual is not contractual. The exception is that faults actually caused by severe weather are excluded from the SLA, however the SLA still remains in force for other services, provisioning, faults etc. whether in the same area of the severe whether or not. We are concerned that this subject has been in state of confusion for some time and ComReg should go further and create a remedy that it should be clarified.

Question 8: Do you agree with ComReg’s preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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 8:

We agree with ComReg’s analysis which acknowledges the availability of supplier choice and product speeds is different depending on geographic location and believe this should be picked up more strongly in the first bullet of the Overall Preliminary Conclusion at clause 9.31. However we agree with the second bullet of 9.31.

Question 9: Do you agree with ComReg’s preliminary conclusions on the product assessment for the WCA 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 9:

We are concerned that for FTTx (FTTC and FTTH) that the alternative supplies of wholesale WCA is wholly dependent on a properly functioning WLA market. We consider Eir a difficult and reluctant wholesaler as demonstrated by the compliance issues highlighted in the Eircom RGM and at least the 12 unresolved non-compliance notices. We are concerned and believe that the incentive to invest in competitive WCA products to eir is soft and will soften further in the Urban and Regional ECA markets with ComReg’s proposals to de-regulate the urban WCA market and the proposed leased lines de-regulation (which we disagree).

Question 10: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA 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 10:

We would agree that the urban market has different characteristics to the sub-urban and more rural areas and a small number of entrants have invested in urban infrastructure to compete with the eir. However we would note the commercial deployment drivers don't appear to align with the urban area defined by ComReg and it's not clear to us why such a difference exists. We also consider that ComReg needs to provide more justification and further transparency as to the selection of each of the urban exchanges.

Question 11: Do you agree with ComReg's assessment of SMP in the WCA 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 11:

We do not agree with ComReg's assessment of SMP in the market as the analysis does not appear informed of how the market works in practice and the proposals in our view opens the potential for eir to strengthen its market position and control of the market.

✂

De-regulating the Urban WCA allows eir to drive backhaul pricing to the floor to drive out wholesale competition. It is recognised that ex-Post regulation is too slow to address this situation. The potential consequences of this ComReg proposal is to risk the existence of a wholesale competitor to eir, and secondly the de-regulation gives eir the freedom to decide what operators it will provide urban WCA and on what conditions.

✂

Hence we believe the consequences of this ComReg proposal for the WCA Urban market is to extinguish wholesale competition to a single supplier eir who will have the freedom to decide what retail competition will exist in the urban area.

Question 12: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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 12:

Absent the de-regulation of the leased lines market we agree the competition problems and the associated impacts on competition identified by ComReg are those which could potentially arise in the Regional WCA Market (and related markets). However as indicated in our response to question 13 we consider there is a loop-hole in the proposed WCA regulations which could be circumvented if the a de-regulated leased lines market is used by eir to supply WLA services directly to its down to its downstream arm or selected wholesale customers.

Question 13: Do you agree with ComReg’s proposed remedies in the Regional WCA 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.

Response 13:

Whilst we agree with ComReg's proposed remedies for the Regional WCA market we are seriously concerned there is a major loop-hole in that eir could circumvent these remedies by simply purchasing WLA services and using leased line type products to create an alternative solution.

Figure 1 of this consultation highlights that the difference between WLA is the access to the local exchange whereas WCA bitstream access is to a central access point. Hence in simple terms the difference between the WLA and WCA markets is the backhaul element. As entrant operators have the ability to purchase VUA and leased lines (either from eir, other providers or self-supply) it can be argued eir could do the same for its downstream business and this would appear to be equivalent.

Hence whilst eir could be mandated to provide the regional WCA solution which would maintain the obligation to supply to the wholesale market, there is possibility the leased lines de-regulated market could allow eir to drive down costs to its downstream business without similar offer being available to other operators. We note ComReg is proposing to make Regional WCA services cost oriented (including a reasonable margin) services available, however the opportunity and motive would exist for eir to provide it downstream business a better deal through using leased lines/wholesale Ethernet services. There is also opportunity and motive to discriminate in the supply of backhaul to different wholesale customers.

As ComReg has concluded through its extensive market analysis that the Regional WCA market is not competitive and regulatory remedies are required, the onus is with ComReg to close the loop-hole that the proposed de-regulation of the leased lines market creates.

Hence whilst the remedies in the regional market would initially look appropriate the loop-hole has the potential of undermining competition in this market and effectively makes it the same as the urban market.

Question 14: Do you agree with the above proposals to maintain requirements upon Eir to continue to provide existing access at prevailing prices during a six month sunset period? 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 14:

We do not consider the six month sunset clause is appropriate as a standalone solution. For example for Regional Handover, after some two years eir seem to have conceded to offer regional handover discounts, for BT to then be told eir don't have capacity at some of the key sites for us to trigger the discount. Hence, if ComReg is going to put the industry at risk of no supply or unreasonable supply it should at least make provision

that eir must make available facilities and capacity (there and then) for operators to move to substitutes such as WLA VUA and regional handover solutions.

Question 15: 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.

Response 15:

For the WLA Market

We note the preliminary conclusions for the Regulatory Impact Assessment are structured to consider the impact of increasing levels of regulation, with Option 1 applying access regulation only; Option 2 Access, Transparency and Non-Discrimination obligations; Option 3 applying Access, Transparency, Non-Discrimination, Price Control and Cost Accounting obligations and with Option 4 adding accounting separation obligations. We agree with ComReg's analysis for the WLA market and the impact assessments in Option 4 as far as they go. In our view, the existing regulatory environment generally aligns with Option 4 and has been demonstrated to not have worked properly as seen through the Eircom RGM and separately the non-compliances published on the ComReg website. We therefore consider that ComReg need to develop an Option 5 that creates incentive for eir to comply with Option 4 as discussed in our response at 7.1.

For the WCA Regional Market

The Regulatory Impact Analysis follows the same format as for the WLA market and we would make the same comments as for that market other than the loop-hole that we have raised earlier in our response to question 13. I.e. eir could circumvent ComReg’ proposed regulation by supply to itself and possibly others a WLA plus leased lines solution rather than offering a regulated WCA service. The impact is the reduction of wholesale competition and a distortion of retail competition.

For the WCA Urban Market

We do not agree that this market should be de-regulated as eir would have the opportunity and motive to drive wholesale competition out of the market which would ultimately limit choice of wholesale carrier for retail providers.

Annex A – Extract of the ComReg listings of Wholesale Non Compliances Published on the ComReg WebSite.

[Opinion of non-compliance issued to Eircom Limited for a breach of its access obligation in the Retail Fixed Narrowband Access market](#)

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Posted: 17th November 2016

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Posted: 17th November 2016

Reference Number: 16/99

Notification of non-compliance issued to Eircom Limited

Notification of non-compliance issued to Eircom Limited

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Posted: 10th July 2015

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3. Colt Technology Services Limited (Colt)



Market Reviews: Wholesale Local Access and Wholesale Central Access

Consultation Response by Colt Technology Services

Non-Confidential Version

About Colt

Colt provides world class network, voice and data centre services to thousands of businesses around the world, allowing them to focus on delivering their business goals instead of the underlying infrastructure. Customers include 18 of the top 25 bank and diversified financial groups and 19 out of the top 25 companies in both global media and telecoms industries (Forbes 2000 list, 2014). In addition, Colt works with over 50 exchange venues and 13 European central banks.

Colt operates across Europe, Asia and North America. It recently completed the acquisition of KVH, an integrated managed communications and IT infrastructure services business, with headquarters in Tokyo and operations in Hong Kong, Seoul and Singapore.

Today Colt's network directly connects 207 cities, with a further 49 Metropolitan Area Networks (MANs) and direct fibre connections into more than 22,500 buildings. Also, Colt operates 29 carrier-neutral data centres in Europe and in Asia-Pacific region. Our Global network spans three continents with Colt-owned infrastructure in 28 countries. This allows us to provide services to our customers across 86 countries.

Colt has a wide portfolio of network, voice and data centre services which are delivered with industry leading customer service and security:

- Our network services offer, among others, managed network Services, bandwidth and Ethernet services, fibre infrastructure and wavelength services;
- Voice services comprise Enterprise voice services (such as PSTN and SIP trunking access and outbound calls) as well as wholesale voice services (world-wide call termination via TDM and VoIP interconnection service, Reseller solutions and tools, White Labelled Services and Number Hosting);
- Data centre services enable Colt to provide colocation in carrier-neutral data centres, remote hands' services, disaster recovery space and DC Connect (direct connections to any enterprise within a data centre – including carriers, internet and cloud service providers, internet and financial exchanges, and content providers or distributors)
- Also Colt delivers integrated solutions services using our strong capabilities to integrate products and services and provide solutions to enterprises across the globe.

Consultation response

Colt welcomes the opportunity to respond to the present consultation on ComReg's Review of the Wholesale Local Access (WLA) and Wholesale Central Access (WCA).

While Colt is mostly active in the Leased Lines market, there are strong linkages between leased lines and WLA markets. Indeed leased line deployments can, for example, contribute to FttP/H business cases by allowing stronger economies of scale to a given Communication provider (CP). Also competition in the backhaul leased lines market is an ancillary input to creating competition in the WLA market. Accordingly, we consider mandating Eircom to provide a fully unrestricted access to its Civil Engineering Infrastructure (CEI) is the most appropriate remedy to promote infrastructure competition in the WLA market.

In reality there is no strong distinction between "leased lines" and FttX deployments, such that they qualify for a different regulatory treatment. All CPs are interested in deploying their equipment and reusing it in the most efficient way possible, which may naturally lead to network equipment being used for combinations of business and residential use. Indeed, in a world where underlying technologies and patterns of demand are constantly changing, any attempt to pin down a meaningful definition of these terms will rapidly become obsolete as markets evolve. Other regulators across Europe, such as ARCEP in France, have acknowledged this convergence by reviewing leased line and WLA markets together. This is precisely why Colt strongly supports ComReg's approach to focus on the upstream inputs in a manner that is completely agnostic to downstream use.

This approach has proven to be highly effective in countries such as Spain, Italy Portugal and France where duct access has been mandated with no restriction and where FttP is being rolled out extensively¹.

However, while an unrestricted CEI product appears to be the right approach, Eircom does not share the same view and has consequently refused our requests to use the CEI product. We therefore strongly welcome ComReg's clarifications cited below:

"Restricting Access Seekers' use of CEI to within Eircom's defined network boundaries (for example exchange or aggregation areas) could artificially restrict Access Seekers' abilities to build access paths

¹ At the end of Q3 2016:

- In France, , about 41,623 km of ducts were leased by alternative operators in order to deploy FTTP. (See: <http://www.arcep.fr/index.php?id=13415&L=0>.)
- In Spain, FttP coverage reached about 70% of homes passed.
- In Portugal, FttP coverage reached about 79% of homes passed.

that are necessary to serve End Users using CEI inputs. For example, Access Seekers may wish to build Access paths which cross two or more Eircom defined exchange boundaries in order to provide services to End Users.

[...]

For the reasons outlined above, in ComReg's preliminary view Access Seekers' use of Eircom's access network CEI, should not be limited to Eircom defined boundaries within its access network topology (such as exchange or aggregation area boundaries).

[...]

ComReg is of the view that reasonable restrictions would include restrictions relating to the technical and/or structural limitations of CEI, health and safety considerations and network integrity issues. Where Eircom refuses an Access Seeker's request to access CEI, it must provide the reasons and justification for such a refusal to the Access Seeker.

For the avoidance of doubt, ComReg notes that the use of Eircom's CEI by an Access shall be limited to the provision by an Access Seeker of a ECS and/or ECN. In particular, Access Seekers should not be restricted from using the CEI for the purposes of providing broadband, broadband enabled services (e.g. IPTV, VOIP), leased lines, backhaul for fixed and mobile services, and for network rollout etc."

Nonetheless, given ComReg's above statement does not reflect Eircom's current duct access product, it is necessary to describe below how the current restrictions on the CEI product differ from Colt's requirements (and experience across Europe), hence making the product unworkable. We then give examples of how Colt would be ready to invest more in deploying fibre infrastructure in Ireland in the event an unrestricted CEI product were available.

Inadequacy of current WPNIA product

Colt attended some Industry Forum meetings regarding the implementation of Wholesale Physical Network Infrastructure Access (WPNIA). However, the scope of the discussions appeared to have been intentionally narrowed by Eircom, covering only a subset of the full scope of Eircom's SMP obligation hence limiting the discussion.

Consequently, Eircom decided to restrict the CEI product in a way that does not reflect spirit of ComReg's Decision. The limitation is set out in the document "ARO Annex C Service Schedule 107: Duct Access" which states that "Under this Product Offering, Eircom will permit Access Seekers to have their fibre cable carried in sub-ducts installed in Eircom's duct infrastructure between nominated Eircom ingress and Eircom egress chambers locations for the purposes only of providing broadband services to their customers". The wording of this paragraph is clearly intended to allow Eircom the scope to limit access to its facilities depending on the nature of the use to which such access is put.

The “Product Description” document² therefore states explicitly that the “following non-exhaustive list of exclusions will apply:

- Aggregation of leased lines, NGN Ethernet and other data products;
- Backhaul circuits, including mobile backhaul;
- Broadband Network Infrastructure specifically designed to replace point to point customer connections (i.e. directly between two Customer Sites);
- To carry infrastructure directly between Operators POPs or core network deployment”

Those restrictions are completely unjustified and we therefore welcome ComReg’s clarifications on their intention of such CEI obligation. Indeed ComReg’s Decision is (and was originally) intended to allow service providers to deploy and configure their networks and services in a way that they see fit. Those above listed restrictions are purely based on Eircom’s incorrect interpretation of their obligation. Eircom is consequently wrong to refuse Colt’s access requests on those grounds.

Colt deploys fibre optic networks to serve business customers throughout Europe. One of the most common means by which it does so, is the use of remedies applied pursuant to “Market 4” wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location, under the 2007 Revision of the EU Recommendation on relevant markets.³ The remedies applied by ComReg under the Decision are similar to those applied under equivalent market reviews in other EU countries.

Colt’s experience in working with passive infrastructure access remedies across Europe⁴ has afforded us considerable experience of the factors that most affect the success of passive infrastructure access remedies. Our experience is that at least the following must apply:

1. **No limitations on end use.** There is no provision in the scope of Market 4 (or the explanatory text) for the access provider to discriminate between access seekers on the basis

² Eircom Wholesale Duct Access, Product Description 10/11/2014. Version 0.4

³ In October 2014, the Commission changed its list of relevant markets. Market 3a “wholesale local access provided at a fixed location” is the market on the new list that corresponds most closely to Market 4 in the 2007 revision. For convenience, we refer to the nomenclature that was in use at the time the Decision was made, rather than that in use today. That is to say, we refer to the Decision and analogous decisions elsewhere in the EU, as Market 4 decisions and not Market 3a
http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=7118

⁴ Especially in France, Italy, Spain and Portugal.

of the downstream use. Nor is/was there any such provision in the Decision. Any such restriction adds a level of complexity to the product making it unattractive and unworkable.⁵

2. **Any-point-to-any-point connectivity.** To avoid objectively justified technical or operational reasons, the access provider should not be able to limit the points of ingress and egress into the network. Allowing the access provider to limit the ingress and egress points allows it to institute a *de facto* limitation on end use, even if there is no *de re* limitation on end use in force.
3. **Access should be agnostic as to the segment of the access provider's network that the facility belongs.** While it is acknowledged that CEI is intended for the deployment of access networks, this does not imply that the access seeker should be denied access to a facility, merely because the access provider has classified the facility as belonging in its backhaul segment. The classification of a facility as "access" or "backhaul" is necessarily arbitrary and only relative to a particular network architecture. It is quite possible for a given network route to belong in the "backhaul" segment of one network while belonging in the "access" segment of another network.
4. **Appropriate tools and processes.** According to the experience that Colt has from the European countries where access to ducts is a proven and well working wholesale service, it is imperative that the product offer contains an (electronic) ordering interface, together with fit-for-purpose processes and support systems. It is also necessary that the support systems allow access seekers to interrogate the duct owner's inventory in order to plan deployment. The inventory should contain the best available information on, at the very least, duct routes and manholes accurate location but also on current space availability. An example of a well-functioning OSS framework is in Portugal, where the inventory database is so accurate that an operator can begin to deploy their fibre cables into ducts, five days after the initial request, provided that the support system shows that there is available capacity for the requested route. The product should therefore include functional interfaces and processes, and a support system for access to the database over its ducts. Colt believes that the creation of a non-discriminatory reference offer should be the most appropriate approach.

Considering ComReg had already imposed Eircom to provide Wholesale Physical Network Infrastructure Access (WPNIA) through their last Market 4 Decision, ComReg's present proposals

⁵ This is the case for example in the United Kingdom where BT's PIA (Physical Infrastructure Access) product has such restrictions and where the take up of the product is extremely limited. Ofcom is therefore consulting on how to make the product work to foster FttP deployments at a large scale. One of their suggested solutions is to allow the use of PIA for any usage.

https://www.ofcom.org.uk/data/assets/pdf_file/0024/95109/Wholesale-Local-Access-Market-Review.pdf

principally amount to clarifications on existing obligations imposed on Eircom and therefore can be implemented without undue delay. We would therefore urge Eircom to:

- Amend the existing product schedules to reflect the requirements by removing the above list of restrictions but also by appropriately modifying sections on tools and processes.
- Comply with its regulatory obligations, in relation to any individual order submitted, that falls within the scope of this Access Request, by providing a price offer within a month of an access seeker's application and agreeing to final terms and conditions within three months. Eircom's regulatory obligations to fulfil any such order are independent of any action and the timing of such action it takes in respect of the first point above.
- In the event that Eircom declines to fulfil either of both above points: provide CPs with an objective justification in writing. (In fact, Colt did submit an access request but this was met with a flat refusal, and not an objective justification).

Market Requirements and Use Cases

Market environment

An ever-increasing need for bandwidth has provoked a shift from copper to fibre based transmission capacity. Deployment of fibre optic cable typically requires installation in ducts.

For the past 10-15 years, most operators conducted their own civil works (at considerable expense). Yet, with high-quality connectivity at affordable prices fast becoming a basic requirement (and no longer a differentiator), alternative operators are no longer able to justify undertaking their own civil works in all circumstances. Consequently, the trend across Europe is to move away from self-provided civil infrastructure and towards the efficient usage of existing infrastructure, allowing the sunk costs of construction to be defrayed among multiple parties.

Colt has excellent experience of sharing ducts with SMP operators in European countries where duct access is offered both under regulated and commercial terms. Colt's experience shows that deployment of fibre cable in duct represents a small fraction of the corresponding digging cost. The average typical dig cost (trench, cable, chambers) is about €150/m. By using duct sharing instead, this cost can be reduced by about 80%.

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The final result of giving access to CPs to a fully unrestricted duct access offer will be that Irish customers – both business and residential – will be able to choose between a wider number of service providers, leading to an overall improvement in service quality, performance and price.

Potential use cases

Below, we set out some examples of how Colt intends to use CEI. The types of use illustrated below are based on examples of how Colt has deployed fibre in several EU cities.

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In this context, a shared duct offer will permit Colt to effectively deploy, from a number of new sub-nodes, fibre cable rings to connect multiple customers. A full fibre cable is the preferred option as opposed to a single fibre pair lease, as multiple drops and multiple fibre pairs are normally necessary.

4. Eircom Limited (Eircom)

eir

Response to ComReg Consultation & Draft Decision Paper:

Market Reviews:

Wholesale Local Access (WLA) provided at a Fixed Location

Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products

Consultation and Draft Decision

ComReg Document 16/96



30th January 2017



DOCUMENT CONTROL

Document name	eir response to ComReg Consultation & Draft Decision Paper 16/96
Document Owner	eir
Submission Date	30 th January 2017
Status	Non-Confidential



Executive Summary

eir welcomes the opportunity to comment on ComReg's Consultation and Draft Decision paper in relation to its analysis of the WLA and WCA markets. In this response eir submits:

- ComReg have failed to categorise the retail broadband market correctly. The market should include mobile broadband and broadband services provided over fixed wireless networks and satellite. In addition there are likely to be sub-national geographic markets rather than a retail broadband market that is national in scope, especially in the presence of a competitive urban WCA market.
- As a result of differing competitive conditions in urban and rural areas there are likely to be differences in the levels of substitutability e.g. in rural areas where more users access broadband via traditional telephone lines, one would expect to see higher levels of switching between copper based services and mobile broadband, FWA and satellite. As such eir is of the view that there is effective competition in both urban and rural retail broadband markets, albeit due to the existence of different competitive effects.
- ComReg has not properly taken into account a number of developments in respect of the WLA market such as SIRO's, Virgin Media's and Imagine's roll-out plans. There is significant market entry absent reliance on eir's network infrastructure.
- There is increasingly dynamic infrastructure competition and the increasingly competitive state of the markets does not support ComReg's proposal to impose more draconian obligations.
 - Imposition of Equivalence of Inputs (EoI)/self-serve model for passive infrastructure (CEI) access is disproportionate and not warranted by any market failure. ComReg has not properly assessed the costs (which will be excessive) or made any attempt to quantify potential benefits particularly where there is an absence of any evidence of market demand for CEI Access.
 - The implementation of the EC Directive on measures to reduce the cost of deploying high-speed electronic communications networks¹ (CID) calls into question the need to impose separate access obligations for passive infrastructure and the fairness of ComReg's proposal to only specify CEI Access obligations for eir. It should be all or none.
 - ComReg has further specified a number of existing obligations in more granular detail particularly in relation to the production of Statements of Compliance (SoC). We do not consider this to be necessary or appropriate in markets that are more dynamic than when last considered in 2010/2013. Further more detailed specification of existing obligations is unwarranted given the progress eir has made implementing an effective Regulatory Governance Model [~~X~~]. In addition, specifying such obligations as part of this market review constitutes prejudgment of the outcome of ComReg's on-going review of eir's Regulatory Governance Model²
 - Sub-loop unbundling (SLU) as a remedy is otiose
 - Product development: timelines (from WBARO) are out of date and not consistent with our IT development lifecycle. If timelines are to be specified they must be realistic and evidence based. The output of Cartesian's analysis in the RGM review will be relevant when it is available.
 - RAP change requests: ComReg is hard wiring current processes into the Decision. These processes have evolved over time. ComReg's approach will constrain further evolution that may be of benefit to all access seekers.

¹ [2014/61/EU](#) implemented by the European Union (Reduction of cost of deploying High Speed Public Communications Networks) Regulations 2016

² Described by ComReg in <https://www.comreg.ie/publication/review-of-eirs-regulatory-governance-model/>

- SLAs: eir agrees that SLA development may be more effective if the process is time bound. However it may be appropriate to add an additional step for new products where product performance can be assessed first before contractually committing.
 - Trials: Trials can be an important part of the product development process to test processes, new technology and customer experience. ComReg's proposed timelines and rules will add unnecessary months to the product development process dampening competition and innovation,
 - SoCs: The scope of SoCs should not be extended nor should they be published. ComReg's failure to date to reach a decision on the adequacy or otherwise of the SoCs which have been produced is no justification for extending this obligation and putting onto industry the task of scrutiny. Industry scrutiny will add overheads for both ComReg and eir and this is an administrative burden serving no purpose if ComReg continues to refuse to maintain an approvals process.
 - Cost accounting and accounting separation: the existing regime which ComReg is seeking to continue is out of date and too burdensome. A review is urgently needed.
- The Proposal to impose cost orientation on VDSL is not justified given the state of competition and that the imposition of such an obligation at this stage of eir's rollout of high speed broadband would undermine and deter on-going investments in NGA by eir and other players. ComReg's stated reasons for imposing the new obligations do not, on inspection, provide a sound basis for such high-risk regulatory intervention
 - eir is of the view that the cumulative criteria identified by ComReg for the purposes of defining the geographic boundaries of the WCA Market are too restrictive and do not accurately reflect the number of Exchange Areas where differing competitive conditions and thereby effective competition exist. eir considers that less restrictive criteria would be more appropriate in this regard.
 - eir agrees that the Urban WCA market should be deregulated but is of the view that the transition period is neither proportionate nor justified particularly as ComReg has made it clear that it will not reach a decision on this market review for a number of months.
 - ComReg has further specified a number of existing obligations in more granular detail. We do not consider this to be necessary or appropriate in markets that are more dynamic than when last considered in 2010/2013.
 - Product development: timelines (from WBARO) are out of date and not consistent with our IT development lifecycle. If timelines are to be specified they must be realistic and evidence based. The output of Cartesian's analysis in the RGM review will be relevant when it is available.
 - RAP change requests: ComReg is writing current processes into the Decision. These processes have evolved over time. ComReg approach will constrain further evolution.
 - SLAs: eir agrees that SLA development may be more effective if process time bound. However it may be appropriate to add an additional step for new products where product performance can be assessed first.
 - Trials: Trials can be an important part of the product development process to test processes, new technology and customer experience. ComReg proposed timelines and rules will add unnecessary months to the product development process dampening competition and innovation,
 - SoCs: The scope of SoCs should not be extended nor should they be published. This is an administrative burden serving no purpose if ComReg continues to refuse to maintain an approvals process.
 - Cost accounting and accounting separation: the regime is out of date and too burdensome. A review is urgently needed.

- eir disagrees with the imposition of the proposed margin squeeze test (MST) (if, contrary to our submissions, wholesale prices are cost oriented). The retail MST to Bitstream in the regional area will set retail prices in the urban area (the market analysis has recognised that all operators set national prices) so unless tests are flexible, ComReg will make eir's retail pricing in an already competitive market even more uncompetitive and create a pricing umbrella for other operators. In addition, there is no sound economic reason to impose a MST when there is cost orientation and so the imposition of such a remedy is disproportionate.
- ComReg's general approach of imposing more onerous obligations on eir is not justifiable in a market setting of effectively competitive retail markets, effective competition in a substantial portion the WCA market (as acknowledged by ComReg), and significant roll-out of alternative high speed broadband networks which means that such obligations are disproportionate and not authorised by the regulatory framework.³
- Further more detailed specification of existing obligations is unwarranted given the progress eir has made implementing an effective Regulatory Governance Model [~~2~~].

³ In particular 5(f) of the Framework Directive, Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009



Response to Consultation Questions

Question 1 Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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 retail market trends and developments in Chapter 3:

3.47 Having regard to the discussion in paragraphs 3.13 to 3.46 above, ComReg is of the preliminary view that the most notable retail trends of potential relevance to the retail market are:

- a) *Increases in download speeds on broadband subscriptions;*
- b) *Increases in download traffic on broadband subscriptions;*
- c) *Retail bundling of services and patterns there within;*
- d) *The continuing rollout by Eircom of its FTTC network (VDSL) and FTTH networks, providing broadband access with download speeds up to 100Mb/s and 1Gbps respectively;*
- e) *The announcement of Vodafone and ESB of a Joint Venture (the 'SIRO' network) to provide broadband access using a FTTH network; and*
- f) *The announcement by the Irish Government of the National Broadband Plan to provide high speed broadband access in rural areas.*

eir agrees in principle that the aforementioned developments are some of the most notable developments in the provision of retail services that are of relevance to the Wholesale Local Access (WLA) and Wholesale Central Access (WCA) markets as identified by ComReg. However, eir first notes that the Joint Venture (JV) between Vodafone and ESB was announced in July 2014⁴ with Phase I launching in 2015. As such, the scope and continuing rollout of SIRO's FTTH network as opposed to the announcement of the JV is of more relevance for the assessment of the relevant markets. SIRO is now reaching a critical phase in its rollout and as of December 2016 has passed approximately 64,000 homes and to date has contracted with four separate service providers (SPs).

Figure 1. SIRO Premises Passed

[✂]

Its network is expected to cover 200,000 premises by the end of 2017 and based on SIRO's current pace of rollout, its initial target of passing 500,000 homes by the end of 2018 appears to be achievable. This would be within the current market review period and is likely to have a huge impact on the market, regardless of the outcome of the National Broadband Plan (NBP) bidding process.

While increases in download speeds and traffic, increased bundling, eir's rollout of its FTTx network, the SIRO Joint Venture and the National Broadband Plan are all important developments in the market, eir would add that the following developments are also of relevance;

- Virgin Media's expansion and upgrade plans
- The Liberty Global and Netflix partnership
- The provision of television services by eir and Vodafone
- The entry of Sky to the retail broadband market

⁴ <http://siro.ie/more-about-siro/esb-and-vodafone/>



- The network agreement between BT and SIRO
- Imagine's aggressive plans to roll-out a national wireless network to support 'fibre-speed' broadband.

Virgin Media's expansion and upgrade plans

Virgin Media has confirmed⁵ that it plans to expand its footprint by an additional 200,000 new homes and businesses over the next two years, a 25% increase on its current network coverage. This will bring the number of premises passed by Virgin Media's network close to 1 million, covering 60% to 70% of Irish homes.

In addition, eir believes it is likely that Virgin Media's introduction of DOCSIS 3.1 is planned for 2017⁶. DOCSIS 3.1 provides symmetrical 1Gbps services and in time speeds as high as 10 Gbps will be possible making its network 'GigaReady'. Virgin Media states that real world latency and packet loss on cable networks are effectively indistinguishable from those achieved on Fibre to the Home (FTTH). Additionally DOCSIS 3.1 is quick to deploy and cost effective. Liberty Global, the parent company of Virgin Media, has said that it expects the upgrade to cost only approximately €20 per home⁷.

Liberty Global and Netflix partnership

Liberty Global, the owner of Virgin Media has agreed a multi-year partnership with Netflix that will see the internet television company's app added to Liberty's set-top boxes. Although eir notes that the addition of Netflix to Virgin Media's set-top boxes occurred subsequent to the publication of the market review, it further highlights the extent to which eir competes with well-resourced international competitors. Such deals are made on a global basis and cover numerous countries.

Television

Both eir and Vodafone have now launched IPTV services, and Virgin Media has acquired 2 terrestrial television companies in Ireland⁸, as well as its parent company's acquisition of Formula 1. Competition in the retail broadband market is occurring at the bundles level and as an undertaking that has regulatory obligations in a number of wholesale markets, eir is at a disadvantage against other unregulated operators, who are able to leverage their experience and existing customer bases in various markets.

Sky's entry to the Broadband market

Sky entered the retail broadband market as a national player in February 2013. In the intervening period Sky's market share has grown and as of Q3 2016, Sky had an 11.4% share of the fixed broadband market⁹. Considering Sky's growth prospects over the market review period and its ability to leverage a substantial and well-established base of existing TV customers, it should be viewed as a primary operator in the retail broadband market, in both urban and rural areas. Sky has launched a mobile service in the UK and may also intend to do so in Ireland, further strengthening its position.

⁵ <http://www.independent.ie/business/technology/virgin-media-digs-in-for-fibre-battle-as-major-network-expansion-beckons-35378463.html>

⁶ See for example <http://www.broadbandtvnews.com/2016/09/14/mike-fries-docsis-3-1-will-come-2017/>

⁷ <https://www.libertyglobal.com/pdf/public-policy/Liberty-Global-Policy-Series-Connectivity-for-the-Gigabit-Society.pdf>

⁸ <http://www.irishtimes.com/business/media-and-marketing/tv3-owner-virgin-media-buys-utv-ireland-for-10m-1.2718283>

⁹ ComReg Document 16/108, Figure 3.1.10



BT and SIRO's network agreement

In the intervening period since the publication of the consultation BT and SIRO have established a network interconnect agreement enabling BT to offer its corporate, public sector and wholesale customers access to SIRO's local access network. As a result, BT now has a further external source of supply and presumably Sky, as a BT wholesale customer, can access SIRO services should it wish to do so. This means that the retail market will be even more competitive for FTTH offers – particularly from the likes of Sky, which can leverage off their content. This could also create uncertainty for FTTC retail demand in the areas covered by FTTH.

Imagine's network expansion

Imagine is in the process of upgrading its network nationally to exploit the TD-LTE technology which offers superior FWA broadband services relative to WiMax. As stated in the Imagine statutory accounts for the year ended 31 December 2015 "The company also invested in the Group's TD-LTE project which gives the company a strong strategic position for the future. The group has agreed €50m funding for the roll out with an international infrastructure fund." Imagine have committed to providing a wholesale TD-LTE service.

All of these developments indicate the growth and diversification of eir's competitors in the relevant WLA and WCA markets, and the reduction in any market power which it might have had.

Question 2: Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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 does not agree with ComReg's preliminary conclusions on the retail product and geographic market assessments. ComReg state in paragraph 4.296 as follows;

Having defined the focal product (broadband provided over a copper network) and the available substitutes, it is ComReg's preliminary view that:

- *Retail broadband and retail narrowband internet access constitute separate markets;*
- *All broadband products provided over copper, FTTC, FTTH and CATV networks constitute a single market;*
- *Bundles, in which broadband is a key component, do not constitute separate markets, as the broadband access component of the bundle constitutes a relevant market in its own right; and*
- *There is likely to be a single national geographic market for retail broadband.*

Relevant product market

ComReg considers that retail mobile broadband and broadband products provided over Fixed Wireless Access networks and Satellite networks are not effective substitutes for retail fixed broadband provided over copper, FTTC, FTTH and CATV networks. This result is primarily due to ComReg's claims about the functional differences, customer usage and difference in pricing of this technology. However, eir is of the view that ComReg have taken an overly narrow view of the market and that the interplay between products in the retail market is more complex than ComReg concludes.



Whilst in some cases it may appear self-evident as to what the conclusion of the supposedly intuitive hypothetical monopolist test (HMT) or SSNIP test should be, when there is product differentiation, this can strain intuition too far. The test, mechanically applied, gives a result that individual products are ‘in’ or ‘out’ of the market for regulatory purposes and thus converts a necessarily continuous question into a question of ‘yes’ or ‘no’. If the HMT is to be used as a basis for market definition there is merit in moving beyond an intuitive or qualitative application to a more quantitative one. As a result there is a prima facie case for designing appropriate forms of customer survey. eir does not believe that ComReg has done this.

In the WLA/WCA Market Research respondents were asked how they would respond to a €2 increase in the price of their overall bundle or standalone broadband service. This is an across the board increase i.e. all respondents on all platforms, whether business or residential users or purchasers of bundles or standalone products were asked how they would respond to a €2 increase. This is therefore not representative of a SSNIP for all customers as this should be related to a 5% or 10% increase in the particular price they pay for the service they use and therefore is likely to skew the response in terms of estimating hypothetical switching behaviour.

According to para 4.20, the *“price of broadband provided over a copper network typically varies from €35.00 to €59.95, with an average price of €45.00 per month. For business customers, the price can vary from €17.80 per month to €133.50, with an average price of €45.00 per month.”* Applying a SSNIP of 5% and 10% to the average price of broadband provided over a copper network as well as the average price of broadband provided to business customers would yield an absolute increase of €2.25 and €4.50 respectively. Based on the average pricing an increase of €2 falls outside of this range and in any event were the correct absolute increases based on average price to be applied, the result is still likely to underestimate the number of respondents who would engage in switching behaviour.

As the market research conducted in this regard will help form a conclusion on the scope of the retail market, which in turn informs the analysis of the relevant wholesale markets (where demand for the upstream product or service is a derived demand), it is of the utmost importance that such survey work is conducted in the appropriate manner and that the surveys are designed correctly.

According to para. 4.23, *“if the price of standalone broadband (i.e. a broadband service that is not offered as part of a bundle) was hypothetically increased by €2 per month, 25% of residential respondents on a fixed phone line (copper) network indicated they would definitely or maybe change their behaviour. 64% of these respondents indicated that they would cancel their subscription and switch to an alternative network. Of these, 64% said they were fairly likely or very likely to do so in response to a €2 increase in the price of their broadband service. Of those residential respondents, who indicated that they would cancel and switch in response to the hypothetical price increase, 33% indicated they would switch to a FWA supplier, 25% would switch to a fibre supplier and 20% would switch to a cable supplier.”*

As such ComReg have not only failed to conduct the SSNIP test in the correct manner but it appears that the results themselves have not been correctly interpreted. The results here indicate that a larger proportion (33%) of those who responded that they would cancel and switch and are very/fairly likely to do so, would switch to fixed wireless access (FWA) rather than to a fibre based service (25%) or even a cable service (20%), the latter two of which are considered by ComReg as being within the retail broadband market, on the basis that they are effective substitutes. This result holds for those who purchase broadband as part of a bundle (See paragraph 4.24 below).

4.24. For respondents whose broadband is purchased as part of a bundle, 24% of residential respondents accessing services via a copper network said that they would definitely or maybe



change their behaviour in response to a hypothetical price increase of €2 in their broadband bundle.¹⁴⁹ 52% of these respondents indicated that they would cancel their subscription and switch to an alternative network. Of these, 76% said they were fairly likely or very likely to do so in response to a €2 increase in the price of their broadband service.¹⁵¹ Of those residential respondents who indicated that they would cancel and switch in response to the hypothetical price increase, 23% indicated they would switch to a FWA supplier, 22% would switch to a fibre supplier and 14% would switch to a cable supplier.[Emphasis added]

The conclusions that ComReg have reached are therefore inconsistent with the results of the market research. As eir has already remarked, when faced with a generic €2 increase the number of respondents who would potentially switch in the event of a price increase is also likely to be underestimated, meaning a true SSNIP is likely to result in more customers switching to alternative products (including mobile broadband, FWA and satellite).

Additionally despite the spread of fibre broadband, wireless technologies are still delivering comparable connectivity in many parts of Ireland, especially in rural areas lacking in NGA coverage. According to a sample survey of Irish broadband speeds by technology monitoring Ookla group, wireless technology firm Imagine, with an average speed of 77Mbps, were ranked second only to Virgin Media and ahead of eir, Vodafone and Sky¹⁰. As previously mentioned, Imagine is currently in the process of upgrading its network nationally to exploit the TD-LTE technology which offers superior FWA broadband services relative to WiMax, which will make FWA an even more attractive alternative to copper-based ADSL.

Although mobile broadband and broadband provided over FWA and satellite networks may not represent perfect substitutes for broadband provided over FTTC and FTTH, ComReg identify the focal product as broadband provided over copper and thus the SSNIP test should involve assessing potential substitutes against the focal product. Even though two services may not be considered direct substitutes, they can belong to the same market as long as there is a chain of substitution between them. Such chains of substitution exist where the price of a broadband access service provided over ADSL is constrained by the price of the service provided over a FTTH network. Such constraint in turn exists, if substitution exists, for example, between mobile and ADSL, on the one hand, and ADSL and FTTx on the other.

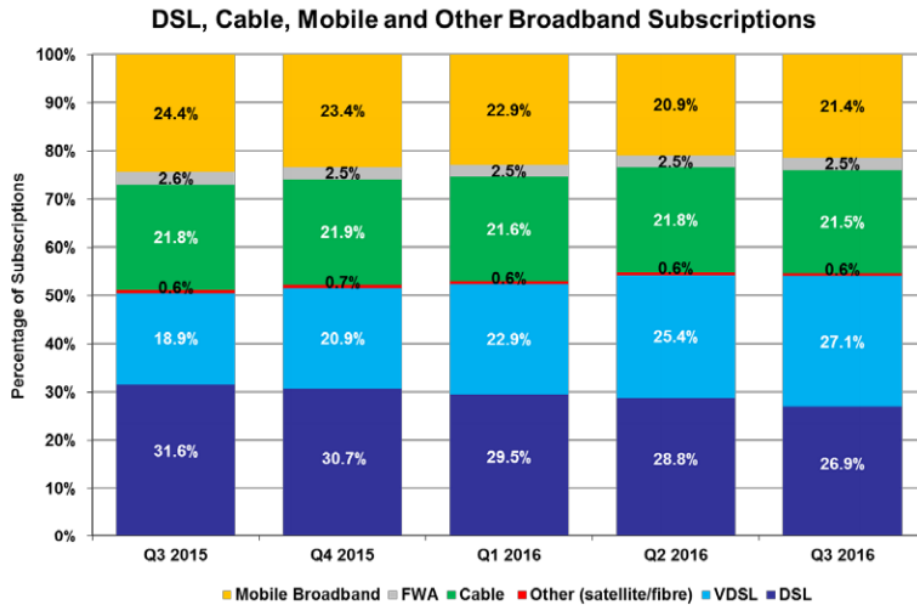
In addition, according to the latest ComReg Quarterly report 21.4% of broadband subscribers received broadband services over a mobile network using a dongle or MiFi device as of Q3 2016. This is not an insignificant proportion and is in fact only 0.1% less than the 21.5% of subscribers who received broadband services over Virgin Media's DOCSIS 3 CATV network in the same period which services considered as being within the retail broadband market.

The most recent figures from ComReg's Q3 2016 report are shown below. Although the share of mobile broadband subscriptions of the total broadband subscriptions has fallen slightly since Q3 2015 (there was an increase in mobile broadband subscriptions of 13,263 subscriptions), it has in fact increased from Q2 2016 and remains in line with the number of cable subscriptions. In addition while the share of FWA subscriptions is relatively small, this has remained stable over time, indicating that there is a cohort of broadband users for whom this is an effective substitute. Imagine's announced substantial investment to upgrade its network to the next generation FWA technology¹¹ will also be expected to see renewed growth in FWA subscriptions.

Figure 2. Broadband Subscriptions by Platform

¹⁰ <http://www.irishtimes.com/business/technology/wireless-broadband-still-rivalling-fibre-in-rural-areas-1.2937890>

¹¹ <http://www.imagine.ie/imagine-sets-target-1m-homes-passed-wireless-broadband-2018/>



Source: ComReg QKDR – Q3 2016

With regards the extent to which one might argue that mobile broadband (using a dongle or MiFi device) for example may be viewed as a complement rather than a substitute, it appears that the level of complementarity among broadband access platforms is low. This can be seen in the results of the WLA/WCA Market Research, where of a total 1,815 respondents, only 80 (4.4%) indicated that they have more than one broadband access platform (See Slide 23). 80% of those who indicated that they use more than one means of accessing broadband at home claim that this is because they are using 3G/4G internet access on their phone.

An economic approach to market delineation should seek to take into account all competitive constraints. In assessing whether a single service is a relevant market under the HMT, the relevant measure is not that of substitution to simply another service, but the totality of all substitution. In focusing purely on another single service, it is possible to significantly underestimate the overall level of sales loss and thus overestimate the power an undertaking has to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.

eir is of the view that ComReg has failed to take into account all competitive constraints and that it has oversimplified the manner in which the retail broadband market operates and the way in which consumers interact with the market. The conclusions ComReg have reached are contrary to the evidence and observable behaviour.

Geographic market

eir is also of the view that ComReg has failed to delineate the geographic market in the correct manner and believes that there are in fact sub-national geographic markets at the retail level.

According to the Broadband coverage in Europe 2015 Study¹² national NGA coverage in Ireland grew by 9.2% and by mid-2015 nearly 80% of Irish households had access to high-speed broadband services. However, most investment in NGA infrastructure has continued to focus on urban and semi-urban areas, with NGA networks passing only 24.9% of rural homes, a figure below

¹² <https://ec.europa.eu/digital-single-market/en/news/broadband-coverage-europe-2015>



the EU average of 27.8%. There is currently a noticeable difference in the quality and quantity of broadband services being offered in different parts of Ireland. According to the Q3 2016 Akamai 'State of the Internet'¹³ report only 29% of homes in Ireland have a speed of 15Mbps or higher, resulting in Ireland being 23rd for distribution of high speed services. Improvements in service to rural regions have been relatively slow. Ireland has a low population density compared to rest of Europe: 67 inhabitants per km² compared to the EU average of 120 inhabitants per km². Furthermore, rural Ireland has an extremely low population density of only 26 inhabitants per km.

On the other hand LTE coverage in rural areas grew by 8.4% in the first half of 2015, reaching 73.0% of rural household by mid-2015 and greatly above the EU average of 36.3%. With the rollout of LTE, mobile operators are able to offer bandwidths which frequently are above those which can be achieved on the copper network.

The National Broadband Scheme (NBS) recognised the ability of mobile broadband to meet user needs. The scheme was designed to deliver basic, affordable broadband to target areas across the country in which services were insufficient and was awarded to Three. Although the NBS ended following a 68 month operational period on August 25th 2014, Three continues to provide broadband coverage throughout NBS areas on a commercial basis.

The Government's focus has now turned to the NBP which identified at the time of inception that the current trajectory of investment would lead to a clear urban/rural divide for access to high speed broadband services and as such is aimed at addressing a 'market failure' in that under existing market conditions it would be uneconomic to serve certain customers¹⁴. It is difficult to reconcile the fact that an intervention such as the NBP is necessary if competitive conditions are not sufficiently different across geographic areas. The NBP has highlighted the importance of minimising this "digital divide", so that segments of the population would not become marginalised and unable to participate fully in a society and economy increasingly reliant on digital and online services. The very presence of a so called 'digital divide' would indicate that there are likely to be sub-national retail markets and differing competitive conditions.

In fact the WLA/WCA Market Research, conducted by RED C on ComReg's behalf highlights the significant differences between urban and rural areas with regards consumers' means of accessing broadband (See Slide 24 below).

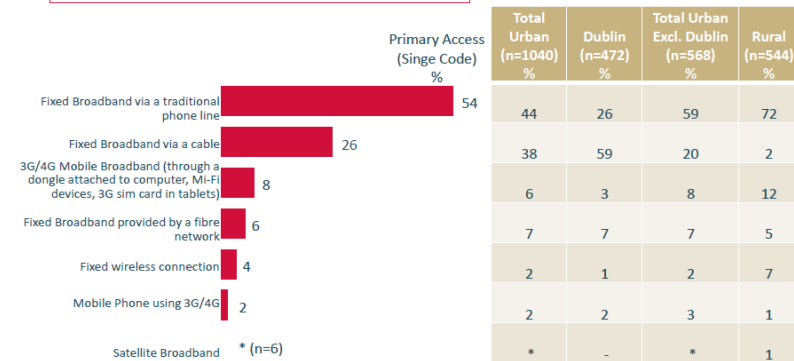
¹³ <https://www.akamai.com/us/en/multimedia/documents/state-of-the-internet/q3-2016-state-of-the-internet-connectivity-report.pdf>

¹⁴ This is required to justify the provision of State Aid.

Most Often Means of Accessing Broadband at Home

(Base: All With Broadband Access At Home, n=1583)

Q.11 Which means of accessing broadband do you and your household use most often when at home?



N = 1 Other broadband type

N = 6 Don't Know

Primary means of broadband connection is traditional phone line at 54% nationally. Cable remains most popular means of primary broadband access in Dublin at 59%.

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In urban areas 44% of respondents indicated that they access broadband via a traditional telephone line, followed by cable at 38%. In contrast 72% of respondents in rural areas accessed broadband over a traditional phone line, with only 2% using cable broadband. In addition the percentage of respondents using mobile broadband and FWA was higher in rural areas, with 12% and 7% of respondents in rural areas as opposed to 6% and 2% of respondents in urban areas indicating that they use mobile broadband and FWA respectively. All respondents¹⁵ who indicated that they use satellite broadband were located in rural areas.

In addition, in its assessment of the 'Modified Retail Broad Broadband Market' (i.e. the retail broadband market in the presence of regulation in the WLA market but absent regulation in the WCA market), ComReg leave the question of the geographic scope of the market open and only conclude that there may be separate geographic retail markets. It is unlikely that the presence of regulation in the WLA market alone would create separate retail broadband markets.

Again it appears that ComReg have taken the easier approach and oversimplified the market and the differences that exist at a sub-national level. The evidence would suggest that there are in fact significantly different competitive constraints regionally and as such there exist separate geographic markets for urban and rural areas.

Question 3: Do you agree with ComReg's preliminary conclusions on the WLA Product Market 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 views.

eir would like to raise a number of issues with regards ComReg's preliminary conclusions on the WLA Product Market Assessment related to the following

- Alternative FTTH networks
- The National Broadband Plan (NBP)
- The focal product and the relevant product market
- The presence of indirect constraints

¹⁵ Although this was a small sample, n=6



Alternative FTTH networks

5.84 ComReg considers, with the exception of the SIRO network, that it is unlikely that a WLA service offered over alternative localised FTTH networks, would meet the expectations of Access Seekers, given the very limited geographic coverage of these networks at present. Similar to the case described above in relation to FWA networks, an alternative FTTH SP could only offer a WLA service in fragmented and very small geographic areas. Therefore, ComReg's preliminary view is that an Access Seeker would be unlikely to switch from Eircom's widely available WLA products to wholesale WLA products provided over these alternative FTTH networks.

However if we look for example at the scenario where there are two different successful bidders for NBP and assume that these NBPCos are independent of the successful bidders, there would potentially be four different FTTH providers;

1. open eir commercial FTTH
2. SIRO commercial FTTH
3. NBPCo 1A services
4. NBPCo 1B services

The two NBPCos would be entering the market during the period of the review and as a result of having to deal with four different FTTH providers, one would expect aggregators to emerge, or for existing wholesale providers, including BT and open eir, to provide such services. In addition to the established wholesale operators other market participants such as Digiweb have the capability of providing such a platform. Access seekers are not as limited in the access they are seeking as ComReg assumes. It is already the case that Vodafone has integrated with open eir, BT, and SIRO in order to purchase the respective wholesale offerings. A number of smaller providers have signalled establishing relationships with SIRO, which strongly suggests that integrating with more than one wholesale provider is not a technical or economic barrier.¹⁶

NBP

5.88 ComReg noted in paragraph 3.46 that the Irish Government has plans to provide high speed broadband services to areas where no concrete plans for industry investment exist and in areas that are not currently served by network operators. The NBP programme expects to rollout high-speed services to 757,000 premises. It is expected that the SP(s) awarded the NBP contracts will provide VULA type products over the relevant network. While this product is likely to be a functional and technical substitute for WLA products provided by Eircom, given the timing and uncertainty as to the successful candidate(s), it is too early to conclude whether and to what extent this will act as an effective constraint on Eircom's WLA products, particularly given that the NBP winner may have an effective monopoly in the NBP footprint.

Given the constraints about commenting on the NBP process we cannot provide detailed comments. ComReg is an advisor to the DCCAE and we would suggest it discusses the continuing plans on products to be offered with the DCCAE. We note that the NBP contract is still due to be announced this year and the successful bidder(s) will be rolling out during the period under review and so there is not complete uncertainty¹⁷. However ComReg needs to provide assurance that it will be in a position to review the situation when the contract is awarded and not a number of years after the fact. As such eir would consider that ComReg should agree to commence a review, including

¹⁶ []

¹⁷ <http://www.dccae.gov.ie/news-and-media/en-ie/Pages/PressRelease/National-Broadband-Plan-in-rural-Ireland.aspx>. There is nothing official subsequent to this although there are further reports <https://www.kildarestreet.com/wrans/?id=2016-12-16a.1342>



public consultation, immediately upon conclusion of NBP tender process as this will have a definitive impact on the market. eir would envisage that, due to the nature of the NBP and the impact it is likely to have on the market, such a review commitment would involve a commitment by ComReg to consult and conclude a review within 6-12 months.

The focal product and relevant product market

As per para 5.8 “ComReg considers that Eircom’s current generation local access product, referred to as Local Loop Unbundling (‘LLU’), represents a suitable starting point for the product market definition exercise.” and is therefore treated as the focal product in the WLA market.

eir is of the view that due to the steady decline in both LLU and Line Share products (See Table 1), it may be more appropriate to delineate the WLA market on the basis of legacy and next generation technologies. The demand for these legacy products is likely to decline further over the lifetime of this market review as retail (and consequently) wholesale demand ultimately migrates to next generation access.

According to ComReg’s Q3 2016 report, 12.3% of DSL lines were provided to subscribers by OAOs using local-loop unbundling. In Q3 2016 there were 56,499 unbundled local loops, down from 68,262 in Q3 2015 and down from 59,209 in Q2 2016. Between Q3 2015 and Q3 2016 the total number of LLU lines decreased by 17.2% and declined by 4.6% since Q2 2016. Full LLU lines have decreased by 13.3% since Q3 2015 and declined by 3.3% since Q2 2016. Shared LLU lines decreased by 18.0% since Q3 2015 and declined by 4.8% since Q2 2016.

In contrast 23.5% of VDSL lines were provided to subscribers by OAOs using VULA. In Q3 2016 there were 108,557 VULA lines, up from 17,170 in Q3 2015 (+532%) and up from 31,874 in Q2 2016 (+183%) i.e. the market for next generation WLA continues to grow and with SIRO’s continuing rollout as well as the awarding of the NBP contract there will continue to be increasing infrastructure based competition.

Table 1. eir’s LLU and Line Share volumes

[✂]

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 whether the access is provided on legacy technologies or otherwise, is logical. While eir notes ComReg’s intention to impose regulatory remedies in the WLA Market, eir considers that ComReg has not paid due consideration to the nature of the market which is characterised by declining demand for legacy technologies and increasing demand for NGA.

Indirect constraints

In order to assess the effect that indirect constraints may have in preventing eir from imposing a profitable small but significant non-transitory increase in price (SSNIP) of WLA, ComReg proposes to consider the following factors;

- How a SSNIP of WLA would be likely to affect the retail market in terms of wholesale price increase pass through (i.e. the dilution ratio)

- What response in retail demand would be required to make the price increase unprofitable (i.e. the critical loss test)
- Whether the strength of indirect constraints would be weakened by retail customers switching to eir's own retail arm

On the basis of these factors ComReg concludes as follows;

5.173 Having regard to the likely lack of effective indirect constraints, ComReg's preliminary view is that the WLA Product Market does not include retail services provided over the following networks:

- (a) CATV networks;
- (b) Alternative FTTH networks;
- (c) FWA;
- (d) Satellite broadband; and
- (e) Mobile broadband.

eir is of the view that there are a number of issues with ComReg's assessment of indirect constraints, as detailed below.

Dilution ratios

The wholesale price for eir's VUA product is simply that of eir's FTTC VUA product i.e. €23.00 (as detailed in Table 9 of the Consultation). eir is of the view that it would be more appropriate to use a weighted average price of eir's FTTC VUA product and eir's FTTH VUA products.

Table 9: Dilution Ratios - % increase in residential retail prices from SSNIP in WLA

WLA Product (Eircom)	Wholesale Price €	SSNIP Level %	Wholesale Price Increase €	Price -Cost Ratio	Pre-SSNIP Retail Price ⁴²⁰	Effective Retail Price Increase €	% Retail Price Increase from SSNIP pass-through
LLU	€9.34 ⁴²¹	5%	€0.47	27%	€34.17	€34.64	1.4%
		10%	€0.93			€35.11	2.7%
VUA	€23.00 ⁴²²	5%	€1.15	45%	€51.16	€52.31	2.2%
		10%	€2.30			€53.46	4.5%

On the basis that the weighted average wholesale price of VUA (based on eir's FTTC VUA and FTTH VUA products) is likely to be higher than that of simply eir's FTTC VUA product, the price cost-ratio and subsequent % Retail Price Increase from SSNIP pass through will also be higher, indicating that in the case of NGA, price increases at the wholesale level will result in greater increases at the retail level and thereby greater switching behaviour. When one considers that NGA has to a large extent been mostly rolled out in urban and semi-urban areas where competition from Virgin Media is most likely to be present, the indirect constraint that Virgin Media provides at the wholesale level cannot be simply dismissed.

Critical Loss Test (CLT)

eir is of the view that ComReg has overestimated the Marginal Costs (MC) in this particular scenario, where we are looking at the costs that would be avoided in the case where eir is losing customers. There may be different MCs for current customers rather than potential customers e.g. for a new customer CPE will be a marginal cost, however in the case of an existing customer this is a sunk cost.

ComReg’s estimates of MC appear to be based on the DCF model. On the basis of this model and with regard an *existing* customer, eir would define the Retail Broadband DCF costs broadly as detailed in Table 2, ‘Sunk’ being those costs which are incurred and irrecoverable or which are inflexible and ‘Incremental’ being those costs which leave with the customer. ‘Backhaul’ in this case is the cost of interconnect paths. As this is only likely to be flexible in a case where customer decline is catastrophic, this is classed as ‘sunk’.

Table 2. Retail Broadband Costs for existing customers

Sales	Sunk
Modem	Sunk
Delivery	Sunk
Backhaul	Sunk
IP connectivity	Incremental
Connection	Sunk
Billing	Incremental
Marketing and Product Development	Sunk
Accommodation	Sunk
Helpdesk	Incremental
Order handling	Sunk
Servers	Sunk
Corporate overheads	Sunk

[✂]

For comparison purposes Ofcom’s calculations of Marginal costs were in the range of £0.50 to £2.50 for LLU and £7.00 to £10.00 for IPStream/WBC. On the basis of these estimates of MC, Ofcom’s calculations of α were 3.33% - 16.67% and 31.83% - 45.45% for LLU and IPStream/WBC respectively.

In the context that the CLVs have most likely been overestimated by ComReg, eir is of the view that Virgin Media does provide an indirect constraint at the wholesale level. In addition on the basis that the relevant retail market should be extended to include mobile broadband, FWA and satellite, these may also provide indirect constraints at the wholesale level. As ComReg have concluded that they are excluded from the retail broadband market, these substitutes have been dismissed and no analysis whatsoever has been conducted as to what level of indirect constraint they may provide.



5.141 Appendix: 2 of this Consultation summarises outputs from the WLA/WCA Market Research with respect to household and business respondents' reported behaviour in response to a notional 10% increase in the retail price of broadband services. ComReg notes that, in the context of an assessment of indirect constraints, this 10% notional retail price increase would likely significantly overestimate retail customers' behavioural responses, in particular, having regard to the maximum retail price increases arising from the pass-through of a 5% and 10% SSNIP in WLA. Nevertheless, respondents' reported behavioural changes in response to 10% price increases can be informative to the indirect constraints assessment.

As detailed in the response to Question 2, eir has a number of concerns with regard to the application of the SSNIP test and the way in which consumers' responses to such a hypothetical price increase were estimated. Respondents were asked how they would respond to a €2 increase in the price of their broadband package. This is an across the board increase i.e. all respondents on all platforms, whether business or residential users or purchasers of bundles or standalone products were asked how they would respond to the €2 increase. This is therefore not representative of a SSNIP for all customers as this should be related to a 5% or 10% increase in the particular price they pay for the service they use and therefore is likely to skew the response in terms of estimating hypothetical switching behaviour.

However in the context of indirect constraints in the wholesale market where it would be appropriate to consider a lower increase in the retail price on the basis of the dilution ratio, the estimated switching behaviour that ComReg claim is in response to a "10% notional retail price increase" and that "would likely significantly overestimate retail customers' behavioural responses" may in actuality be more representative of the pass through of a SSNIP at the wholesale level.

eir therefore considers that the manner in which ComReg has conducted the CLT is not robust in terms of both ComReg's estimates of marginal costs and subsequently critical loss values as well as the appropriate estimates of customer's behavioural responses against which to compare these critical loss values and thus determine the extent to which various retail services may provide indirect constraints at the wholesale level.

Switching to eir's retail arm

ComReg conclude that in response to a SSNIP in LLU or VULA products the extent to which Access Seekers who offer retail services based on such wholesale inputs would be likely to switch to retail products offered by eir's retail arm would have the effect of mitigating any loss of eir's wholesale revenue. However, ComReg have not done any analysis as to the extent of this trade off. In any event, in the absence of regulation, eir would still be constrained in its behaviour by ex post competition law and were eir to hold a position of dominance in the WLA market, a margin squeeze would be considered an abuse of such dominance.

eir is therefore of the view that on the basis of the weaknesses in its analysis of indirect constraints, ComReg has failed to correctly identify the extent to which Virgin Media, FWA, mobile broadband and satellite broadband act as effective constraints in the WLA market.



Question 4: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA 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.

eir does not agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA Market.

ComReg’s preliminary view as per paragraph 5.198 is “*that the WLA Product Market is national in scope. This is based on the existence of a small number of competitors in the WLA market, with Eircom having a high and relatively static market share, a lack of differentiated pricing and limited differences in demand characteristics across regions.*”

eir does not agree that the WLA Product Market is national in scope. Although there are a small number of competitors in the WLA market, eir is of the view that in the context of sub-national retail broadband markets and the patterns of network rollout, the WLA market is likely to be sufficiently differentiated on a regional basis as would indicate that there are separate geographic markets based on an urban and rural distinction.

SIRO’s entry to the market is very relevant in this scenario and leaving aside the NBP, SIRO is only rolling out in urban areas. To date, SIRO have launched in 9 towns (active), and eir believes that SIRO is set to launch in a further 8 towns imminently. open eir has FTTC (up to 100 Mbps) in all of these towns, while open eir FTTH overlaps with SIRO in 7 of those 9 towns. This would seem to indicate some geographical distinction in the provision of WLA.

As previously mentioned, the NBP is aimed at addressing a ‘market failure’ i.e. the fact that due to economics of density, when deployed on commercial terms, broadband networks tend to profitably cover only part of the population (those that are more densely populated). Such a market failure is necessary to justify the provision of State Aid. The intervention area will not cover those areas where services have already been commercially deployed and in the intervention areas NBPCo will provide wholesale network access. The fact that an intervention such as the NBP is warranted is inconsistent with the conclusion that the WLA market is sufficiently homogenous on a national level as to justify the delineation of the geographic market that is national in scope.

Figure 3. SIRO current and planned network rollout in urban areas

[✂]

With regard to paragraph 5.199 ComReg states that “*given the lack of direct and indirect constraints in the WLA Market generally, the conditions of competition appear to be sufficiently homogenous such that there are no sub-geographic markets. This is notwithstanding the emergence of some localised competitive pressure.*”

eir is of the view that ComReg is incorrect in its assessment of indirect constraints in the WLA market (as discussed in the response to Question 3). On the basis that the retail broadband market is sufficiently differentiated in urban and rural areas and the fact that Virgin Media does act as an effective indirect constraint in the WLA market (with Virgin Media’s market share in urban areas

around 45-55%¹⁸), eir is of the view that ComReg needs to reassess the scope of the geographic market.

Question 5: Do you agree with ComReg's assessment of SMP? 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 paragraph 6.22 ComReg is of the view that *“even if the self-supply of vertically integrated retail Service Providers were included within the WLA Market, Eircom would have a high and stable market share of approximately 68%.”*

eir does not agree with ComReg's assessment of SMP on the basis that the WLA market is sufficiently differentiated so as to justify the geographical delineation of the WLA market with regard to urban and regional centres of competition. In such a scenario the market shares would reflect a different outcome. ComReg appears to be taking the easier route of simply looking at a market that is national in scope.

On the basis that it has incorrectly identified that the WLA market is national in scope, ComReg proceeds to dismiss indirect constraints from Virgin Media's CATV network, alternative fibre, FWA, satellite and mobile networks as insufficient. eir has already raised a number of concerns in this regard and considers that there are in fact sub-national WLA markets and that retail services provided over these networks do provide indirect constraints at the wholesale level although to varying degrees in the sub-national markets.

The correct delineation of the WLA market in terms of the relevant product and geographic markets as well as the presence of differing competitive constraints. will likely to mean that eir's market share will vary across such markets.

In terms of barriers to entry and expansion in the WLA Market ComReg notes in paragraph 6.55 *“that the EU Civil Infrastructure Directive ('CID'), which came into force on 1st July 2016, aims to assist the rollout of high speed telecommunications networks by ensuring that Access Seekers can obtain access to infrastructure operated by various infrastructure owners (including, but not limited to telecommunications infrastructure owners).”*

eir would like to note that as far as the CID is concerned a number of member states have found that SMP remedies are not necessary as a result of the implementation of the directive (e.g. Sweden¹⁹). ComReg quotes a 2014 case to the contrary but that was before the Directive came into force. eir considers that the Directive is sufficient to achieve ComReg's objectives in terms of ensuring access to civil engineering infrastructure.

In addition SIRO has an indefeasible right of use (IRU) over the ESB infrastructure (as shown in the SIRO accounts). eir is unaware of any other company with access to that infrastructure but is sure that others will seek access given its ubiquity. In its assessment of the impact of the CID ComReg can't simply ignore the fact that the ESB infrastructure goes to almost 100% of premises and is more ubiquitous than eir's. The CID only needed to be implemented by July 2016 and as such it appears that ComReg has not taken sufficient consideration of the effect on the market that such has had and will continue to have.

If one also takes into account Virgin Media's infrastructure as well as that of the ESB and potentially Bord Gais there is a significant amount of infrastructure available.

¹⁸ Footnote 858 of the Consultation

¹⁹ Mlex reported a PTS decision to this effect on 14 November 2016.



With regard to paragraph 6.66 ComReg ignores the fact that the CID also applies to Virgin Media and that whilst it has not yet facilitated access to its infrastructure there is no reason why it should not. Additionally Virgin Media has now referenced “UK & Ireland” when referring to its £3bn network expansion program, ‘Project Lightning’ and it is clear that it will be rolling out further. That investment appears to involve an extension of the cable network and also fibre to the premise (FTTP) which will facilitate provision of wholesale services. It has indicated as follows;

“We have concluded that, in many cases, large scale builds deploying narrow trenching to build FTTP are more cost efficient than smaller infill opportunities”²⁰

This aligns with local press commentary on new build in New Ross, Ballina, Drogheda and Dundalk. As a result the WIK report is outdated.

The WIK report advises that VM is technically constrained from offering an effective active wholesale product or products at this time. We do not disagree. However we do not see why this will necessarily continue and also why access to Virgin Media’s passive infrastructure should not be treated consistently with eir’s, i.e. symmetric obligations. This is justifiable because VM has market power in urban retail markets, and from a practical perspective its duct network is newer than eir’s.

Virgin Media have announced more detail on their Irish network expansion plans²¹ advising that it is intended to pass 200,000 additional premises by end 2018.

In paragraph 6.121 ComReg states that *“while BT Ireland is the largest external purchaser of WLA from Eircom, this is not likely to strengthen its bargaining position as any dependency by Eircom’s on wholesale revenues earned from BT Ireland could be largely converted to retail revenues. ComReg also note that BT Ireland has no external source of supply, other than Eircom, in the WLA Market at present.”*

As previously mentioned in eir’s response to Question 1, in the intervening period since the publication of the consultation BT and SIRO have established a network interconnect agreement²² enabling BT to offer its corporate, public sector and wholesale customers access to SIRO’s local access network. As a result, BT now has an external source of supply and has therefore strengthened its bargaining position. It can also leverage the market power of its wholesale customers, including Sky.

eir has a number of issues with regards to ComReg’s view of the development of competition in the WLA market over the period of the review as stated in paragraph 6.122.

“Eircom is the largest supplier of WLA and Access Seekers purchasing WLA have, within the lifetime of this review, limited options for switching to another supplier. As noted previously, the SIRO network rollout has been slow to date, and is likely to have a limited footprint within the period under review in this market review. As such, the SIRO network may not be a credible alternative source of local access for Access Seekers looking for a large scale footprint.”

As is to be expected, SIRO’s rollout started off slowly as it learnt the practical lessons of FTTH deployment and working on an electricity network. . However the rollout has now gathered pace and at the current rate it appears to be achievable that they will meet their initial target goal of 500,000

²⁰ <http://www.libertyglobal.com/pdf/press-release/Virgin-Media-Fixed-Income-Q3-2016-FINAL.pdf>

²¹ <http://www.independent.ie/business/technology/virgin-media-digs-in-for-fibre-battle-as-major-network-expansion-beckons-35378463.html>

²² <http://www.rte.ie/news/business/2016/1201/835793-siro-signs-network-deal-with-bt-ireland/> and <http://siro.ie/home/siro-broadband-partners/>



homes passes by the end of 2018. This is during the review period and does not constitute a limited footprint.

Additionally 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. eir notes that many of its competitors compete on a global scale and are extremely well resourced. Significant market players such as Vodafone/SIRO and Liberty Global (Virgin Media) are well placed in terms of access to capital markets.

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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.

eir does not agree that the competition problems and the associated impacts on competition End Users that ComReg has identified are those that could potentially arise in the WLA Market on the basis that ComReg has failed to delineate the market in the correct manner or appropriately assess the level of competition that eir faces in terms of both direct and indirect constraints.

With regard to paragraph 7.21, eir's access obligations require that it implements changes at its own costs where requested by access seekers. In many cases it does this and access seekers then do not use the new products – examples include. BECs over WEIL and NTU for Line Share

[✂]

ComReg state in paragraph 7.31 that *“Eircom could restrict Access Seekers’ use of its WLA products, services or facilities, (including ducts or poles) to the provision of only certain services by Access Seekers (while at the same time Eircom’s own self-supply is not subject to any such restrictions). This potentially has the effect of limiting Access Seeker’ investment, as they cannot benefit from the economies of scale and scope that would result from the ability to use WLA inputs across a range of downstream markets (including but not limited to. retail and wholesale broadband access, fixed telephony, retail TV services or leased lines).”*

eir has a number of issues with this statement. eir does not seek to act in a discriminatory manner and did alter its duct and pole products in the light of the CID, unlike other operators and utility providers which have failed to produce reference offers or even contact points. In addition it is inherently inefficient to provide passive infrastructure access on an EoI basis and effectively force eir to consume its own CEI products. If a network planner is working on a GIS system that contains the network information which the planner requires it is inefficient to require that he make enquiries from another system as to the network information. This is not to say that the same constraints as to usage should apply but ComReg should be reluctant to introduce new processes when companies like eir already operate on a first comer first served basis, regardless whether the customer is internal or not. Additional processes come with an overhead and costs which will in time increase the regulated costs. The consultation was written prior to eir amending its duct and pole products. In particular, with regard the reference to downstream markets such as leased lines, eir notes that the leased line use restriction is no longer in place.

ComReg also states in paragraph 7.33 that *“Eircom could engage in vertical leveraging behaviours in a number of ways, absent regulation in the WLA Market. Perhaps the most obvious example would be an outright refusal to provide access to WLA services to its downstream competitors.”*

ComReg cannot simply have regard to an extensive hypothetical list of abusive conduct. It has to produce evidence for its assertions to justify intervention in a market. In addition, in a scenario where eir was determined to have SMP in a particular market, it would be subject to the behavioural constraints imposed by ex post competition law. All of eir's main competitors e.g. Sky, BT, Vodafone and Virgin Media, operate as part of large international corporations who take advantage of substantial economies of scale in terms of network deployment, product development at both the wholesale and retail levels, and content purchasing power and would readily make a complaint in the event of an abuse of dominance.

With regard to paragraph 7.38, ComReg states that “A vertically-integrated SMP undertaking could also have an incentive to frustrate the retail/wholesale switching process through which retail customers can switch to an alternative product or an alternative SP. Access Seekers may wish to migrate their downstream customers between wholesale products, and may wish to carry out single or bulk migration of their customer base (for example, migrations from current generation WLA products to next generation WLA products).”

ComReg has recently investigated eir's bulk migrations processes which work as intended. However as noted in eir's response to Questions 7 and 13 migration from NGA service to CGA (reverse migration) though possible should be penalised by charging as ComReg should be encouraging investment by operators and encouraging the adoption of new technology for the benefit of consumers. It is eir's continued view that efficient and swift migrations are key to the operation of a competitive market and require pan-industry processes and agreements. Migrations from other operators to one another, and to eir, have also to operate swiftly and efficiently. eir expects ComReg to apply migration principles reciprocally and seeks a clear commitment to that effect.

Question 7: Do you agree with ComReg's proposed remedies in the WLA 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.

eir sets out its response to the various proposed remedies below.

Requirement to provide Unbundled Access and Virtual Unbundled Access

The need to maintain all of the legacy LLU/LS remedies (paragraphs 8.58 to 8.71) would appear extremely questionable, from the perspective of materiality and the requirement on ComReg to forebear from imposing remedies, unless such remedies are proportionate and objectively justified. As of Q3 2016 the sum total of LLU and LS lines in the eir network was [✂]. This overall figure is declining steadily. At current rates of decline, eir estimates that the figure will likely be around [✂] by the end of 2021 (the lifetime of the review²³). Between Q2 2015 and Q2 2016 the total number of LLU lines decreased by [✂] and has declined by [✂] since Q1 2016. Full LLU lines have decreased by [✂] since Q2 2015 and have declined by [✂] since Q1 2016. Shared LLU lines decreased by [✂] since Q2 2015 and have declined by [✂] since Q1 2016. Based on this rate of decline a [✂] figure is likely to be extremely conservative, as the rate of decline is likely to intensify with the accelerated transition to FTTX based services. At these levels of materiality, the maintenance of the whole set of legacy remedies is completely disproportionate.

²³ ComReg refers to the 3 years following the market review as its lifetime – the WPNIA decision was in 2010 and ComReg needs to bear its own delay in conducting market reviews into consideration when imposing remedies



Regarding the proposed obligation to provide access to Sub-Loop Unbundling (combined with GNP where required) and Shared Sub-Loop Unbundling, in areas which have been identified as susceptible to form part of a state subsidy scheme, such as the NBP (8.58 to 8.71) eir propose that the same rules in relation to RAP services provided in the NBP footprint and outside of this footprint should apply except for those specific requirements set out in the DCCAE NBP contract which will be dictated by State Aid rules. As outlined in paragraph 8.65 of the consultation Vectoring technology has been implemented extensively in cabinets as part of the NGA rollout. The limitations arising from vectoring technology for operators wishing to deploy are catered for in the existing agreed Industry processes and rules

“The obligation of access to the sub loop will be available as follows:

A request will be considered unreasonable if:

- *FTTC/Vectoring roll out has taken place or is imminent or credibly scheduled by an operator deploying FTTC.*
- *The SLU operator fails to commit to next generation wholesale access (VUA/Bitstream).*
- *The SLU operator fails to commit to bandwidth enhancing technology where it is possible.*

A request will be considered reasonable if:

- *The request for SLU is at a cabinet or in an exchange area where NGA roll out and vectoring enablement has not already taken place and is not imminent or credibly scheduled; and*
- *There is a commitment to open access by the SLU operator;*
- *There is a commitment by the Access Seeker to bandwidth enhancing technology (BET), where it is possible.*

In the light of these guidelines and the vectoring that has already taken place sub-loop unbundling should not be required for FTTC anymore. We note that open eir has never received a request for any form of sub-loop unbundling strongly suggesting there is no demand for this option. Continued maintenance of the obligation does nothing other than impose administrative overheads on open eir in terms of maintaining product documentation. EVDSL can be unbundled utilising Line Share and the existing rules governing Line Share should be maintained for this variant. Sub-loop unbundling is not possible for FTTH, however spectrum unbundling (WDM –PON) may be available in the future but this technology is not in operation today. VUA is available today in FTTH, CVDSL and EVDSL – this is the remedy that should be applied in both the NBP and non-intervention footprints.

In paragraph 8.84 ComReg proposes that eir should be required to provide access to FTTX based VUA products services and associated facilities, including GNP. eir recommend that the existing remedy for providing VUA access for FTTC, FTTH and EVDSL with Geographic Number Portability should be maintained from the last Decision Notice and not altered. Unbundled fibre access (8.85) as proposed is an impractical solution and remedy and WDN-PON may be a more workable alternative to VUA FTTH in the future, if there is demand. The remedy for providing unbundled access to the fibre loop for FTTH should be maintained as the existing VUA service. This is consistent with the advice of Wik who conclude “There is no economically feasible option for physical unbundling of the fibre access infrastructure of a PtMP topology...The only option for supporting the Market 3a criterion of unbundling for such a GPON-based NGA network is a VULA.”



Requirement to provide access to Co-location, Co-location resource sharing and Co-location Rack Interconnection

With regard paragraphs 8.89 -8.112 ComReg is proposing to modify the co-location offering to facilitate wireless backhaul to provide access to masts. As eir does not own many masts and is unlikely to build many in the future it does not seem proportionate to impose this remedy. eir notes in any event that the NBP will have such a remedy and that it is not necessary to impose it as a result in this market review.²⁴ The major mast network operator in Ireland is Towercom who offer access to both fixed and wireless operators on a commercial basis. If any remedy were to be imposed it would be more suitable to impose it on Towercom, given the separate market in masts.

[✂] of data circuits in Dublin are provided by Wireless OAOs today, open eir provide a significant variety of interfaces for interconnect and products for legacy, Ethernet and leased line services for network to network interfaces (NNI). There is no demand for a new interface for supporting wireless OAOs and no bottleneck justifying its imposition. open eir offer a commercial backhaul service for design and implementation for Wireless Operators (MNO) which is specific to meeting their managed service requirements. Typically these commercial services use existing interfaces, therefore no new point of handover is necessary for Wireless Operators. In any event there would be planning related delays associated with eir facilitating third party operator access to open eir masts for the purposes of wireless backhaul. First of all it would have to be determined, in each individual case, whether or not the installation of backhaul equipment on eir masts necessitated planning permission or determining whether the equipment is entitled to the benefit of exemptions. This would lead to further cost and delays in cases where eir does not own a sufficient number of masts to justify the imposition of such a regulatory burden and where there is no demonstrated market failure.

At para 8.106 to 8.112, ComReg proposes to require eir (pursuant to Regulation 12(2)(f) of the Access Regulations 2011) to allow Access Seekers to interconnect their co-located equipment in exchange buildings or similar facilities with the view to enabling Access Seekers "to share services or to offer wholesale services to other Access Seekers". At para 8.110, ComReg seeks to justify this new obligation on the basis that "Eircom as a vertically integrated undertaking with SMP in the WLA market, has the ability and incentive to refuse access to co-located rack Interconnection services and facilities" and that "access to shared Co-location is necessary to ensure the development of sustainable and effective downstream competition and to minimise foreclosure concerns that could arise, absent such regulation".

eir does not accept that co-located rack interconnection is in any way "necessary" to ensure competition in markets downstream from WLA and notes that ComReg has provided no explanation why it is "necessary", as it contends. eir notes that pursuant to Regulation 12(2)(f), ComReg may require an operator "to provide co-location or other forms of associated facilities sharing". Associated facilities are defined in the Framework Regulations 2011 as "those associated facilities, physical infrastructures and other facilities or elements associated with an electronic communications network or an electronic communications service which enable or support the provision of services via that network or service or have the potential to do so and include, among other things, buildings, entries or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes and cabinets".

The question accordingly is not, contrary to what ComReg appears to believe, whether eir has "the ability and incentive to refuse access to co-located rack Interconnection services and facilities" but whether such co-located rack interconnection services and facilities are associated facilities or

²⁴ EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01), this is a mandated wholesale access product.



services within the meaning of the Framework Regulations 2011, that is, whether they are facilities or services which are required to enable access by Access Seekers to the WLA services which eir is obliged to provide. The answer to this question is clearly no. Co-located rack interconnection between access seekers has nothing to do with the provision by eir of WLA services. It is concerned with requiring eir to allow the use of its premises by Access Seekers so that they can provide interconnection services to each other. This is clearly not something which is required in any way to "enable or support" the provision of the services which eir is otherwise mandated to provide as part of its SMP obligations. As such, it is simply not an obligation which ComReg has powers to impose on eir further to Regulation 12.

Co-location is a very intrusive remedy, requiring as it does that an operator allows access to its property. An obligation of co-location thereby interferes with an operator's enjoyment of its property rights. For this reason also, it is a proportionate remedy only where such intrusion is absolutely and necessary to ensure that Access Seekers may rely on the services which eir is otherwise obliged to provide. This is not the case of co-location rack interconnection. As such, imposing such an obligation on eir would constitute an unjustifiable encroachment upon its constitutional right to private property.

Requirement for Migrations (8.113 – 8.124)

ComReg is proposing that Migrations from SB-WLR and VUA to standalone VUA or to standalone VUA combined with the transfer of a telephone number (i.e. porting) should be treated as a VUA Soft Migration, if required. This is not possible. In general all migrations attempt to minimise impact to the end user and the only migration type that would disrupt an end user would be if the customer was being migrated from one network platform to another (e.g. NGA to CGA) or to another Operator network (e.g. migration to ULMP or from ULMP). In the case highlighted regarding migration from SB-WLR with VUA to standalone VUA while there is a technician visit required to disconnect the POTS service there is no disruption to the end user as the VUA service remains active. A soft migration is not possible as the telephone service needs to be disconnected. Regarding the porting scenario there is an existing order type that facilitates porting out the geographic number where the POTS provider and GNP operator are the same.

Migration from an NGA service to CGA (reverse migration) though possible should be penalised by charging as ComReg should be encouraging investment by operators and encouraging the adoption of new technology by consumers. It is eir's continued view that efficient and swift migrations are key to the operation of a competitive market and require pan-industry processes and agreements. Migrations from other authorised operators to one another, and to eir, have also to operate swiftly and efficiently. eir expects ComReg to apply migration principles reciprocally and seeks a clear commitment to that effect rather than the imposition of additional remedies on eir, which are disproportionate for the reasons set out above.

Approval for network changes

ComReg proposes (para 8.138) that eir should be required to seek approval from ComReg in writing for changes to the rules or technical standards for the deployment of telecommunications equipment in the access network when such changes have the potential to impact on services already available and services in use, including changes to the CLFMP. eir agrees that any operator impacting network changes to the network which do not have an agreed "business as usual" classification should be submitted to ComReg for approval. However, any Network changes that do not impact any operator should not need prior approval by ComReg. It is the eir view that a change in this procedure would impede efficient and cost effective development of changes in the network which would ultimately benefit other operators and consumers. It is imperative that some technical changes to meet customer operation requirements or changes to enhance or protect the network

can be made in the shortest possible time. For example, step increases in demand will require rapid deployment of technical equipment in the shortest possible time to preserve the quality of service. Requiring ComReg's approval in writing will only serve to introduce delays in deployment. Any network changes requiring an outage should not require prior approval by ComReg but instead should be managed via the existing Change Management process. Any changes to Requirement for Access to Civil Engineering Infrastructure Network collateral (including CLFMP) contracted in the WBARO should be notified and approved through the normal regulatory governance processes rather than adding another layer of bureaucracy.

ComReg proposes to specify an obligation that eir maintains the industry agreed protocol on vectoring EVDSL in the ARO. This causes concern regarding the manner in which ComReg is exercising its formal powers. The agreed industry solution reflected in the vectoring protocol is already included in the ARO thus ensuring its status and the need for industry agreement for any changes and as such there is no justification for ComReg to exercise its powers in this manner. The agreed approach, including the protocol in the ARO, was to address a regulatory lacuna. ComReg's decision D03/13 established a protocol for vectoring CVDSL but was silent on the issue of vectoring EVDSL as this was not contemplated in 2012. It was considered expedient, to address the balance of end-user benefits and in the interest of promoting competition to agree the protocol and formalise it in the ARO absent this market review or other formal ComReg decision making process. eir would like to point out that the agreed solution applies to all network operators but places eir alone in the position of taking compliance action. However it is unclear what if any action eir should take under the ARO if another network operator fails to follow the protocol. It seems from ComReg's statements in the consultation (8.167) *"that some Access Seekers have deployed vectoring at Eircom's exchanges."* ComReg considers this to be evidence that *"The agreed industry process appears to be working effectively"*. eir has not been informed that multiple Access Seekers have deployed EVDSL in its exchanges and has not been made aware that any Access Seeker has enabled vectoring. eir has followed the protocol and properly informed Industry of its intentions. However it may be that others have not and ComReg urgently needs to consider how this non-compliance by those other operators should be addressed. The ARO may not be the appropriate vehicle in this regard and we would hope that ComReg identifies the operators concerned, given its stated knowledge, to prevent any further breaches.

Requirement for Access to Civil Engineering Infrastructure (CEI)

ComReg proposes to impose additional requirements for eir's Civil Engineering Infrastructure Access (CEI) duct and pole access products. ComReg also proposes to impose Equivalence of Input (Eoi) non-discrimination obligations in respect of CEI access. Given the lack of demand for such products the additional obligations are not proportionate and the proposed Eoi obligation is economically inefficient. Given that eir is a vertically integrated operator and that its downstream arms are in effect marketing operations it is not economically rational to require its upstream arms to consume the same products as other operators which have networks.

There is no justification for the imposition of a CEI access obligation on eir

ComReg dismisses the role of the Civil Infrastructure Directive (CID) in terms of enabling investment in alternative networks. The transposition of EU Directive 2014/61/EU is a very important policy measure to accelerate the delivery of high-speed broadband throughout the EU and has a potentially very positive impact on certain Member States including Ireland where rural population density and dispersion patterns are a specific barrier to investment. We note that some Member States, for example Denmark and Sweden,²⁵ have concluded that the CID is sufficient such that SMP access obligations are not required. In any event ComReg should

²⁵ Mlex reported a PTS decision to this effect on 14 November 2016.

permit the CID to operate before reaching a conclusion on its efficacy and not disregard it in advance of any experience with its application.

ComReg rejects reliance on the CID alone on the basis “*there are no specific requirements for equivalence (non-discrimination), or requirements to set and publish prices in advance.*” (8.194)

We would suggest that there is an obligation in the CID to have a reference offer and to make it available on request. This is not clear in the Irish implementation as described below. The Directive, inter alia, sets out an approach to infrastructure sharing between utility companies and telecommunication operators through a series of sequential steps involving requests for information, access requests for surveying, commercial discussion on terms and conditions including price and, if that discussion is unsuccessful, finally an arbitration process overseen by an independent body (ComReg in Ireland). In practical terms, the approach is very similar to the process that eir has already in place with regard to its regulatory obligations to allow access to its infrastructure to all other licensed telecommunication operators.

However eir is concerned at certain omissions in the SI that in our view may amount to a flawed transposition of the Directive. Specifically, there is no obligation imposed on companies that would meet the requirement set out in Article 3(2) of the Directive as follows:

“Member States shall ensure that, upon written request of an undertaking providing or authorised to provide public telecommunications networks, any network operator has the obligation to meet all requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communication networks.”

These concerns have been made known the DCCAE. The European Commission understands this provision to require the production of a reference offer. In any event it seems to us that deficiencies in the Irish transposition of the Directive cannot be held up to justify the imposition of CEI access remedies on eir alone. ComReg should work with the Department to ensure the CID is properly and effectively transposed.

In any event ComReg is wrong to state that access to eir’s CEI is a bottleneck. SIRO has entered the market using CEI that is not eir’s. Virgin Media also operates using its own CEI. The CID gives access to these CEI as well as gas, electricity and water infrastructure. The ESB has more ubiquitous infrastructure than eir (the ESB access network provides service to 100% of homes whereas the eir network does not have the same reach). SIRO is using ESB infrastructure in urban areas and Virgin Media has CEI in urban areas also. As eir notes below it is questionable whether there is likely to be any substantial infrastructure based commercial market entry. If there is to be further commercial infrastructure based market entry it is logical to expect it will take place in more populous areas where it is more economical and where there is a choice of infrastructure available.

eir should not be treated as having a bottleneck in relation to CEI in the areas where alternative infrastructures are present, given the ability for access to be obtained to these infrastructures on fair and reasonable terms and conditions adjudicated by ComReg. With access to rival infrastructures there is sufficient competitive constraint on eir and so long as the market is tending towards effective competition, it should not be subject to regulation.

ESB/SIRO is a clear competitive alternative. We note, for example, that Vodafone is offering its retail LightSpeed broadband packages wholesaled from SIRO at prices comparable to its Simply Broadband packages²⁶ wholesaled from open eir. This illustrates that SIRO’s access to

²⁶ <https://www.vodafone.ie/home/broadband/lightspeed-broadband>, <https://www.vodafone.ie/home/broadband/>

the ESB's ducts and poles does enable services to be supplied at a retail level at competitive prices. It is also notable that SIRO's access to ESB infrastructure was achieved even before the CID regulations.

Virgin Media imposes at least an indirect constraint on eir's pricing of CEI and is now subject to giving direct access under the CID. It is arguable that Virgin Media's civil infrastructure is newer than open eir's and as such should be easier to access (for example less likelihood of encountering blockages in the provisioning process). ComReg should properly have assessed SMP in the market taking into account the presence of Virgin Media in the areas where it is present, particularly given that Virgin Media has a higher retail market share than eir in these areas (Consultation A5.83). Given the EC Framework Directive's requirement to take utmost account of the desirability of making regulation technologically neutral, ComReg must explain why eir is being designated as having SMP in relation to this access and not Virgin Media.

We also note that the Government's Report of the Next Generation Broadband Taskforce, May 2012, identifies a broad range of sources of alternative infrastructure. This is highlighted in the following table from the Taskforce Report (page 87).

Public Entity	Useful Infrastructure	Commercial or Non-commercial	Has existing telecoms related business
Bord Gais – (Aurora)	Dark fibre ducts along gas pipes	Commercial	Yes
Coillte	Antenna Sites	Commercial	Yes
ESB – (ESB –Telecoms)	Electricity network – sites, structures and conduits	Commercial	Yes
Iarnrod Eireann	Railway lines – (BT have fibre along the path)	Commercial	No
Local Authorities	Local Authority owned infrastructure – ducts, site locations, Structures (e.g. streetlamps)	Non-commercial	No
National Roads Authority (NRA)	Road ducting on national roads	Non-commercial	No
Office of Public Works (OPW)	Structures for masts (e.g. buildings, masts)	Non-commercial	No
Railway Procurement Agency (RPA)	Laying fibre along RPA owned infrastructure	Commercial	No
RTE Transmission Networks Limited (RT NL)	RTE sites and mast structures	Commercial	Yes
Waterways Ireland	Tow paths along canals	Commercial ³⁷	No

In our view we do not have significant market power in the provision of CEI and ComReg has produced no evidence to the contrary. To the extent to which we do have SMP in the WLA market then unbundling / VUA remedies are sufficient given the lack of any bottleneck in the provision of passive infrastructure. To date no Access Seeker has availed of our CEI products



outside of the NBP and so there is clearly no commercial demand for CEI Access. This means the obligation ComReg is seeking to impose is not proportionate. Under Regulation 6.(4)(g) of the CID a network operator has the right to refuse or limit access to its infrastructure having regard to “*the availability of viable alternative means of wholesale physical network infrastructure access provided by the other network operator and suitable for the provision of high-speed electronic communications networks provided that such access is offered under fair and reasonable terms and conditions,*” It is not clear to us that ComReg has the authority to deny eir its rights under Irish law through the imposition of a blanket obligation to provide access to its CEI.

ComReg’s further specification of the CEI obligation is not proportionate

ComReg states (8.217) that it is of the view that the eir CEI access products are unsuitable based on the Cartesian Report and the views of Access Seekers. As we highlight below the Cartesian conclusions are merely one means of analysis and not one which enables eir’s CEI products to be compared with those of any other operator and are thus flawed and cannot be relied upon. It is not clear to us whether ComReg has analysed the views of Access Seekers or whether it is taking their views at face value, as appears to be the case with Cartesian’s consideration of Access Seekers’ views. eir would like to point out that there are no unreasonable restrictions in place for access to CEI and the only restrictions are the absence of the amendments which ComReg is seeking to impose. eir has removed all the restrictions which ComReg has previously suggested to eir that needed to be removed.

ComReg’s requirements are unclear

The Cartesian report appears to contemplate that all the data which is described in its report on eir’s physical network infrastructure is collected and included in eir’s systems. Whether or not this is in fact required is unclear when looking at ComReg’s proposed Direction which could be interpreted as saying that the proposed obligations would only apply to the existing data set. If such data is required, a point ComReg needs to clarify, then it has not been collected. The utility of the remedy which is proposed is as unclear as ComReg’s description of it and again the expenditure contemplated by Cartesian (which is only a small part of the likely expenditure) is disproportionate. In addition ComReg cannot propose any such remedy without being clear what is required and what market failure is intended to be remedied.

ComReg presents a high level description of Eol at paragraph 8.402 “*The term Eol is generally accepted and understood to mean that the vertically-integrated SMP operator consumes exactly the same upstream inputs as their wholesale customer, e.g. uses the same OSS interfaces, provisioning and service assurance processes, etc. The processes and OSS interfaces used by an Access Seeker during all stages of the product life cycle (i.e. from product development and service provisioning to in-life i.e. service assurance and customer switching) should be exactly the same (subject to minor exceptions) as those used by Eircom’s downstream arm.*” Nowhere in the consultation does ComReg articulate what Eol means in the context of CEI. For NGA services such as Bitstream it is clear who the downstream arm is, e.g. eir Retail, and consequently it has been possible to design and implement a common OSS interface (the open eir Unified Gateway) through which Access Seekers and downstream arms can procure these products. However in the case of CEI eir’s downstream arms do not directly consume ducts or poles. It would seem that ComReg is seeking to introduce a new concept of a downstream arm that sits upstream of other downstream arms, if the ‘generally accepted and understood’ meaning of Eol is to apply in respect of CEI. By implication eir must set up a new division to fulfil the role of the upstream downstream arm. This is an artificial construct that introduces significant



duplication of resource (including needing two planning teams, segregated provisioning and assurance teams, and support staff, such as HR, procurement and finance) and creates operational inefficiencies. It is not economically rational to require upstream arms to consume the same products as other operators which have networks. In any event the substantial cost and disruption that would be entailed has not been calculated let alone justified.

Paragraph 9.5 of the draft WLA Decision states *“For the avoidance of doubt, the [EoI] obligations set out in this Section 9 apply irrespective of whether or not a specific request for products, services, facilities or information has been made by an Undertaking to Eircom.”* It is entirely unreasonable for ComReg to impose such a burdensome obligation irrespective of whether there is any demand for the products and the demand would need to be of substantial scale to justify any major development of the product and processes. Otherwise the recovery of the implementation costs would make the CEI products disproportionately expensive and choke any potential market demand that might emerge in time.

The imposition of Equivalence of Inputs is a disproportionate measure

As per the consultation, *“Equivalence of Inputs” means the provision of products, services, facilities, and information by the SMP Undertaking to Access Seekers such that such products, services, facilities, and information are provided to Access Seekers within the same timescales, at the same price, functionality, service and quality levels and on the same terms and conditions and by means of the same systems and processes as the SMP Undertaking provides to itself. The systems and processes shall operate in the same way and with the same degree of reliability and performance as between Access Seekers and the SMP Undertaking’s provision to itself.”*

ComReg makes known that it agrees with the EC statements in the 2013 Non-Discrimination Recommendation²⁷ that *“EoI is better equipped to deliver transparency and address the problem of information asymmetries”* than is EoO. ComReg does acknowledge that EoI is not suitable in all cases and that the potential impact of EoI obligations on eir can be significant in terms of required system changes. ComReg do concede that, with the exception of VUA and CEI access, WLA products, services and facilities should be provided to an EoO standard as achieving an EoI standard would not be proportionate. As we discuss in this response the application of EoI to CEI access will be costly and unjustifiable relative to commercial market interest in the products and that it will not assist Access Seekers. It would be based on an artificial construct as eir only has one network and whilst all parts of the company use that network there is no second operator and treating the company as if that were the case is inherently economically inefficient and disproportionate. As such all WLA products, services and facilities with the exception of VUA should be provided to an EoO standard for the reasons set out below.

Recommendation 7 of the 2013 Commission Recommendation states: *“Where NRAs consider that the imposition of a non-discrimination obligation on SMP operators under Article 10 of Directive 2002/19/EC is appropriate, proportionate and justified pursuant to Article 16(4) of Directive 2002/21/EC and Article 8(4) of Directive 2002/19/EC, they should examine whether it would be proportionate to require SMP operators to provide relevant wholesale inputs on an EoI basis.”* ComReg has not attempted to conduct an assessment of whether such an obligation is appropriate or the proportionality of its proposal to apply EoI to CEI access.

²⁷ Commission Recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, C(2013) 5761



The Cartesian Report estimates the cost for eir to meet the EoI obligations for ducts and poles products in the region of €465,000 to €543,000. The actual costs of the products Cartesian contemplates would be significantly higher, so even if ComReg can see some justification, which is not agreed, such a measure is not proportionate.

The Cartesian estimates of cost to implement EoI are gross under-estimations

Cartesian provide a list of estimated costs to implement what they term EoO improvement options for ducts and poles with an overall cost estimated in the region of €365k to €425k. Cartesian estimate that further costs in the region of €100k to €118k would be required to implement EoI. Cartesian concludes that *“If Eircom were to transition to EOI without making the potential improvements identified for the EOO approach, then the system and process costs would be expected to be similar or less than the combined cost range of €465,000 to €543,000.”* We note Cartesian’s observation that *“The effort estimates were based on Cartesian’s own assumptions, derived from internal experience of delivering business change projects. The assessment was conducted without Eircom’s input and Eircom has not validated the outputs. As such, the estimates should be considered as directionally correct rather than absolute.”*

The Cartesian desk top analysis is superficial and only appears to consider development of some of open eir’s system elements. Cartesian’s assumed IT development effort is completely understated. In respect of the estimates, Cartesian have only included IT development costs for the UG and “Resource Inventory” – which we believe is our Smallworld GIS system²⁸ which stores details of duct routes, chamber locations and pole routes. Cartesian did not engage in any manner with eir IT or Service Design in preparing these figures, so they have no basis in relation to any possible IT development costs, including payments to the system supplier that may be incurred by eir to address their recommendations. The majority of the costs appear to be “Process” change related.

It should be noted that even if we were to develop ‘resource inventory’ system capabilities the fundamental point that is missing is the fact that we do not have accurate or complete occupancy information on ducts or similar information on poles and the cost / time required to gather this information is staggering as explained in the following section of this response.

One of the main problems we face is the consolidation and update of the Pole/Duct inventory, including Tagging (Operator ID) and assessing available capacity of the Duct/Pole routes. The biggest issue is establishing the capacity (survey) particularly in relation to buried ducts and chambers. This alone is a major piece of work even if we had all the necessary data to hand, which we do not. As a pre-requisite to ‘automating’ the ordering and fulfilment processes, the following systems developments would need to be undertaken in order to support a self-service type process for the proposed CEI Access:

[✂]

No estimate for additional licensing costs was included in the Cartesian report. This could also be a significant outlay for both new software modules and end-users licences in eir’s Smallworld solution. Currently the licence only covers open eir’s expected users at any given point in time. It definitely does not provide for third party access. The supplier is a third party which would obviously expect significant additional fees. Making this data available to OAOs in a ‘usable’ format on a self-service basis and subsequently receiving

²⁸ This is a commercial product supplied by GEC.



and recording 'OAO Designs' and documentation for import and update into Smallworld is a very significant undertaking.

The proposed 'one-stop' shop approach is likely to be unreasonable from the Access Seekers' perspectives. Neither eir nor ComReg can insist on other operators abandoning their GIS systems to use GE Smallworld so that they have the same view of ducts and poles (as would be required by Eol). To date eir has provided either a direct view into its GIS (Click before you dig) or, as has been requested by some Access Seekers, provided electronic data from GIS to import in their own GIS planning systems. This does not seem to align with the view of all access seekers using the same interface. Access Seekers are likely to incur significant costs if required by the imposition of an Eol on eir to migrate to the same system as eir, or a compatible system. For reference in respect of potential cost for each Access Seeker, the eir cost of deployment and migration to the new GIS system a few years ago was in region of [€].

There will also be substantial on-going licensing fees payable by each Access Seeker. open eir pays [€] per annum to Ordnance Survey Ireland (OSI) for electronic background mapping and that licence is neither transferrable nor available for third party use. For all Access Seekers to have a similar view they will each need to subscribe a similar amount annually to OSI. Previous feedback from one operator suggests this is a barrier to access but this is not a fee levied by eir, the intellectual copyright belongs to OSI. Separate licences are also required from others, including the ESB, as well as a subscription for eircodes.

Furthermore, there is no estimate in the Cartesian report for IT system changes to eir's BSS/OSS including:

- Ordering
- SLA management
- Assurance
- Billing
- [€]

In addition, there would also be development requirements for new/updated interfaces between the BSS/OSS applications.

We have not undertaken a detailed solution assessment of potential system impacts and costs. Such an assessment would take considerable time and resource which cannot be justified in terms of the relatively short duration of the consultation window, the lack of commercial demand for the CEI Access products, and the absence of resource inventory information over and above that has already been made available to Access Seekers. However based on experience the systems development costs are likely to be multiples of the Cartesian estimates.

Cartesian's estimated cost, limited to system development costs, is entirely misleading as it fails to consider other significant costs that would be incurred to implement a 'self-service' / Eol model. It is inherently inefficient to require eir to consume its own CEI products in the same manner as Access Seekers as some teams, for example the network design team, will effectively need to be duplicated – the network design team currently undertakes designs and provides the assurance function that the designs are compatible with eir's network integrity requirements. This would not appear to be able to continue. The full impact on eir's organisational design should be evaluated as part of ComReg's proportionality assessment.



Also we would need to consider and understand the ‘Product definitions’ and ‘Standardised Pricing’ concepts put forward by Cartesian – we are unsure how these type of services would work as there are multiple variables to be considered when assessing the costs and pricing. This could have a serious impact on our Billing systems as we may require some complex algorithms to be developed to automate pricing rules.

A key consideration in deciding whether or not to automate a process is the level of activity and volumes of service requests/orders associated with the activity. It would appear that there is a distinct lack of commercial interest in these passive infrastructure services from other operators and it would be difficult to justify the capex expenditure eir would incur to implement automation of the order/fulfilment process with absolutely no guarantee of demand.

The ability of Access Seekers to review GIS data in real time and to reserve space is something that will require integration of order management systems and GIS systems however the driver for any such investment is again likely to be driven by order volumes. As noted above, this capability is not without significant capital investment and licensing costs to the Access Seeker.

In our view the implementation of a self-service / EoI model for CEI Access will be extremely costly with no benefit to any of eir, other operators or consumers. Neither ComReg nor Cartesian have undertaken a proper assessment of whether such changes are appropriate or the costs and benefits they would generate. We note ComReg’s conclusion in respect of CG WLA (8.411) that “*OSS and wholesale interfaces are likely to require substantial investment in order to upgrade or replace them in order to achieve an EoI standard of non-discrimination. In ComReg’s preliminary view, this may not be justifiable or proportionate with respect to CG WLA products, as this would likely involve costly systems re-development with little the incremental benefits*”. The same conclusion applies in respect of the proposed CEI Access remedy.

ComReg’s implementation date is unreasonable

At 8.441 ComReg advises “*ComReg has also considered the time required to implement EoI for CEI. ComReg recognises that the implementation of EoI for CEI may require a reasonable period of time and will need to be scheduled by Eircom as part of their ongoing work programme. In coming to a view, ComReg has not engaged with Eircom, but has relied on the estimates in the Cartesian report. ComReg considers that an implementation period of ten (10) months is reasonable.*” As we have already highlighted the Cartesian analysis and estimates are a purely desk top analysis, eir was not consulted and Cartesian only consider and reach implausibly light estimates of the cost and effort to implement changes to a small sub-section of the multiple changes which will be required to implement a self-service / EoI model. It is difficult to see how ComReg can conclude 10 months is a reasonable timeframe without undertaking any analysis itself or engaging with eir. As ComReg will be aware from engagement on product development bilaterally and in the industry Forums eir’s IT System Development Life Cycle works to a Release schedule which means that RAP changes requiring IT development cannot be delivered in less than [✂] months unless the requirements are very small, which is definitely not the case in respect of CEI Access. This completely omits all the manual work which may be required and which would entail diverting existing resource, which will result in a detriment to eir, other operators and consumers²⁹. The magnitude of the ComReg proposals is such that a

significant volume of eir resource would have to be deployed at the expense of other developments.

Passive Access Records are available to the maximum extent possible

8.275 “The availability [of] sic PAR information will enable Access Seekers to be better able to plan their network rollout, and if necessary consider alternative routes or deployment strategies to overcome congestion or pinch-points in the CEI network. Therefore, access to PAR is invaluable from the perspective of network planning and deployment purposes.”

There appears to be a presumption in the Cartesian analysis and ComReg positioning that eir is holding back information related to passive access. That is simply not the case. We make available the CEI information we have. We do not have occupancy records and this has been explained to ComReg (Response to Section 13D on 3rd March). We have also highlighted to ComReg that our Pole and Chamber records are incomplete (S13D response on 3rd March and S13D response on 20th May 2016). eir has estimated based on high level analysis the resource requirement and costs associated with undertaking such an exercise. As explained in more detail below the cost of duct utilisation recording (including chamber remediation) is in excess of [] and the cost of capturing information on pole utilisation is in excess of [].

Duct space recording

The concept of creating a duct space record is a seemingly straightforward proposition however the logistical challenge is significant. The basic concept is to record the number and diameter of cables installed in a duct and based on the information calculate the utilisation of space and therefore the capacity remaining in the duct. The challenge is when there are multiple ducts in a track and when tracks meet and cross so there are multiple entries and exits from a chamber. Looking from above an open eir cable chamber is typically either square or rectangular which usually denotes a maximum of four ingress/egress points, however additional ducts are sometimes constructed at different levels thereby increasing the complexity of duct space recording. Below (Highlighted in red) is an example of a chamber with multiple ingress and egress points.

[]

Figure 1 - Chamber 1166 in Athboy Co. Meath

The chamber in question has ingress and egress on three of the four chamber sides. However it has multiple duct entries on two of the three sides (East & West). The term used to describe these in eir’s GIS is a “conduit route face”. An example of duct record for a typical chamber is illustrated below.

[]

Figure 2 – Duct ingress and egress for chamber 1620 in Athboy

On further examination of this example it can be seen that the route faces break out with 2 to the East, two to the West and 1 to the North.

[]



Figure 3 – Internal Chamber inspection from GIS

Examination of the 3-way duct cluster feeding the chamber from the East reveals that there are legacy cables not in duct however there is a 7-Way sub-duct in duct 1 of the 3-way nest of 100mm ducts (3 x 100PP). To capture information relating to the occupancy of the 100mm ducts requires a physical survey and then a desktop update of the inventory system. At present the only cables in the ducts are eir cables. Adding perhaps multiple operators deploying cables in the ducts adds a further level of complexity.

[✂]

Figure 4 – Duct space record requiring validation

Establish a duct space record

The first step to understanding the challenge is to quantify the total access points or chambers to be surveyed. eir have GIS records for [✂] chambers / underground access points. Connected to these chambers are [✂] duct sections. Given that each duct has two ends, the total number of conduit faces to be surveyed is ~ [✂]. Each chamber will have a minimum of 2 conduit faces (1x ingress and 1x egress) and a minimum of 2 duct openings to be captured.

Chamber Access

Chambers can be broadly categorised into two types. The first type is typically urban based and is comprised of readily accessible chambers of varying sizes with steel/concrete covers located in footpaths, carriageways and verges. Within the readily accessible chambers some are more complex to access than others with chambers located in the roadway generally requiring local/road authority permission/traffic management to access depending on location.

The second type are more generally rural based and are comprised of a mix of buried boxes/pits where excavation and backfill is required each time access is required. These chambers inevitably require permission from the relevant Licensing Authority to access and generally result in a delay in obtaining the permission when encountered. It is questionable whether a survey activity of duct space would seek to access these chambers due to cost. When cabling through these chambers it is normal practice to excavate and then back fill rather than raise them to the surface and create an accessible chamber. In either case the elements of survey are as follows:

1. Travel time to a given location
2. Inspect accessible chambers
3. Record cable type/size for each conduit face
4. Update inventory

Scale

The following assumptions are used in analysis:

- Travel time to location = 30 minutes

- Set up per chamber (signing, lighting, Guarding & Traffic Management) = 15 minutes
- Inspection and recording per chamber = 10 minutes
- Travel between chambers at a given location = 3 minutes (assumes drive not walk for transport of equipment and excludes in accessible chambers)
- Travel time from site = 30 minutes
- A working week is assumed at 34.5 hours (6.9 hours per day)

Based on the full recorded population of chambers and assuming all are readily accessible the estimated resource is outlined in the table below. The analysis suggests a resource requirement of [✂] man years to establish a duct space record for the entire urban and rural network. Based on fully absorbed costs of [✂] per man-year the estimated survey cost is [✂].

[✂]

Table 1 – Survey resource estimate in man years

Chamber accessibility for duct space recording

The survey process will inevitably throw up exceptions with respect to inaccessible chambers. In urban areas this can be due to obstructions due to traffic management and will typically require multiple visits to access all chambers. There is also the issue of inaccessible chambers due to either their location or the nature of the covering of the access. This covering may be due to a new road surface being laid over chambers by local authorities or chambers of the buried variety where they are uncovered to lay cable and then backfilled.

Experience over several years of laying both cable and sub-duct indicates that on average [✂] blockages per kilometre are encountered. These blockages sometimes relate to duct damage or congestion, but in many cases they relate to inaccessible chambers that must be excavated to effect placing of infrastructure in ducts.

If planning to re-visit, having completed the survey, i.e. to lay sub-duct it makes sense to raise the chamber to render it accessible. Current practice is only to raise a chamber if future access is required. Otherwise the chamber is accessed and then re-buried.

There are significant costs associated with raising chambers. These include the cost of the licence to carry out the work, the cost of execution of the work and the cost in fees for long term damage for altering the surface type by installing an access point (Steel cover). There are also the follow on costs of maintaining these surface chamber covers.

An average cost to raise chambers to the surface and make them available for sharing is estimated to be [✂] per chamber. This is an average cost taking into account work in different surface types (for example verge, footpath, or carriageway), chamber modification or demolition and construction of a new chamber as required.



It should be noted that civil construction costs have increased with the updating and revision of the “Guidelines for the Opening, Backfilling and Reinstatement of Trenches in Public Roads November 2002 Revised November 2015”.

Estimated cost of chamber remediation to carry out survey

The estimated number of chambers that require remediation to enable a survey to be completed and to make the chamber accessible for future use is [2]. Based on a recorded count of [2] chambers this equates to a rough estimate of cost of raising chambers to enable duct space recording of [2]. Therefore the total estimated cost of a complete Duct space record is [2].

Pole utilisation

Pole utilisation is slightly easier to measure in that it can be done without recourse to excavation of roadways and other surfaces and the associated licences. It is however subject to some of the same constraints as duct when surveying. Health and Safety with respect to conducting surveys suggests that a single resource would find it difficult to observe and record while driving. Alternate approaches such as filming and retrospectively recording or using Google Streetview to validate inventory are currently being assessed in the context of identifying unrecorded aerial network elements. In the context of another engagement it appears that Google’s licensing expressly forbids the use of its Streetview imagery in any machine processing. This raises a question mark over any kind of automation of this Streetview type approach to large scale surveying. The capability to record cable counts exists as does the ownership of that cable, however, the scale of the task is significant with an estimated Pole population of [2] spanning the majority of the ~100,000 Km road network in Ireland.

Surveying poles to determine utilisation requires two main pieces of information namely, the number of cables and type carried by the pole and the number of terminations on the pole. This allows determination of the likely load bearing capability of the pole and the capacity to carry additional cables and what space is available to terminate cables (place closures) on the pole. Other attributes such as location, size, species of wood, age etc. is captured as part of the systematic pole test programme. By limiting the survey to utilisation the scale of activity is reduced, nonetheless the resource to survey utilisation of over [2] poles is significant.

[2]

The activity of surveying in rural areas will involve a slow moving vehicle and therefore traffic management is likely to be necessary. This can be achieved by either a second car travelling behind to alert traffic or a Static/semi-static traffic management set-up. Assuming ~ 200 working days and a rate of Traffic management of [2] per day the cost of traffic management is significant and estimated as [2].

The cost of survey and update assumes (a) the use of electronic capture device and software and the (b) automated update of the GIS from the survey device. The FTE cost is estimated at [2]. Manual update of the survey/GIS was not considered as the cost would be significantly greater and inefficient. The estimated costs exclude any systems development costs.



Overall estimated cost of update Pole capacity inventory (excluding system development) [~~€~~].

Over reliance on the Cartesian Report

ComReg appears to have relied solely on the Cartesian Report in its decision making on CEI Access. This reliance is misplaced. Cartesian has approached its analysis from the wrong starting point. *“The potential options considered would support large-scale adoption of the CEI services. Consequently, there is a bias against manual processes in favour of automation and storing information in robust databases.”* Cartesian has assumed there is commercial demand for CEI Access products in Ireland despite the fact that there are two large scale infrastructure programmes that are on-going, in addition to eir’s national NGA deployment by Virgin Media and SIRO and neither are using eir’s CEI. The two operators claim that their major deployment programmes will pass 700,000 premises over the next few years. In addition Imagine is rolling out a national TD-LTE network which it claims offers ‘fibre speed broadband’ services. The large-scale deployment programmes being undertaken by Virgin Media, SIRO and Imagine will not be served using eir’s CEI and are not dependant on access to eir’s CEI. In addition to these publicly announced programmes planning work is on-going for the NBP. eir is unable to discuss that work. It is questionable whether there is any room in the market for additional large scale infrastructure programmes. ComReg / Cartesian must demonstrate that changes are appropriate and that there will be high levels of demand for eir’s CEI before seeking to impose remedies based on a self-service / EoI model that is disproportionately costly to implement.

ComReg has failed to undertake a proper and thorough analysis due to its over-reliance on the Cartesian Report. As is evident from the mandate handed by ComReg to Cartesian (page 8 of the Cartesian Report)

“Also out of scope for the project are pricing, and quantification of the benefits of the identified options.”

Cartesian has not considered pricing implications or endeavoured to quantify the potential benefits, if any, of its proposals. Critically neither has ComReg and these are important considerations which ComReg needs to take into account before imposing any remedy. As a consequence this consultation process absent a balanced consideration of all relevant facts rather than ill-conceived and unjustified notions is not sufficient for the purpose of establishing regulatory policy or imposing obligations on eir.

Provide access to CEI Ingress and Egress points. (8.222)

ComReg’s proposed obligation is unnecessary and thus not appropriate. Duct access will be offered at any technically/operationally suitable ingress/egress point/chamber. open eir recommends that the ingress/egress points outside the open eir exchange / cabinets / final Distribution Point (DP) are the optimal locations from an engineering point of view to offer interconnection with an OAO chamber for the purpose of OAO duct access provision. It is not technically feasible to consider access to breach the sub-duct between an open eir exchange and a cabinet as the sub-duct is multicore sub-duct carrying other services - ingress/egress would require cutting into multicore sub-duct along a route which raises engineering risk and technical difficulty.

ComReg cannot undermine eir’s right to maintain its network integrity with a blanket obligation to provide access to any chamber irrespective of the suitability of access to that chamber. This proposed remedy will increase eir’s costs as it will need to administer access to the CEI facilities and validate the work undertaken to ensure that it is done to an

acceptable standard and that no damage is done to eir's network³⁰. As noted above, eir will offer access to any suitable chamber to an Access Seeker.

It is unclear how eir is indemnified if a third party damages either eir's own fibre network or another operator's network while engaging in this proposed activity, and to what extent a third party will be obliged to make good damage caused and compensate eir for loss of revenue and reputation. Good Health and Safety practice calls for operatives to avoid fibre optic cable handling unless trained to do so. Precautions include awareness of the dangers associated with lasers used in optical transmission and also the handling of fibre optics (handling Sharps). Operatives trained in the process of installing/joining sub-duct typically have a different skill-set than those responsible for handling/splicing fibre optic cables. Extracting and cutting sub-duct tubes mid-section increases the risk of exposure to harmful elements in a fibre optic network. While eir can reasonably be expected to manage the Health & Safety risks associated with activity it initiates, it is unreasonable to place a burden on eir to facilitate engagement in such activity by third parties that may create unnecessary risks.

In contrast to ComReg's view that "this proposed obligation will not result in a significant additional burden on Eircom", eir will need to produce documentation and then administer the access. Following any access it will have to check that no damage is done to our network, which will result in an additional burden.

Requirement for a Tie Connection Service

In Paragraph 8.230 ComReg proposes eir provides access to a Tie Connection between Co-Location and CEI Ingress and Egress points. This is not necessary. Co-Location is offered to support delivery of open eir products e.g. LLU, WEIL VUA - with OAO or open eir backhaul. Assuming the OAOs Co-Location nominated handover chamber is the starting chamber for the CEI Duct Access product then the OAO could connect their own Co-Location backhaul fibre to their fibre installed in the CEI ingress chamber (directly if a large chamber or via sub duct protection box if small chamber).

Requirement for Access to Chambers

Access to chambers proposed in paragraph 8.248. Duct/chamber space is an extremely scarce resource. open eir provides wholesale products - many of which ultimately consume duct space - to all operators. Allowing multiple operators to consume such space could lead to inefficient usage. Any mitigation of this would require considerable work on eir's part to device network engineering rules which have not been required to date. Providing such rules will take time and involve cost. Efficient usage of such space must be maintained and managed otherwise large civil engineering infrastructure build costs will arise. The price currently directed by ComReg for the open eir duct access service is cost oriented on the basis of the existing patterns of use of underground infrastructure by open eir for adding fibre optic cable to copper demands. Any proposal to modify the duct access product to introduce bulky equipment from another operator into open eir duct chambers would invalidate this model and require price increases. Provision of stand-off chambers by other operators for their own equipment/splices will ensure optimum usage of open eir duct space/chambers. It allows other operators freedom to install any equipment under any access arrangements they choose. This approach is also consistent with the In-Span Handover ISH product whereby other operators construct a 'meet-me' chamber. Separate

³⁰ Whilst eir has documented policies they are internal and will need to be revised to be suitable for use by third parties – which again will take time and incur cost.



stand-off chambers will also reduce the risk of illegal entry into / damage to open eir ducts by other operators.

Cartesian state (8.251) *“It can be argued that the absence of Chamber access undermines the value of Duct access. This in turn undermines potential downstream competition as the Access Seeker may be reluctant to risk potential service outages for high value customers or groups of customers. Without access to duct Chambers maintenance and repair tasks could be cumbersome and time consuming. These delays could have negative consequences for End Users and would be ultimately detrimental to competition.”* eir does not agree with Cartesian’s argument. The Access Seekers’ fibre might traverse open eir chambers but the jointing is in their chambers. Repair of fibre in a damaged duct will not adversely impact the Access Seeker – they can pull in new fibre (long length to minimise splices) through their chamber.

Hosting of Active Equipment in Chambers or on Poles

We agree with ComReg’s decision not to impose a product specific obligation on eir to host active equipment on poles or in chambers.

Requirement for Access to Sub-Duct and Direct Duct access

Paragraph 8.259 requires access to sub-duct and direct duct access. In order to protect fibre optic cable in the duct network use of sub-duct is essential. open eir designers will manage duct space utilisation for all users. It is not good engineering practice for fibre to be placed directly in a duct. Placing the fibre in sub-ducting provides more protection for individual fibres and allows eir to maintain the integrity of its network whilst promoting the efficient use of scarce resources in the form of duct space. It would be sub-optimal for Access Seekers to install their own sub-ducts if utilisation of individual sub ducts is low. .

De-congestion and Optimisation of Ducts

eir agrees with ComReg’s conclusion that no additional measures need be specified relating to network de-congestion/optimisation.

Requirement for Access to Dark Fibre, where Civil Engineering Infrastructure is not available

ComReg proposes to maintain the existing obligation. eir agrees.

Requirement for Access to Passive Access Records

ComReg presents this proposal as though it will provide Access Seekers with additional information. (8.275) *“The availability PAR information will enable Access Seekers to be better able to plan their network rollout, and if necessary consider alternative routes or deployment strategies to overcome congestion or pinch-points in the CEI network. Therefore, access to PAR is invaluable from the perspective of network planning and deployment purposes.”* However as highlighted above this is the same error Cartesian made and ComReg should be well aware that eir is already providing access to the PAR it has.

- (i) Information relating to physical location of ducts, poles chambers, cabinets and distribution points (DPs) is readily available to any requester via the Click Before You Dig application. This provides the most up to date information as it has a

direct link to the eir database. Included in the data are technical characteristics such as number of ducts, duct size, chamber type and by virtue of its physical location an indicator of surface type. For large scale requests such as Major Infrastructure Programmes, digital mapping extracts can be provided although extracts are not live but necessarily a snapshot of the network at a point in time.

- (ii) The capability to manage a duct space record that shows utilisation only became available to eir with the introduction of Smallworld. While open eir is currently geo-locating new cables in ducts and sub-ducts, inventory relating to pre-existing cable placement within ducts does not exist. Duct space is established at construction stage using a process called “Rod&Rope” and capacity constraints are identified at the time of network construction. Pole information is derived from data captured during systematic pole testing for decay. Inventory of pole capacity is currently only available through physical survey.
- (iii) Whilst we have made a pole and duct reservation process available this is manual and no inventory system exists with regard to reservation of duct or dates of reservation or reservation expiry dates. CEI Inventory is posted during high level design and only appears on the inventory system at detailed design stage.
- (iv) As there is no reservation system there is also no reserved capacity marked beyond the proposed inventory posted during high level design.

ComReg believes that eir has an incentive to refuse or limit access to PAR information. The reasoning for making access to PAR obligatory appears to come primarily from paragraphs 7.35 to 7.40 of the consultation. In summary, ComReg believes there are information asymmetries that can lead to competition problems and an inefficient use of resources by Access Seekers. A number of examples and potential consequences are given in this section, e.g. insufficient notice of network and process changes could impede the ability of WLA Access Seekers to launch corresponding retail products and to compete with eir / open eir on an equivalent basis in downstream markets. This is not correct and we have set out above how the information we have on passive infrastructure is made available. In addition, details of new network deployment are made available 6 months in advance of recording in the Advance Pre-Qualification file. This shows that eir has neither the incentive nor opportunity to limit access to this information.

As per the consultation, “*Passive Access Records*” or (“PAR”) means all available physical records for passive access, *inter alia* information relating to (i) physical location of Ducts, Sub-ducts, Poles, chambers, cabinets, and distribution points, including their technical and physical characteristics; (ii) the installed fibre and metallic cable capacity in Ducts and in Sub-duct and on Poles, including their used capacity (iii) the reserved Duct, Pole and Chamber capacity (reservation information includes x.y. co-ordinates of start and the end of the route, requested date of reservation, reservation lapse date); and (iv) the reserved capacity by internal or external Undertakings, per route.” This appears to be limited to available information, so it would appear there is no obligation to provide information we do not currently have on existing utilisation. ComReg needs to clarify the confusion the Cartesian report and the consultation have produced. Despite the fact that gathering information not currently on-hand would not be economically feasible for eir, ComReg state they did not find an equally effective and efficient obligation to remedy the potential competition problems whilst proposing a contradictory Direction.

The competition problems referred to by ComReg are discussed in paragraphs 7.35 to 7.40 of the consultation and it is not clear that any of them are relevant to the CEI Access



products. Para. 7.35 discusses eir's own use of the products. "*Eircom as the undertaking proposed to be designated with SMP in the WLA Market could launch downstream retail and or wholesale products using WLA inputs which Access Seekers could not match because no wholesale equivalent has been made available.*" Ducts and poles are used by open eir to operate its network and provide services. The network services are offered to downstream arms and Access Seekers in accordance with transparent terms and conditions. eir's downstream arms do not consume ducts and poles directly. Other operators can use such products should they wish. Reference is also made to information required for participation in tenders. No evidence or further explanation is given for this statement. The only relevant tender in the context of ducts and poles would appear to be the NBP and access to CEI for that tender is subject to the NBP tender protocols.

Paragraph 7.36 refers to metrics. open eir has defined metrics for CEI Access products however in the absence of any demand and use of the products it has not been possible to calculate such metrics or monitor product performance. As noted earlier in this response, open eir offered to undertake trials during the product development process in order to better refine the operation of the products. No Access Seeker availed of this opportunity other than the earlier trial by eNet. Nor has any Access Seeker subsequently sought a trial³¹. open eir maintains its long held position that it will review the CEI Access product processes etc. in light of actual performance should commercial demand ever emerge. As such there is no issue to address regarding CEI Access.³²

Paragraph 7.37 considers the availability of network planning information. As we note below it would seem appropriate that all maintainers of CEI should have plans to which access can be given if requested so that the objectives of the CID can be met. Separate regulation by ComReg is not required in this respect.

The remaining paragraphs on potential competition issues arising from information asymmetries relate to end-user switching and migrations which is not relevant to the CEI Access. ComReg has failed to produce any evidence to justify the need to specify an obligation in respect of PAR.

Proposed Transparency requirement with respect to Physical Network Planning Information

ComReg proposes that eir should have an obligation of transparency with respect to the provision of Engineering Planning and Design Rules or the equivalent for CEI (8.548). open eir has such rules but they have been designed for use by eir or its sub-contractors. Use by third parties would necessitate a review of such rules. That would take time and involve considerable cost. The justification for the incurring of such cost is not set out in the consultation.

Section 10 of the draft Decision creates an obligation on eir that it "*shall, in particular, make available on its publically available wholesale website in advance of implementation, information regarding its CEI roll out plans, and information relating to wholesale products, services, and facilities such as the expected time for service availability.*" As ComReg is aware this is done.

Transparency requirement for KPIs for CEI

We note ComReg's view that (8.506) "*that it is necessary to develop a set of KPIs with respect to CEI access. ComReg will consider whether to consult separately on the specific*

³¹ We note in the UK trials using CEI have taken place, even if again there is no demand for the products.

³² The use of CEI in the context of the NBP is not discussed for reasons of bidder confidentiality.



CEI KPIs, at the appropriate time.” In our view the appropriate time would be once it has been established that there is commercial demand for the products and that all parties have had some experience as to their operation. Until such time as the relevant products are tested it is not possible to produce robust KPIs.

Pricing

eir notes that price controls for CEI were established by ComReg in its Decision D03/16. Clearly the introduction of any changes to the regulated products arising from ComReg’s market review will necessarily alter the basis on which the price controls have been calculated.

Proposed obligations on SLA fairness, reasonableness and timeliness of access

eir suggests that in setting these requirements (paragraphs 8.302 -8.317) ComReg should take into account that other than in the case of the introduction of new products the SLA negotiation period commences when OAOs submit a clear set of requirements and rationale for adjusting existing SLA or Introducing new SLA metrics. ComReg should confirm at this stage whether what is submitted is clear and is fit for purpose. A six month period of negotiation at the end of which open eir will provide an updated new draft of SLA document which effectively be the Best and Final Offer (BAFO). The draft SLA document would then be notified to ComReg and published in accordance with the specified timelines. The notified document will include an expected launch date. The launch date for the new or amended SLA will be dependent on whether there are any development requirements to introduce the SLA and once an SLA is launched the SLA cannot be reopened for discussion for a period of at least 24 months without the agreement of both open eir and ComReg. This will provide a minimum period of time during which the reasonableness of the SLA can be assessed.

Paragraph 8.311 seems to suggest that any SLA should offer a 100% performance level without exception and for this to be compensated in the pricing. eir does not agree with such an obligation, particularly as there is no evidence of a relevant pricing proposal which would give adequate compensation. eir very much doubts that ComReg is able to adjust any cost orientated pricing to give effect to a non-commercial SLA, such as suggested. ComReg has in this consultation and in relation to the current SLA dispute not provided any details of its legal ability to do this and practical details of what it would entail.

In paragraph 8.325 ComReg propose that eir must develop new SLAs, or amend existing SLAs where required, when eir is planning to introduce new products or changes to existing products. It is eir’s view that during the product development life cycle – open eir should provide OAOs with an overview of the new product development which should include whether an SLA is appropriate for the new product development or existing product enhancement. If there is a change necessary to an existing product it may sit within existing SLA metrics. Similarly, the introduction of a new product variant may consume the same SLA metric already available for the original product. ComReg has failed to explain why the introduction of new product variant or associated service would always require an SLA or a change to SLA. If and when an SLA is required, the SLA negotiation period could be concluded prior to the launch of the product and follow the steps outlined SLA Fairness remedy ComReg has suggested. Additionally where a new product is introduced for which there is limited experience as to likely performance in a live environment – an SLA review should be delayed for a period of 12 months to allow a period during which performance of the new product can be assessed allowing the identification of any relevant SLAs. ComReg’s proposed invariable requirement would delay product launches that are valuable to, or have been requested by, OAOs.

In the past some SLAs have taken more than two years for agreement from all OAOs however in that time many operators wish to use these products/services irrespective of an SLA as it is an



improvement to the service/product they currently have and allows a product or service to mature and be measured before applying penalties. SLAs, whilst valuable, do not affect the efficiency and operation of the new service/product. When a product is fit for use and has been requested by an OAO it should be launched without delay.

Suspension of an SLA

ComReg proposes that eir is required to ensure that SLAs include, where appropriate, comprehensive set of terms and conditions governing the circumstances when the SLA can be suspended, and the process to be applied for the suspension of the SLA. Such terms and conditions should be based on objectively defined and measurable parameters. No change is necessary as eir's published Reference Offers provide for objective transparent and proportionate SLAs. The SLAs have been agreed at industry level and set out objective exclusion criteria where SLAs would be not applied to provisioning and repair orders. SLAs are only suspended in the event of the occurrence of specified events which events are already explicitly dealt with in eir's RIO, ARO, WBARO and LLRO reference Offers. In the context of ComReg's review of eir's RGM, Cartesian are currently looking at the processes regarding declaration of storm mode i.e. suspending SLAs in extreme circumstances. Given that neither ComReg nor eir know the result of this work it is suggested that both parties should first look at the outcome of such work before specifying a remedy which may be redundant. ComReg's failure to do this is a breach of natural justice, but in any event does not demonstrate evidence based conclusions on ComReg's part.

Requirement regarding Timeliness of Product Development, paragraphs 8.354 – 8.374

ComReg proposes to impose an obligation on eir to meet certain timelines with respect to the development of new WLA products, services and facilities or changes to existing WLA products, services and facilities. open eir is already committed to a transparent RAP product development process. open eir aims to optimise its development capability to best meet industry demand and ensure that all requests for product changes are captured and delivered through enhanced industry engagement. This industry engagement ensures timelines with respect to the development of new products or changes to existing products are communicated and met and also ensures that OAOs are able to prepare their networks and systems for such products, which ComReg in this consultation considers necessary. open eir will continue to operate this way with or without the proposed obligation, as it is part of its RGM.

Industry engagement is co-dependent on both open eir and operators to ensure requirement is defined, agreed and developed in tandem along the development journey. Paragraph 8.353 mentions concerns by some operators regarding timelines but fails to provide any evidence and does not record that the process with operator input and cooperation has evolved in recent years to become an extremely transparent one with key timeliness indicated, updated and in the large met.

Clear product requirement specification is necessary prior to embarking on expensive developments for all operators. If open eir fails to plan correctly and fails to capture customer requirements the result can be costly and damaging to all parties. In Paragraph 8.357 ComReg refer to perceived delays in agreeing product specifications but cite the example of SLA timelines which is misleading given that ComReg is considering SLA remedies separately. Unlike product development it is the negotiation and seeking agreement of SLAs that can take time. In normal product development requests received can be complex. Many requests received can require many bilateral engagements with other Operator(s). The business need of the requestor at the start may change throughout the course of the development and as such the priority can change. All of this can lead to circumstances whereby the pace of the development varies from one case to another. In general [✂] of requests are delivered/fulfilled within 12 Months of request. Each product development request is different but the final solution must satisfy all operators should they require it. This means



that an exhaustive analysis of customer requirements must be captured from the requesting operator and then reviewed by all operators at the product development forum for further input and feedback which can alter / improve the request. Notification periods in place from ComReg at present can mean that a developed product requested by an operator may not be launched until the operators have been given a six month notice period even though the project will have had operator input from its inception. eir also notes that as with SLA development the product development process forms part of its review of eir's RGM and again ComReg is seeking to regulate in advance of the receipt of the final reports from its consultants and consideration of their conclusions.

In paragraphs 8.360 – 8.364 ComReg refer to a lack of clarity with respect to the criteria used by eir for product development prioritisation. open eir have continually addressed concerns with operators on developments. Material outlining the development and prioritisation process has been shared on a number of occasions at the Industry Product Development Workshop hosted by open eir. The new Regulated Access Products (RAP) Customer Portal contains the Product Change Request Log that outlines what is happening with each request, when the request is next due to move to next status and when it is projected to complete. The workshops have been used as a medium to explain all new requests and update on the open requests. The workshops have also been used as a means of discussing progression of requests through the process at key decision times.

ComReg should take cognisance of the difficulties in progressing development requests if other operators do not participate and build and prepare networks when they are informed of the key milestones. open eir must receive cooperation and feedback in a timely manner from other operators to ensure what is being built is what they require. For this reason open eir regularly host development workshops and provide updates and support continually. open eir is committed to enhancing the performance and success of this process further. Pillars are in place to ensure fair and equitable prioritisation for all operators and reports/KPIs (under self-certification) demonstrate compliance.

open eir is committed to transparency and as mentioned above seek input from operators in product development. The suggestion by ComReg for improvement in resource allocation across the industry is welcomed as open eir allocate resource along these lines and welcome any initiative that may lead to improved speed to market following fruitful and timely engagement with operators. In paragraph 8.372 ComReg propose timelines for product development, however these timelines are unreasonable in that they make no provision for the differing size or complexity of requests and projects. This timetable is discussed below.

- a) within three (3) working days confirm in writing that the request has been received;*

Confirming a request in three days is acceptable to open eir. However only a Customer Requirements Capture Document (CRCD) sent to the generic mailbox can be considered to be a request. It is unfair to expect a written confirmation of an undocumented often under-researched verbal request at a meeting. If a request is required by an operator then it should be submitted in writing.

- b) within ten (10) working days confirm to the Access Seeker whether or not the request is for a new or amended product, service or facility and whether or not the request falls within the scope of Eircom's obligations.*

It is unreasonable for ComReg to propose such a timeline. A request must be analysed to identify which market it comes within and if it is regulated etc. This is the concept stage in the present development cycle. open eir indicate at "Concept" whether the change is in the regulated market, whether it is a change to a regulated product, and open eir will take the request on for further



analysis. open eir do this today on average within [~~2~~] working days. This is the rule but there are exceptions. [~~2~~] working days would be a preferable time period.

- c) *within twenty five (25) working days confirm that the requesting Access Seeker has provided it with sufficient information to process the request (unless otherwise agreed between Eircom and the Access Seeker), including the Access Seeker's view on the priority of the request relative to other requests pertaining to the WLA Market that have already been submitted by that Access Seeker. During the twenty five (25) day period Eircom may seek clarification that it may reasonably require from the Access Seeker regarding the request. Eircom or the Access Seeker may, for any particular request, seek agreement from ComReg that the twenty five (25) working day period may be extended.*

It is impossible to say within 25 days that open eir will have sufficient information to process the request. However open eir could confirm that open eir have sufficient information to proceed with next steps during that period.

- d) *within fifty five (55) working days, unless otherwise agreed with ComReg, confirm in writing to the Access Seeker whether it agrees to provide the requested new or amended product, service or facility. Where the request is refused, Eircom shall comply with its obligations to give written reasons for its decision at the time of refusal.*

In the present development process the "Under Review" stage aligns with this obligation. Where open eir have progressed the request to functional design internally there is a higher probability of delivering the request within the agreed timeline set at the start. However, it would not be possible to be tied to a specific 55 day timeline because of the number of inputs and complexities that arise in developments including SME availability, internal governance including capex allocation, competing demands on scarce IT development resource and agreement by other operators which only meet monthly. Today it takes on average [~~2~~] working days to meet this gate and this is more reasonable.

- e) *within seventy five (75) working days, unless otherwise agreed with ComReg, provide to the Access Seeker a detailed description of the relevant product, service or facility and the associated procedures to be developed between Eircom and the Access Seeker.*

In the present development process this is the industry "In Development" stage. At this stage open eir commit and the development is signed off at its Portfolio Board and has secured the IT resource for the next IT release. It assumes all other dependencies are secured, be it Capex, Service Commitment, PDC approval. Today it takes on average [~~2~~] Working days to meet this gate and this is a more reasonable time period.

- f) *within seventy five (75) working days, unless otherwise agreed with ComReg, Eircom shall also provide to the Access Seeker a forecast date by which it expects to provide the requested products, services or facilities.*

As above this is the development gate. Note that forecast date is given at start of request and updates given along the way. However at "In Development" gate a committed date is given.

We note that ComReg seek to justify the proposed timelines because they appear in the WBARO. This is not an adequate justification as the WBARO timelines are redundant and out of date. We acknowledge that the WBARO should have been amended accordingly a number of years ago. This will now be done. eir operates a company-wide IT development lifecycle which is the key



determinant of product development timelines (when a system change is required which is usually the case). ComReg has used the wrong starting point as it seeks to enshrine redundant contractual terms. Cartesian is undertaking a detailed analysis of eir's company-wide product development process and the conclusions of that review should form the basis of consideration of what milestones should be enshrined in regulation, if any. Any milestones must be realistically achievable otherwise eir would be in perpetual non-compliance. ComReg should consult properly on this item after the Cartesian review is completed rather than precipitately proposing unsuitable deadlines.

ComReg proposes absolute deadlines for the proposed milestones. It should be noted that the achievement of the milestones will depend on a number of factors including the complexity of the request and the cooperation of the requesting party, e.g. responsiveness to requests for clarity. If targets are to be mandated they should be based on averages and able to be suspended if there is failure to respond to requests for clarification.

Proposed Transparency requirement with respect to Product Development

ComReg proposes requirements on transparency in product development in paragraphs 8.553 - 566. It should be understood that a robust transparent procedure is in place with industry for all product development. Material outlining the development process has been shared on number of occasions at the Industry Product Development Workshop hosted by open eir. The new RAP Customer Portal contains the Product Change Request Log that outlines what is happening with each request, when the request is due to move to the next status and when it is projected to complete. The workshops have been used as the medium to explain all new requests and update on the open requests. The workshops have also been used as means of discussing progression of requests through the process at key decision times. The prioritisation process was presented at the first product development workshop in February 2016 and again at the SIEG in May 2016. This was an update to previous presentations provided to Industry on this issue back in 2014 and as far back as 2012. A copy of all this material is listed below for reference:

- February 2016 Industry Product Development workshop
- SIEG May 2016
- Roadmap Workshop January 2014
- Industry Engagement Seminar August 2012
- Product Development and Software Development lifecycle.³³

Access Seekers are given the opportunity at an every stage of a proposed development, to provide their views as to the priority of the development. However the priority of one operator may not necessarily be the priority of another. There is limited time and resources available and all requests cannot be prioritised beyond the limits of the systems and processes available. It is confusing in this section of the consultation that ComReg are anxious to facilitate the expedition of developments when in the product development section the proposed notification and SLA development requirements will slow all development. ComReg has also failed to take this into account in its timescales.

The criteria set out in paragraph 8.565 for each proposed development are in place today as outlined above the addition of open eir identifying a proposed development date to Access Seekers, allowing Access Seekers to notify eir of the degree of priority to be given to each particular development and agreeing such priority. In such a robust process as the current open eir process with strict development timelines and schedules it is a requirement by another operator that a development in train should be stopped or suspended if an access seeker deems a new product to have priority. ComReg has failed to consider this eventuality in its proposed process.

³³ If ComReg does not have the relevant documentation eir is happy to provide it again.

In paragraph 8.566 ComReg state that open eir shall publish information on product development with the publication deadlines proposed to correspond to those set out in the proposed access obligation on product development described in paragraphs 8.354 to 8.374) However in response to the proposed timelines open eir has explained that it is not reasonable to set such timelines. It is not possible to advise all Access Seekers that the request has been received and provide them with information regarding the request within ten days of receipt. This is the concept stage of an agreed and established process open eir indicate at “Concept” if the change is in the regulated market, if it is a change to a regulated product, and that open eir will take the request on for further analysis. open eir do this today on average within 13 working days. If a request is specific and detailed to the point that no further business specification clarification is required or is a minor development or change 25 working days (c) is possible but if an operator requests and requires a bespoke solution they should be given enough time to discuss and clarify their needs. 25 days is not enough time to do this. Stage (d) of the ComReg timelines suggests 55 days to for open eir to decide whether it agrees to provide the requested new or amended product service or facility. This is the established “Under Review” stage. This is where open eir have progressed the request to functional design internally and have a higher probability of delivering the request and within the agreed timeline set at the start. Today it takes on average [~~25~~] working days to meet this gate. It would not be possible to achieve the same level of quality product if these timelines were reduced from the established process. To provide a detailed description and specification for the new or changed wholesale product or process is not possible this stage. This is the industry “In Development” stage which entails giving commitment, sign off at eir’s Portfolio Board and having secured the IT resource for the next IT release. Today it takes on average [~~25~~] working days to meet this gate. To require eir to alter its processes as ComReg suggests is disproportionate given eir’s size and resources, particularly when compared to those of other operators.

ARO timelines

Requirements for publishing and timeframes outlined in paragraphs 8.462 – 8.486 are acceptable and align with the FACO and NGA markets. The proposal on billing transparency in relation to the ARO proposing that any invoices and the associated contracts relate only to products, services or facilities falling within in the market will present major billing challenges for open eir. open eir bill based on product usage not market e.g. WEIL rental bill also includes BPU and BECS via WEIL (VUA is billed on own, contract bills are not separated.)

In relation to paragraph 8.471, ComReg specifically say that the timescales proposed in relation to changes to the ARO are not a ComReg approvals process. However, eir is of the view that they should be and it is neither good nor proportionate regulatory practice to propose such drawn out timescales without this involving approval. In the absence of an approval role there is no justification for changes to be notified to ComReg one month in advance of industry notification. ComReg must therefore remove the one month advance notice requirement in the absence of an approval mechanism so as not to unduly delay product development and innovation. In addition, it is unreasonable for ComReg to specify advance notice requirements and then to reserve its position on whether or not there is compliance. ComReg is the regulator and if it insists on prior notification it cannot merely sit on the fence.

Transparency requirements regarding KPIs, SLAs and reporting

In paragraph 8.490 ComReg is proposing to continue to oblige eir to publish KPIs in accordance with the 2011 KPI Decision and believes that the obligation is justified and proportionate. Visibility of performance by eir with respect to its service assurance and provision of wholesale regulated products is currently provided through publication of a range of Key Performance Indicators for WPNIA products as described in the 2011 KPI Decision.



In general open eir has no objection to the transparency requirements outlined regarding the KPIs and SLA reporting.

Please see eir's response under the section *Proposed Transparency requirement with respect to Physical Network Planning Information* (Page 46) for our comments on the proposed obligation of transparency with respect to the provision of Engineering Planning and Design Rules or the equivalent for CEI

Transparency regarding trials (discussed in paragraphs 8.567 to 8.576)

As part of the development process for regulated products open eir regularly needs to operate technical and operational trials of products and processes. Such trials require a commitment from operators and end users to gain the best possible information and feedback to fine tune a development prior to launch. The proposed imposition of timelines as outlined by ComReg in the market review would disrupt the product development cycle and delay launching of market ready products. Three months' advanced notice prior to a trial is unacceptable. All operators will be aware of the product development from the date of the request and will have provided input and will track developments innovations and initiatives such as trials. Termination at least one month before notification to ComReg means that the operators and customers who have participated in the trial could now face a total seven month break in the service due to proposed timelines given the six month notification period. This will result in stranded assets and unnecessary delay in reaching early adopters of new technologies stifling innovation and dampening competition. eir is competing in dynamic retail and wholesale markets and the regulatory framework must allow eir to respond to market developments in a timely manner. Adding months into the product development process is not promoting the interest of end-users or promoting competition. This proposed obligation should not be imposed. ComReg has not provided any explanation for this requirement or justified why it is either appropriate or proportionate.

Price control obligations (8.595-8.673)

ComReg proposes that in addition to existing regulations on FTTC based VUA and bitstream, new obligations be imposed to cap the prices of the services in line with ComReg's estimate of the cost of the services. The new obligations would apply nationally for VUA and in rural areas for WCA. eir believes that the new obligations are not justified given the state of competition in the Irish market and that their imposition would undermine and deter ongoing investments in NGA by eir and other players. ComReg's stated reasons for imposing the new obligations do not, on inspection, provide a sound basis for such high-risk regulatory intervention. eir believes that there is no basis for continuing regulation of eir's NGA services in urban areas given the dominance of cable in these areas and the additional constraint imposed by ongoing cost-based regulation of the legacy copper network. The imposition of cost based price regulation for FTTC based WCA in rural areas is also unjustified given the high take-up of copper services in these areas which will continue to be subject to regulation.

FTTC based access services are effectively constrained, particularly in urban areas

Determining the appropriate degree of regulation requires carefully balancing the expected benefits and risks of alternative forms of regulation. Regulation of electronic communications is required to be proportionate to the problem being addressed, which requires that the least onerous obligation(s) be imposed that can effectively remedy any identified problem. In relation to NGA investments, the European regulatory framework specifically requires that:

- No ex ante regulation be imposed in markets which are assessed on a forward-looking basis to be tending towards effective competition, where entry can take place (i.e. such that there are not high and non-transitory barriers to entry) and where competition law alone would be adequate to address the market failure concerned;³⁴
- Where an operator is found to have SMP, no wholesale access price regulation should be imposed on active NGA wholesale inputs where non-discrimination obligations are imposed to achieve equivalence of inputs and a demonstrable retail price constraint exists through take-up of inputs and/or the presence of alternative infrastructure;
- Where an operator is found to have SMP, no wholesale access price regulation should be imposed on passive NGA wholesale inputs or non-physical or virtual wholesale inputs offering equivalent functionalities where non-discrimination obligations are imposed to achieve equivalence of inputs and a demonstrable retail price constraint exists through cost-based price regulation of a legacy access network and/or the presence of alternative infrastructure; and
- NRAs should differentiate remedies and maintain or impose price control obligations only in those geographic areas where the above two conditions are not fulfilled.³⁵

ComReg has recognised the competitiveness of the WCA market in urban areas and proposes to withdraw regulatory obligations in this market. However, the proposed new cost orientation obligations for VUA and regional WCA are more extensive and more interventionist than can be justified by the state of competition and competitive developments under way.

The Consultation does not properly examine whether there would exist a competition problem in the supply of FTTC based access services if copper access services are subject to cost based price regulation. It is necessary to do this to ensure that the proposed new cost orientation obligations for FTTC based access is proportionate. Similarly, and consistent with the European Commission's 2013 Recommendation, cost orientation should only be imposed where non-discrimination obligations are ineffective.

To assess the effectiveness of the existing set of regulations it is necessary to consider what is the overall constraint on eir's pricing of FTTC based services. The Consultation considers potential constraints on an individual basis, rather than assessing their aggregate impact.

One key constraint on prices for FTTC based access is the presence of copper-based services that will continue to be subject to cost-based pricing. Even putting aside the competitive constraints of technologies such as mobile, to only consider copper, FTTC and Virgin Media's cable, then copper currently has a 40% share of these three technologies nationally, with FTTC and Virgin Media having similar shares of 31% and 29% respectively.³⁶

Wholesale prices for copper access are regulated at cost and retail prices for copper-based services are set in the highly competitive market in which eir's prices are effectively constrained by the presence of access-based competitors such as Vodafone and Sky together with networks using rival technologies. The European Commission notes "*If a company has a market share of less*

³⁴ Commission Recommendation on relevant product and services markets of 9 October 2014

³⁵ Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies.

³⁶ The Consultation, p.58.

than 40%, it is unlikely to be dominant.”³⁷ FTTC’s small share (of around 31%) compared with copper is well below the level that would normally be considered necessary for dominance.

The Consultation’s stated reason (para. 4.93) for ignoring the constraint of copper on FTTC’s prices is:

“ComReg considers that substitution between copper-based broadband and FTTC based broadband is likely to be one-way (or asymmetric) due to the higher download/upload speeds available on broadband products offered over FTTC networks. Generally, a subscriber to a FTTC based 100Mb broadband product is unlikely to find a lower speed broadband product offered on a copper network to be an effective substitute.”

As a general proposition this is wrong. Consumers frequently weigh up whether quality differences are sufficient to justify paying more for a product and may trade down or up in response to changes in the relative price of products of different quality. As the European Commission states: “A low quality product or service sold at a low price could well be an effective substitute to a higher quality product sold at higher prices. What matters in this case is the likely responses of consumers following a relative price increase.”³⁸

Market research for ComReg, moreover, shows that the Consultation is wrong to assume customers will not switch from FTTC to copper. In particular, the research found (para. 4.79):

“...25% of residential respondents on an FTTC network said that they would definitely or maybe change their behaviour in response to a hypothetical price increase [of €2]. 47% of these respondents indicated that they would cancel their subscription and switch to an alternative network...Of those residential respondents who indicated that they would cancel and switch in response to the hypothetical price increase and were likely or fairly likely to do so, 49% indicated they would switch to a broadband service provided over a copper network.”

The European Commission’s 2013 Recommendation also establishes the expectation that copper is likely to exercise a demonstrable retail price constraint until at least 2020:

“If the product offered by the SMP operator on the legacy access network is no longer able to exercise a demonstrable retail price constraint on the NGA product (for example in the event of a copper switch-off), it could in principle be replaced by an NGA-based product that is tailored to have the same product features. However, it is not envisaged that such an NGA-based anchor will be required in the immediate future or before 2020” (Emphasis added).

A second key constraint on FTTC prices is the presence of Virgin Media. As noted above, Virgin Media has a similar share to FTTC nationally. In urban areas where Virgin Media has coverage, its share is [Confidential: 45-55% compared with eir’s share across all technologies of only 25-35%].³⁹ There is no sound basis for finding eir to have SMP in relation to either VUA or WCA in areas where it faces competition from Virgin Media given the latter’s network has potentially twice as many customers as eir. ComReg’s own market research found (para. 4.128): “Of those residential respondents [on a FTTC network] who indicated that they would cancel and switch in response to

³⁷ http://ec.europa.eu/competition/antitrust/procedures_102_en.html

³⁸ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, para. 46.

³⁹ The Consultation, footnote 858.

the hypothetical price increase and were likely or fairly likely to do so, 51% indicated they would switch to a broadband service provided over a CATV network.”

The economics of eir’s FTTC investment is heavily dependent on continued migration of customers to FTTC, which would be unachievable were FTTC’s prices raised given that this would cause significant migration away from FTTC.

ComReg acknowledges the constraints on FTTC to some extent in finding that WCA offered in urban areas is competitively constrained. However, ComReg fails to recognise that:

- The presence of regulated copper access and rival networks will effectively constrain the supply of FTTC based VUA in urban areas; and
- The presence of regulated copper access together with the margin squeeze regulation applying to FTTC based VUA in regional areas would effectively constrain the supply of FTTC based WCA in regional areas.

The Consultation does not specifically consider the effectiveness of competitive constraints in urban areas on VUA where the loss of customers to cable at the retail level from an increase in FTTC VUA prices would be concentrated and where there would in addition be a significant loss to copper and the growing competitive constraint of SIRO. Further, in addition to the indirect constraint provided by cable at the retail level, experience from other countries shows that wholesale access to cable networks is practical and timely and should also be incorporated into the competitive analysis. For example, wholesale access to cable is currently provided in Belgium and France⁴⁰. The Framework Directive (Article 5(b)) requires that regulators ensure “that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services”. ComReg is instead proposing to introduce highly intrusive regulation on eir while failing to consider whether any regulation should be imposed on Virgin Media despite its much higher market share in urban areas. This is inconsistent with ComReg’s duties under the Framework Directive and will distort and undermine competition including by providing more favourable investment conditions for Virgin Media despite its already very high share of the urban retail market.

In regional areas, WCA prices are constrained by both access to regulated VUA services as well as the adoption of national pricing for WCA (para. 11.38) which leads to the effects of the acknowledged competitive pressure in urban areas extending to regional areas. While some obligations may be justified in relation to regional WCA, for the reasons discussed below eir believes that there is no compelling evidence of any market problem warranting the imposition of cost-based price regulation for regional WCA.

A key driver for ComReg’s proposal to impose the new obligations appears to be eir’s price increase for FTTC based VUA and bitstream in September 2016. The pricing analysis presented in the Consultation suggests that FTTC based retail services are being effectively constrained by copper and cable. Based on market research conducted in June 2016, the Consultation reports:

⁴⁰ <http://www.bipt.be/en/operators/telecommunication/Markets/price-and-cost-monitoring/wholesale-tariffs-for-cable-access> and http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2659&lang=en

- residential respondents with a bundle that includes broadband provided over a copper network paid an average of €54 per month while those who purchase broadband as a standalone product spend on average €35 per month (para. 4.21);
- residential respondents on an FTTC network whose broadband is part of a bundle paid an average of €50 per month while those who purchase broadband as a standalone product spend on average €40.09 per month (para. 4.76); and
- residential respondents on a CATV network whose broadband is purchased as part of a bundle paid an average of €72 per month for their bundle while those who purchase CATV broadband as a standalone product spend on average €42.21 per month (para. 4.124).

Broadband over copper provides speeds of up to 24 Mbps, broadband over FTTC speeds of up to 100 Mbps and broadband over cable speeds of up to 360 Mbps.⁴¹ Given the relative speeds provided by the technologies, the June 2016 pricing analysis suggests that FTTC was relatively cheap. The €3.50 VUA price increase in September 2016 even if fully passed through to retail prices would still have left FTTC based broadband cheap compared with copper broadband. The price increase for VUA should also be seen in the context of ongoing price rises imposed by Virgin Media including a €5 increase in March 2016 and a €4 increase in January 2017 which Virgin Media attributed to *“increased operating costs and ‘a near trebling of rates’ payable across its network.”*⁴² It is unsound to infer that eir’s FTTC based access prices are not effectively constrained as a result of a price increase given the overall structure of market prices and when eir’s major rival is increasing its prices reflecting the impact of higher costs.

Given the small share of FTTC based access relative to copper services priced at cost and Virgin Media’s cable services and the evidence of prices in line with substitutes taking into account quality differences, there is no justification for ComReg’s proposed heavy-handed intervention to introduce cost-based pricing regulation for FTTC based VUA in urban areas or FTTC based WCA in regional areas. FTTC based access is already effectively constrained by the ongoing regulation of CGA services, the presence of cable in urban areas and the current margin squeeze tests applied to FTTC based access. Given the competition in the market, any possible benefits from cost-based price regulation would be outweighed by the significant risks of distorting competition and deterring investment.

ComReg has also not examined whether there would be a justification for retaining the current margin squeeze rules were the FTTC based access services subject to cost orientation obligations. A margin squeeze would require either (i) wholesale prices being set above costs; or (ii) retail prices set below cost. Cost based regulation of wholesale FTTC access rules out the possibility of excessive wholesale prices. Thus for eir to engage in a margin squeeze would require eir to set retail prices below cost. Such loss-making pricing would only be rational if eir would have a reasonable expectation of being able to set retail prices at excessive levels in the future for a sufficient period to recover the losses. However, there would be no basis for such an expectation with eir already subject to intense competition from Virgin Media and competition increasing with SIRO as well as the ongoing presence of LLU-based operators with significant sunk costs and continuing access regulation supporting further entry. eir has already discussed why simultaneous margin squeeze rules and wholesale cost based regulation is generally unfounded in the Compass

⁴¹ The Consultation, Table 2.

⁴² <http://www.irishtimes.com/business/media-and-marketing/virgin-media-ireland-prices-will-increase-from-january-1.2864247>

Lexecon report, “Concurrent upstream cost and downstream margin regulation for current generation broadband and voice in Ireland” dated 28 May 2015.

Looking forward, copper and cable will continue to provide substantial constraints on the conditions under which FTTC access is supplied and in addition SIRO’s network will provide a further important competitive constraint. In December 2016, Virgin Media announced plans to:

“extend its service to an additional 200,000 new homes and businesses, a 25pc bump on its previous footprint. ‘We cover 50pc of the country at the moment,’ says Hanway from a low-key office in a north Dublin business park. ‘I don’t see why that shouldn’t get to 60pc or 70pc. We’ll expand to almost a million homes in the next two years.’”⁴³

This completely refutes the assumption made in the Consultation (para. A5.42) that “*Virgin Media’s network coverage is unlikely to change significantly during this market review period*”.

SIRO’s wholesale open access FTTH network was reported to have passed 64,100 fibre-to-the-home premises in November 2016 and is passing an additional 10,000 homes per month.⁴⁴ It is expected to cover at 200,000 premises by the end of 2017 as part of its initial rollout to 500,000 homes.

ComReg’s own analysis showed that in Exchange Areas where Virgin Media network coverage, its share of the market is typically higher.⁴⁵ The expansion of Virgin Media’s and SIRO’s networks suggests that competitive pressure on eir will intensify. In light of this, ComReg should be moving to relax rather than tighten regulation on eir.

Cost-based price regulation would undermine on-going NGA investments

The Irish market is remarkable for the extent of competitive investment in NGA networks currently taking place. eir continues to invest in deploying FTTC and in FTTH deployment in progress to extend the footprint of high speed broadband to a further 300,000 homes and businesses to reach a total of 1.9 million premises by the end of 2018. As noted above, SIRO is rolling out its FTTH network to 500,000 homes and Virgin Media announced in December the extension of its network to an additional 200,000 homes.

ComReg’s proposals to provide cost-based access to eir’s FTTC network puts this level of investment at risk. By depressing the prices of access services, cost-based access renders investments in competing networks less attractive. Why would a provider incur the substantial demand, competition and technology risks of undertaking new network investment when they can obtain cost-based access to eir’s fibre network. As stated in the EC’s Recommendation of September 2013⁴⁶:

“it is important in order to promote efficient investment and innovation, in accordance with Article 8(5)(d) of Directive 2002/21/EC, to allow those operators investing in NGA networks a certain degree of pricing flexibility to test price points and conduct appropriate penetration

⁴³ <http://www.independent.ie/business/technology/virgin-media-digs-in-for-fibre-battle-as-major-network-expansion-beckons-35378463.html>

⁴⁴ <https://www.siliconrepublic.com/comms/siro-ftth-broadband>

⁴⁵ Consultation para A5.83

⁴⁶ http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

pricing. This would allow SMP operators and access seekers to share some of the investment risk by differentiating wholesale access prices according to the access seekers' level of commitment...In addition, pricing flexibility at wholesale level is necessary to allow both the access seeker and the SMP operator's retail business to introduce price differentiation on the retail broadband market in order to better address consumer preferences and foster penetration of very high-speed broadband services."

Empirical studies have found that:

- "active remedies, especially when coupled with incremental cost-based access pricing, can substantially impede fibre deployment, because of the hold-up problem" and a lack of strict cost-oriented fibre access obligations was linked to relatively rapid NGA deployment when considering a benchmark set of European countries;⁴⁷ and
- "Our main finding is that tight access regulation to both the legacy and the NGA networks harms NGA investment by incumbent telecoms operators, but does not affect cable operators."⁴⁸

Further, cost-based regulation of FTTC critically undermines the migration path for customers from current generation to FTTC and eventually to FTTH. Rather than a ladder of technologies offering incrementally greater speeds for incrementally higher prices, the proposed regulation would bring down the price of FTTC and increase the price difference between FTTC and FTTH. This is likely to significantly undermine customer demand for and the economics of investment in FTTH.

Are ComReg's stated reasons for imposing cost-based pricing for VUA reasonable?

ComReg's Consultation (para 8.626) puts forward a range of arguments to justify the cost-based price regulation of FTTC based VUA, particularly:

- (a) More predictable demand for FTTC based services;
- (b) Price increases suggest that current controls are of limited effectiveness;
- (c) To achieve a consistent regulatory approach with current generation access (CGA);
- (d) To provide appropriate investment signals;
- (e) To provide more price certainty for the access provider and access seekers; while
- (f) Allowing a reasonable rate of return.

(a) Demand for FTTC based services remains highly uncertain

The Consultation's first reason for cost orientation is that "*demand for FTTC based VUA services is now easier to forecast...therefore, it would be easier to determine forecasted costs and volumes*". However, demand for eir's FTTC based VUA is subject to high uncertainty. First, there is significant uncertainty in relation to migration of customers between eir's networks of different technologies. ComReg's Information Notice 16/110 shows a range for the estimated cost of FTTC VUA from €14.50 to €18.50 depending on parameters including the speed of take-

⁴⁷ "Why Is Europe Lagging On Next Generation Access Networks"; http://bruegel.org/wp-content/uploads/2015/10/pc_2015_14.pdf

⁴⁸ http://www.cresse.info/uploadfiles/2016_pa7_pa3.pdf



up. This is a substantial range of uncertainty with the upper end of the range being 28% higher than the lower end.

[✂]

Figure 4 [✂]

Moreover, even this range ignores key additional sources of uncertainty including the likely loss of lines to rival operator networks including to large announced investments of Virgin Media (“a 25% bump on its existing footprint”) and SIRO to 500,000 homes. These investments, announced since ComReg’s 2013 NGA decision, show both the substantial demand uncertainty still impacting eir’s FTTC network and the vulnerability for demand to be affected by further new announcements.

(b) Price increases suggest that current controls have limited effectiveness

ComReg’s second reason is that constraints on eir’s pricing appear limited, particularly because “*Eircom has increased its NGA wholesale prices twice since the launch of NGA services in 2013*”. Firms in competitive markets frequently increase prices. Virgin Media increased its prices twice in less than a year by a total of €9 a month, citing cost factors including a trebling of rates.⁴⁹ Virgin Media also increased its prices by as much as €7 in 2015.⁵⁰ As noted by the European Commission in its 2013 Recommendation, NGA pricing may need to be particularly dynamic to enable firms to identify how to efficiently recover costs across new products with uncertain demand and to support penetration (ie low prices initially can encourage customers to experience faster services before prices are moved to more sustainable levels as demand matures).

(c) To achieve a consistent regulatory approach with current generation access (CGA)

ComReg’s next reason is to achieve a consistent regulatory approach with the pricing of CGA. However, regulation is required to be proportionate to the problem being addressed. The European Commission’s 2013 Recommendation specifically requires that cost orientation not be imposed on NGA where economic replicability is effective precisely for the reason that NGA investments warrant greater pricing flexibility.

(d) To set appropriate investment signals

Again, this reason put forward by ComReg for cost orientation ignores that investment in NGA warrants a less interventionist approach. Further, it is unclear whether ComReg appreciates the need for an additional mark-up in the allowed rate of return to compensate for the risks of NGA investment. We return to this issue below.

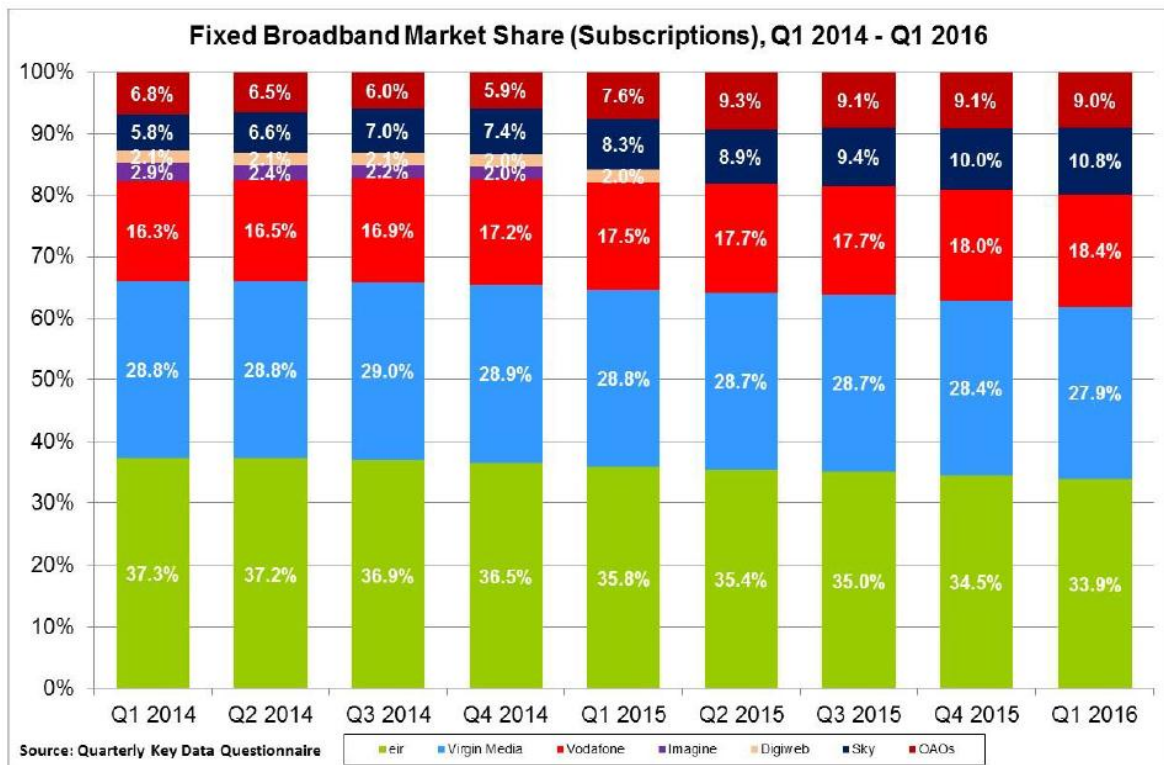
⁴⁹ <http://www.imagine.ie/virgin-media-ireland-prices-will-increase-january/> and <http://www.irishtimes.com/business/media-and-marketing/virgin-media-ireland-prices-will-increase-from-january-1.2864247>

⁵⁰ <http://www.irishmirror.ie/news/irish-news/upc-customers-hit-price-hikes-4923916>

(e) To provide more certainty for the access provider and access seekers

ComReg’s next justification for imposing a cost orientation obligation is that it would provide more price certainty for the SMP operator and for service providers. Such an obligation undermines certainty for the SMP operators by making its pricing subject to the regulator’s view of costs. Risks to the SMP operator are raised because it is now constrained from being able to adjust prices in response to cost changes.

The existing margin squeeze rules also provide substantial certainty for access seekers by governing eir’s pricing so as to ensure a sufficient margin for competitors. Under the current regulations, access seekers have been highly successful, growing their share of the retail fixed broadband market from 33.9% in Q1 2014 to 38.2% in Q1 2016 and 39.9% in Q3 2016 (ComReg’s Quarterly Key Data). eir share’s has fallen significantly from 37.3% to 33.0% over the same period with Virgin Media’s share down from 28.8% to 27.1%. The evidence is that access seekers are able to compete successfully based on current regulation and thus ComReg’s reason provides no justification for now imposing cost orientation.



(f) Allowing a reasonable return

ComReg states that the cost orientation obligation will allow a reasonable rate of return. However, eir is concerned that ComReg may fail to take into account the additional asymmetric risks associated with the investments.

The European Commission’s 2010 NGA Recommendation requires that a risk premium should be included to reflect any additional and quantifiable investment risk incurred in order to take into account the risk associated with NGA investments.⁵¹ It is important to recognise that there

⁵¹ Annex 1

are two sources of risk that may need to be taken into account. First, NGA investments may be subject to higher systematic risks and this should be reflected in the allowed WACC. Second, cost-based price regulation can give rise to an asymmetric risk in that a firm is prevented from earning returns above its cost of capital when conditions turned out favourably but is not compensated for returns below its cost of capital when conditions turn out unfavourably. This is especially a problem when investment is subject to substantial uncertainties at the time the investment is undertaken. Ofcom has noted the importance of allowing NGA investors a fair bet:

“An investment is a “fair bet” if, at the time of investment, expected return is equal to the cost of capital. This means that, in order to ensure that an investment is a fair bet, the firm should be allowed to enjoy some of the upside risk when demand turns out to be high (i.e. allow returns higher than the cost of capital) to balance the fact that the firm will earn returns below the cost of capital if demand turns out to be low. This issue is particularly important where there is significant uncertainty around demand (or other factors that affect returns), and so is particularly relevant to NGA.”⁵²

“One way of compensating for the asymmetry is to allow an upward adjustment to the regulated price to reflect the reduction in the expected returns due to the asymmetric treatment. Whilst this does not correct for the asymmetry it may be able to compensate for the asymmetric treatment such that the investor faces a ‘fair bet’ when undertaking the investment.”⁵³

While uncertainties are likely to be greatest for FTTH investments, a number of regulators have recognised that a mark-up over WACC is also required for FTTC investments.

Table 4. Allowable risk premiums for FTTC networks

NRA	Risk premia (real, pre tax)
AGCOM, Italy (2015) ⁵⁴	3.2% (FTTH)/ 1.5% (FTTC)
BIPT, Belgium ⁵⁵	1.5% (FTTC)
IRL, Luxembourg (2014) ⁵⁶	2.5% (FTTC)

Should ComReg proceed to impose cost-based price regulation on FTTC based access, the determination of the appropriate mark-up over WACC for the risks borne at the time of the investments will be an important issue.

⁵² Ofcom, Wholesale broadband access charge control consultation, January 2011, paragraph A8.27.

⁵³ Ofcom, *Regulatory challenges posed by next generation access networks*, 23 November 2006, para. 4.52.

⁵⁴ <https://www.agcom.it/documents/10179/3160100/Allegato+22-12-2015+1450770379301/f7652967-94564bd4-8c69-e0c95b49da78?version=1.0>

⁵⁵ <https://www.agcom.it/documents/10179/3160100/Allegato+22-12-2015+1450770379301/f7652967-9456-4bd4-8c69-e0c95b49da78?version=1.0>

⁵⁶ <https://assets.ilr.lu/telecom/Documents/ILRLU-1461723625-133.pdf>



Are ComReg's stated reasons for imposing cost-based pricing for FTTC based WCA in regional areas reasonable?

ComReg's reasons for proposing cost-based pricing for FTTC based WCA in regional areas are generally the same as those put forward for cost-based pricing of FTTC based VUA. As such, they suffer from the flaws identified in the previous section. ComReg also puts forward (para. 13.306(c)) one additional reason specific to FTTC based WCA, i.e. that regulation would prevent cross subsidies from regional to urban areas. eir considers that this reason is also flawed. First, eir is subject to competition law that prevents it from pricing below cost for anti-competitive reasons. Second, such a pricing strategy would make no economic sense. eir faces substantial competitors in urban areas with significant sunk assets including Virgin Media and BT. eir would incur substantial losses if it were to attempt to foreclose competitors from urban areas. Further, eir would have no ability to recoup such losses as if it sought to raise prices above costs to recoup earlier losses, it would be constrained by the presence of Virgin Media's cable network assets and the ability of other players to obtain access to WLA inputs and to price their services at cost.

With ubiquitous VUA access implemented as a remedy for eir SMP in the national NGA WLA market, the NGA WCA market ipso facto becomes competitive. This is because the VUA service is delivered (to achieve 100% national coverage) to a set of sites for handover to downstream competitors that are reached by networks already built, or bought, for that purpose; so, particularly as the high speed leased line market is about to be found to be competitive, there are sufficient constraints on eir when setting prices for that service added to VUA (in the WLA market) to generate NGA Bitstream Plus (in the WCA) market. This has been demonstrated by the loss of market share by eir as over 70% of externally supplied NGA has already migrated to VUA rather than Bitstream.

Current generation services offered by eir into the WCA market have already been subject to price control by cost orientation for some time in that Bitstream prices have been set at cost. After reconciliation exercise with the costs and revenues reported for eir CGA Bitstream in the FY14/15 separated accounts prices for eir services have been reduced by reducing usage charges and by implementing a discount for operators taking delivery of Bitstream services closer to the end user – rather than at a single national site. This pricing review projected CGA Bitstream revenues and costs to the end of FY18/19 in the presence of declining demand due to migration to eir NGA and to NGA services offered by two competing network providers. For this reason there is no longer any requirement for a separate price control by cost orientation for eir current generation WCA services. Indeed, in the context of increasing build of competing NGA infrastructure by three parties, any control that gave rise to further price reductions in eir current generation Bitstream and so delayed take-up of NGA service, will have the inappropriate effect of delaying investment in rolling out NGA services. A control that caps eir current generation WCA service prices will be more sufficient to ensure that eir cannot avail of any residual SMP to damage consumer welfare.

Cost accounting (8.674 – 8.678) and Accounting Separation obligations (8.681-8.685)

ComReg has failed to consider the implications of its proposal to maintain Accounting Separation and Cost Accounting obligations in the WLA market. Instead of using this market review and consultation process as an opportunity, in the light of a rapidly evolving technological and competitive environment, to critically examine the on-going necessity for the maintenance of the full suite of obligations outlined in ComReg's Decision D08/10, ComReg merely takes the "easy way out" and imposes everything, regardless of the detrimental impact such stringent regulation might have on eir or the Industry in general.



The imposition of obligations in respect of Price Control, Cost Accounting and Accounting Separation has to be considered in the context of market size and increasing competitive conditions in particular markets. ComReg is proposing to impose Accounting Separation and Cost Accounting obligations on WLA markets and refers to the obligations mandated in its decision D08/10. However D08/10 outlines that Separated Accounting information can be provided in a number of different forms. These are published HCA Separated Accounts on a “fairly presents” basis, Additional Financial Statements (AFS) which may be required to be prepared on a “properly prepared” basis or as unaudited Additional Financial Information (AFI). A review of D08/10 is long overdue particularly as it pre-dates all of the NGA technology and market developments that are being contemplated in this review.

ComReg proposes to impose these obligations without outlining even at a summary level how eir is to fulfil these obligations. At a minimum we would expect that ComReg would outline where in the Regulatory Accounts they expect this data to be provided. The costs to administer the level of detail demanded by ComReg are substantial and unreasonable as ComReg has not made any attempt to quantify whether such granular accounts do generate any meaningful regulatory or societal benefit.

ComReg also proposes that the current Accounting Separation obligations will be maintained. eir currently prepares the following for Wholesale Broadband - an Income, a Mean Capital Employed and Average Revenue/Average Cost Statements in the HCA Separated Accounts. A further income statement is produced for each of the main WBA services in the AFS and a further detailed cost schedule is provided in the AFI.

eir understands from the consultation that the following products will be included in the WLA accounts: Local Loop Unbundling; Line Share; Co-Location Services; Pole and Duct Access; Dark Fibre; Virtual Unbundled Access (VUA) either FTTC or FTTH. In many of these cases, materiality is a very important consideration. Given the issues that the low level of revenues, costs, return and Mean Capital Employed cause when employing a “fairly presents” standard, eir suggests that ComReg needs to consider how these obligations are to be applied.

VUA services are currently included in the “Bitstream MB Plus Rental” AFS. As the VUA product is sold separately it is not overly complex to move this to a new market. Given that the handover of VUA services does not always occur at the Aggregation Node there will be a certain amount of core NGN costs that need to be applied to the VUA account. This element will allocate the costs associated with backhaul from the Aggregation Node up to the relevant handover point to the other operator’s network.

The regulated accounting obligations are out of date and ComReg must commence a comprehensive review with the objective of streamlining the obligations and requirements consistent with increasingly competitive markets. The level of regulatory intervention should decrease as competition increases.

Requirement for a Statement of Compliance (8.686 – 8.710)

The current Statement of Compliance (SoC) obligation imposed on eir requires that eir demonstrates its compliance with its non-discrimination obligations only. ComReg is proposing that eir should be required to submit to ComReg written SoCs demonstrating its compliance with *all* of its regulatory obligations i.e. including but not limited to access, pricing, transparency, accounting separation and non-discrimination in the WLA and WCA markets.

The enhanced SoCs demonstrating eir’s compliance with all of its regulatory obligations in the WLA and WCA markets will be required to cover:



- Pre-provisioning, provisioning and service assurance for WLA and WCA products services and facilities.
- Product development including product enhancements, and pre product development screening of Access requests.
- Product prioritisation and investment decisions.
- Access to shared resources including IT and product development resources.
- The management of information, both Structured information and Unstructured information⁵⁷, in conformance with regulatory requirements.
- Other categories as reasonably required by ComReg.

The SoCs are required to be signed by a person of appropriate expertise and authority and as well as detailing the initial risk analysis used to generate controls and the governance measures and controls in place to ensure compliance and auditing of those controls, the SoCs will need to be published on eir's website and updated as required. The enhanced SoCs are to be provided to ComReg within 6 months of the effective date of the decision or in the case of a new WLA or WCA product, service or facility or a change to an existing WLA or WCA product, service or facility, 7 and 3 months respectively in advance of the new product being made available.

ComReg is also of the preliminary view that based on the fact that eir's investment decisions can affect its ability to develop and make available regulated wholesale products and maintain the quality and availability of regulatory products, that the process employed and information relied upon by eir in order to make investment decisions should be subject to risk analysis.

It is eir's view that the whole of this proposal aside from the obligations relating to the inclusion of all of eir's regulatory obligations in SoCs is an unreasonable burden because of the high administrative burden that this proposal will impose on eir. Expansion of the SoC to include prioritisation and investment should not be published as this is confidential internal data that should never appear on a public site.

At present a SoC contains a comparison of the product development, pre-order/order, provisioning and service assurance process for Wholesale Customers versus downstream business. These are detailed documents that describe the process, risks and associated controls. Provision of information reuse of shared resources etc. is not something that is directly comparable and is of little value when determining if an equivalent service is provided to all.

The obligations will be highly resource intensive due to the need to demonstrate compliance with all regulatory obligations as well as defining all the additional controls that ensure such compliance. This is in contrast to ComReg's claim that it "*does not consider the SoC obligation to be over burdensome on eir, as it has, to date, implemented a RGM in order to comply with its regulatory obligations, including its obligations as they apply to the WLA market.*" In order to meet the obligations eir will have to employ additional resources to complete the additional auditing and publication obligations.

ComReg is proposing that the SoCs will be published on eir's publicly available website. However, the details required to be contained in the SoCs are extensive and have been left open-ended in that they apply not only to the specific categories identified by ComReg (e.g. pre-provisioning, provisioning, service assurance etc. which are the basis of the existing controls) but also to "*Other*

⁵⁷ This would include emails, including those sending out presentations and action points from meetings, not covered by defined processes.



categories as reasonably identified by ComReg.”. It is unreasonable for ComReg to have such open ended proposals.

ComReg recognise that some of the information contained within the SoCs may be deemed by eir as being confidential in nature and as such eir can request not to publish aspects of the SoC to Access Seekers. However, this appears to be at ComReg’s discretion and when assessing such requests ComReg will apply its rules relating to the publication of confidential information. This could make public a wealth of information on eir’s operation exposing eir to malicious attack and security breaches on networks and information systems as well as losing any competitive intellectual property advantage.

The requirement to publish the SoC and any updates of such on the eir website does not involve any approval process by ComReg and eir is of the view that it should. ComReg cannot just reserve its rights to take action at a later stage. Absent a proper approval process by ComReg, the publication of SoCs will lead to eir being open to ‘trial by industry’. This is not appropriate or fair. The SoCs are prepared for the purpose of demonstrating to ComReg, as the national regulatory authority, that eir has complied with its obligations. Given this there is no objective basis for their publication.

The SoC process is front loaded, with all the work being required to be done in advance of notification which with the publication obligation will increase workloads. This huge draw on resources in the development cycle will greatly impede developments and stifle innovation in that stage of development where speed, creativity and efficiency are most important in responding to market demands. The retail and wholesale markets are more competitive than 2013 indicating that there is no major regulatory lacuna that needs to be addressed by pouring more obligations on eir. Indeed the reverse should be the case with regulatory obligations being reduced in light of the state of competition.

eir notes again that its RGM is currently being reviewed by ComReg and its consultants. The increased obligations in relation to SoCs would appear to prejudice the conclusion of that review.

Question 8: Do you agree with ComReg’s preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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 per paragraph 9.31 *“it is ComReg’s preliminary view that the ‘Modified Retail Broadband Market’ (i.e. the product and geographic market in the presence of WLA regulation) is as follows:*

- (a) *Asymmetric retail broadband products of any speed provided over copper, FTTC, FTTH and CATV networks, including broadband products provided using upstream WLA inputs (**‘Modified Retail Broadband Product Market’**); and*
- (b) *ComReg recognises the possibility of sub-geographic markets existing; however, we leave this question open.”*

eir does not agree with ComReg’s preliminary conclusions on the assessment of the Modified Retail Broadband Market and is of the view that the same errors as identified in ComReg’s definition of the relevant Retail Broadband Market prevail here also, namely that the market should include mobile broadband and broadband services provided over fixed wireless networks and satellite. In addition eir is of the view that there are sub-national geographic markets rather than a retail broadband market that is national in scope, especially in the presence of a competitive urban WCA market (See eir’s response to Question 1 for more detail on this point).



ComReg has not concluded on the geographic scope of the Modified Retail Broadband market, rather it has simply recognised the ‘possibility’ that sub-geographic markets may exist. However eir notes that it is unlikely that the presence of regulation in the WLA market alone would create this ‘possibility’ of separate retail broadband markets. Rather, the existence of sub-national retail broadband markets holds in the absence of regulation in either the WLA or WCA markets.

Question 9: Do you agree with ComReg’s preliminary conclusions on the product assessment for the WCA 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 does not agree with ComReg’s preliminary conclusions on the product assessment for the WCA Markets. As in the case of the WLA market, eir is of the view that due to the decline in Current Generation (CG) Bitstream products, it may be more appropriate to delineate the WCA market on the basis of current generation and next generation technologies. The demand for CGA products is likely to decline further over the lifetime of this market review as retail (and consequently) wholesale demand ultimately migrates to next generation access.

Current generation technologies are a declining market. In Q3 2016, 43.1% of all DSL lines were provided by OAOs using wholesale Bitstream. In absolute terms there were 198,540 wholesale Bitstream lines in Q3 2016, a decrease of 8.5% since Q3 2015. In contrast 25.3% of all VDSL lines in the same quarter were provided by OAOs using wholesale Bitstream. In absolute terms there were 116,831 wholesale VDSL Bitstream lines in Q3 2016, an increase of 6.1% since Q3 2015.

In paragraph 10.106 ComReg states that “*Virgin Media’s network coverage is primarily targeted towards households, with minimal provision of retail services to businesses. This suggests that business customers affected by a SSNIP in WCA prices may not be able to switch to Virgin Media for retail broadband services.*” The assertion that Virgin Media does not really concentrate on the business market is not necessarily true and Virgin Media appears to be keen to expand in the business market – particularly in the small to medium enterprise segment. It competes vigorously in this market. In addition Virgin Media’s planned additional network rollout will allow it to serve additional business as well as residential customers thus enabling additional business users to switch in the event of a price increase.

The same issues eir has raised in relation to the assessment of indirect constraints in the WLA market apply in the context of the WCA market. eir considers that the manner in which ComReg has conducted the CLT is not robust in terms of both ComReg’s estimates of marginal costs and subsequently critical loss values as well as the appropriate estimates of customer’s behavioural responses against which to compare these critical loss values and thus determine the extent to which various retail services may provide indirect constraints at the wholesale level.

eir is therefore of the view that on the basis of the weaknesses in its analysis of indirect constraints, ComReg has failed to correctly identify the extent to which Virgin Media, FWA, mobile broadband and satellite broadband act as effective constraints in the WCA market.

Question 10: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA 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 does not agree with ComReg's preliminary conclusions on the geographic market assessment in the WCA markets on the basis that the criteria for determining whether an Exchange Area should be included in the Urban WCA Market or otherwise are too restrictive and not reflective of the differing competitive conditions that serve to differentiate urban and rural areas.

The range of criteria that are used for assessing the WCA market are based around the following conditions;

- (a) A minimum number of SPs;
- (b) Network presence;
- (c) SPs' market shares;
- (d) Network coverage of alternative networks; and
- (e) Reasonable additions.

ComReg states that *“the analysis of these conditions leads to a set of cumulative criteria that an Exchange Area must meet for consideration as to whether or not there are differences in competitive conditions compared to other geographic areas.”*

For the purposes of the market definition exercise the following operators are considered as being primary operators i.e. those that can operate in the WCA market absent regulation and that have a sizeable national or (regional) presence.

- BT Ireland;
- Eircom;
- SIRO;
- Virgin Media; and
- Vodafone.

eir is of the view that in terms of assessing the levels of competition within a given area the cumulative criteria are overly complex and restrictive and therefore fail to identify those exchanges where the competitive conditions are sufficiently differentiated. eir addresses its concerns regarding the cumulative criteria below.

As set out in paragraph A 5.58, the proposed criteria are:

- (i) *Criteria 1: An Exchange Area in which at least three Primary Operators would be capable, within a sufficiently short period, of providing either broadband services at the retail level to End Users, WCA or WLA in the Exchange Area, absent regulation in the WCA Market; and*

eir is of the view that there is a distinction to be made here in terms of operator presence in a given exchange area, namely with regard the level(s) of the supply chain where such operators are present. An Exchange Area should be deemed sufficiently competitive where for example there are a minimum of two network providers, whether this is eir and an Alternative Network Provider or two Alternative Network Providers.

- (ii) *Criteria 2: An Exchange Area in which Eircom would provide broadband services at the retail level to less than 50% of End Users within that particular Exchange Area, absent regulation in the WCA Market; and*

eir is of the view that in the presence of infrastructure competition this criteria is unnecessary as competition at the network level allows for effective competition in the retail broadband market. However should ComReg wish to impose conditions on competition in the retail market for the



purposes of geographic delineation, eir notes that broadband services at the retail level should include mobile broadband as well as those provided over FWA and satellite networks as discussed earlier in this response.

- (iii) *Criteria 3: An Exchange Area where one or all of the Primary Operators providing retail broadband services to End Users using inputs from the WLA Market provide a total greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA market; and*

eir is of the view that this condition is not necessary as competition at the retail level will differ across urban as the presence of a specified number of Primary Operators is sufficient to determine that there is effective competition at the retail level.

- (iv) *Criteria 4A: An Exchange Area in which each Alternative Network Operator has the network coverage to, within a sufficiently short period, provide retail broadband services to End Users to more than 30% of the premises in that particular Exchange Area (or currently provides greater than 30% of End Users with retail broadband services), absent regulation in the WCA market; and*
- (v) *Criteria 4B: An Exchange Area in which each Alternative Network Operator providing retail telecommunication services to End Users provides greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA Market.*

When considering Criteria 4A in conjunction with Criteria 4B, eir is of the view that it should only be necessary for one of the Alternative Network Operators i.e. either SIRO or Virgin Media to have passed 30% of the premises in a particular Exchange Area. This is on the basis that an Exchange Area can as a whole be considered as having economies of density or otherwise. It would make commercial sense over time to further rollout network so as to pass the majority of premises in a particular Exchange area, where such is deemed to be 'urban' or 'semi-urban' but not initially. eir considers that Criteria 4B is unnecessary. The very presence of an Alternative Network Operator will allow OAOs to either resell a wholesale product or provide services at the retail level so that the Alternative Network Operator does not also need a defined share of the retail market in that particular Exchange Area.

- (vi) *Criteria 5: Exceptionally, on a case-by-case basis, where an Exchange Area:*
 - (i) *(a) fails no more than one of criteria set out from (2) to (4) above and fails the criterion by a small margin (i.e. less than 10% percent of the percentage specified); OR*
 - (ii) *ii. fails no more than one of criteria set out from (2) to (4) above and where an Alternative Network Operator provides telecommunication services either at the wholesale level or at the retail level which equates to more than 60% of End Users within that particular Exchange Area; that Exchange Area will be deemed to have satisfied the relevant criterion.*

On the basis of these criteria, of the 1,217 Exchanges examined, 88 met criteria 1 to 5 and therefore are deemed as having competitive conditions which are different from the remaining 1,129 Exchange Areas. eir believes that this is not reflective of the number of Exchanges where competition is sufficiently differentiated and that the criteria are overly complex and prescriptive in determining which Exchanges should be included in the Urban WCA Market.

An example of how restrictive these criteria are can be seen in the inclusion of Exchange Areas where SIRO has already rolled out its network in the Regional WCA Market. Looking at the nine



towns where SIRO has rolled out its network to date (Carrigaline, Cavan, Drogheda, Letterkenny, Sligo, Skibbereen, Tralee and Wexford) only the Carrigaline exchange is considered as meeting criteria 1-5 even though the number of addresses passed by SIRO's network in five of these towns (Dundalk, Carrigaline, Letterkenny, Cavan and Tralee) is over [~~2~~].

As ComReg states in A.538 *“The boundaries of any geographic unit should also be relatively stable and easily understood by SPs.”* eir considers that criteria based simply on the number of Network Operators (eir, SIRO and Virgin Media) or the number of Primary Operators (as defined by ComReg) in an Exchange Area would be more appropriate in this regard and would allow for ease of analysis of competitive conditions within an Exchange and thereby increased ease of implementation.

Similar to the manner in which Ofcom⁵⁸ has identified distinct WBA geographic markets to reflect the geographical differences in competition and supply conditions, eir considers that the following criteria may be more appropriate and representative of the true levels of competition within an exchange.

- Criteria 1: Exchanges where two or more Network Operators are present or forecast to be present; OR
- Criteria 2: Exchanges where three or more Primary Operators are present or forecast to be present

Additionally, eir is of the view that there should be a periodic review of the competitive exchanges. eir's concern is that absent such a review, exchanges that become competitive over time, with further network rollout envisaged over the market review period, will continue to be subject to regulation, thus distorting the market.

Question 11: Do you agree with ComReg's assessment of SMP in the WCA 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 Urban WCA market and its proposal to remove existing ex-ante regulation in this market. However eir has a number of concerns relating to the delineation of the Urban and Regional WCA markets (as addressed in the response to Question 10) and also strongly objects to the proposed sunset period that ComReg had proposed for the withdrawal of existing regulation, which is unnecessary, unreasonable, disproportionate and contrary to the interests of consumers. The market is likely to have at least 6 months to adjust to ComReg's proposed deregulation before it comes into effect.

11.117 As noted in paragraph 11.49, Eircom is the largest supplier of WCA in the Regional WCA Market and Access Seekers have limited options for switching to an alternative WCA supplier, although ComReg notes that BT Ireland does supply WCA services in some areas of the Regional WCA Market. In addition, because of the more rural nature of the Regional WCA Market, there is limited scope for a purchaser of Eircom's WLA products or an alternative network operator to supply WCA in the Regional WCA Market as any wholesale offering would need to have a wider geographic footprint to meet the expectations of WCA Access Seekers.

ComReg have failed to adequately consider the effect that the NBP will have on the market. The NBP will be in this market and the new NBPCo will provide plenty of countervailing buyer power. As previously mentioned there needs to be a guarantee of a review once the NBP starts to be rolled out.

⁵⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/57810/WBA-Final-statement.pdf



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. eir's competitors compete on a global scale and are extremely well resourced. Market participants such as Liberty Global (Virgin Media), Vodafone and BT for example are extremely well placed.

Question 12: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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 does not agree that the competition problems and the associated impacts on competition End Users that ComReg has identified are those that could potentially arise in the WCA Market on the basis that ComReg have failed to delineate the market in the correct manner or appropriately assess the level of competition that eir faces in terms of both direct and indirect constraints.

12.13 For example, as outlined in paragraphs 10.119 to 10.124, if Eircom raised the price of WCA, this would raise input costs for purchasers of WCA from Eircom.⁹¹⁶ Given that such inflated wholesale prices may be passed on by the SPs to their retail and/or wholesale customers via higher retail prices, it could lead to reduced revenues for these SPs and possibly their exit from the downstream retail and/or wholesale markets. This way, Eircom's excessive pricing of WCA could lead to the distortion or foreclosure of competition in these markets.

As ComReg frequently mentions Vodafone is switching to VUA, which is in the WLA market and BT also buys VUA and Line Share so it is hard to say that eir is able to charge excessive prices in the WCA market, especially in the presence of regulation in the WLA market.

In paragraph 12.50 ComReg asserts that it "has presented examples of such behaviour and therefore considers that it is justified and proportionate to impose robust obligations on Eircom in the Regional WCA Market relating to access, transparency, non-discrimination, price control and cost accounting and accounting separation."

eir would like to reiterate that ComReg cannot simply have regard to an extensive hypothetical list of abusive conduct. In addition, in a scenario where eir was determined to have SMP in a particular market, it would be subject to the behavioural constraints imposed by ex post competition law. All of eir's main competitors e.g. Sky, BT, Vodafone and Virgin Media, operate as part of large international corporations who take advantage of substantial economies of scale in terms of network deployment, product development at both the wholesale and retail levels, and content purchasing power and would readily make a complaint in the event of an abuse of dominance. All evidence points to increased competition so ComReg must do more than present a list of hypothetical of abusive conduct.

Question 13: Do you agree with ComReg's proposed remedies in the Regional WCA 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.

eir's response as to the suitability of the various proposed remedies in the WLA market (See Question 7) will also apply here to the similar remedies in the WCA market. In addition eir would like to raise some points with regards the following;



Requirement to provide access to specific wholesale central access products

In relation to paragraphs 13.49-13.58, eir notes that Bitstream IP and BMB are "legacy" products as is Bitstream BEA. Bitstream Plus and BP VEA are the modern equivalents. The Bitstream products associated with the current generation access products are Bitstream IP and BMB. These would be considered legacy products and the underlying technology is approaching end of life. open eir are proposing to retire a number of these products from sale as only a subset of the legacy IP products are actively used by industry. As is evident from the product volumes where possible end users are migrating from the CGA technology to the NGA product, Bitstream plus. Given ComReg's duties in relation to encouraging innovation it should facilitate such retirement.

Requirement to provide access to backhaul (13.59-13.64)

BECS was notified as end of sale in June 2016 and no changes to existing circuits from January 2017. BECS via WEIL is the required interconnect for Bitstream IP and BMB products. BECS via WEIL allows Operators to utilise a single WEIL to interconnect with the open eir network for all their traffic requirements.

Requirement to provide access to Migration Services including Bitstream Soft Migrations (13.65-13.81)

All LLU migrations require an exchange visit. In general all migrations attempt to minimise impact to the end user and the only migration type that would disrupt end user would be if the customer was migration from one network platform to another (e.g. NGA to CGA) or to another Operator network (e.g. migration to ULMP or from ULMP).

In the case highlighted re Bitstream soft migrations migration from the current generation platform to the NGA service, Bitstream Plus requires a site visit to provide the service as there is a change in technology platform which necessitates changing the port the customer is connected to which will result in a disruption to the end user service. Migrations from Bitstream IP to Bitstream BMB products can be done electronically where there is no change of port required as they are migrating to a product of a similar speed.

As outlined in response to Question 7, migration from NGA service to CGA (reverse migration) though possible should be penalised by charging as ComReg should be encouraging investment by operators and encouraging the adoption of new technology by consumers. It is eir's continued view that efficient and swift migrations are key to the operation of a competitive market and require pan-industry processes and agreements. Migrations from other operators to one another, and to eir, have also to operate swiftly and efficiently. eir expects ComReg to apply migration principles reciprocally and seeks a clear commitment to that effect.

In paragraphs 13.108-13.113 ComReg proposes that eir should notify ComReg, in writing, of any proposal to withdraw access to facilities already granted, giving detailed reasons for the proposal, including the impacts that the withdrawal of access is likely to have on existing WCA purchasers. ComReg is of the preliminary view that a period of five years prior notification of the closure of an MDF or the closure or relocation of an Aggregation Node should be considered as appropriate and proportionate. eir welcomes ComReg's view that the five year notification period may be reduced if eir offers an alternative Access option that is acceptable to all Access Seekers impacted by the proposed withdrawal of Access as eir cannot be expected to bear the expense of maintaining dual networks for an unreasonable period of time.

ComReg proposes to impose an obligation on eir to grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services.

However, ComReg's proposals ignore the fact that operators and eir have same access to the OSS gateway, which should reduce rather than increase the regulatory intervention.

eir notes the proposed obligations on SLA fairness, reasonableness and timeliness of access requiring open eir to conclude, maintain and update legally binding, fit for purpose SLAs with Access Seekers for WLA products, services and facilities and the Unified Gateway ('UG') set out in paragraphs 13.120 – 13.171. eir refers ComReg to its detailed suggestions earlier in this response and does not repeat them.

ComReg is proposing to impose certain timelines with respect to the development of wholesale products in the Regional WCA market, these timelines are as described for the WLA market.

open eir is already committed to a transparent RAP product development process as outlined earlier in this response. In its response to question 7 eir has addressed the timelines proposed for product development for the WLA and WCA markets. .

Specification of the non-discrimination standards with respect to the provision of WCA

Paragraph 13.186 suggests new CG WCA products should be provided on an EoI basis and not EoO basis. – This does not incentivise new products because of the additional overheads this introduces in a declining market. There is also no reason for this as new CGA products are likely to use existing systems. The same applies to CGA service assurance – given the likely migration to NGA and the NBP it is hardly economically efficient to require development of existing systems.

However ComReg has proposed an obligation to impose a deadline to migrate retail customers from the legacy IT stack because "*Eircom have a target date of November 2018 to complete the migration of all CG WCA services to Eircom's new IT systems*". ComReg states that it "*has considered the complexities of the bulk migration of CG WCA services to Eircom's new IT systems, the lead time for the development required to achieve such a transition and the risks involved with expediting such transitions in the context of declining CG WCA volumes. ComReg considers that there are considerable risks associated with expediting such a transition and considers that a target date for completion of the transition from CG WCA to Eircom's new IT systems by 1 November 2018 is achievable.*" It should be noted that when responding to ComReg on timelines the November 2018 target was provided to ComReg as a **draft date** noting that we had **not commenced planning**. It should be noted that the IT programme [✕] eir can confirm that November 2018 is not feasible. It is not appropriate for ComReg to mandate a date for eir's IT development programme.

ComReg quotes the Commission Recommendation on consistent Non-Discrimination Obligations and Costing Methodologies in relation to paragraph 13.193. eir notes that the Recommendation⁵⁹ is all about NGA and not CGA services e.g. para 3

"(3) One of the core objectives of the Digital Agenda for Europe is the deployment of next generation access networks (NGA Networks). The Digital Agenda for Europe aims to support the substantial investments, which will be required in the coming years. The present Recommendation aims to promote efficient investment and innovation in new and enhanced infrastructures whilst recognising the need to maintain effective competition, which is an important long term investment incentive. 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.

⁵⁹ <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-consistent-non-discrimination-obligations-and-costing-methodologies>



Increasing legal and regulatory predictability in this manner should further help to trigger the investment needed in the near to medium-term future”

Cost accounting obligations and Accounting Separation remedies

ComReg has failed to consider the implications of its proposal to maintain Cost Accounting (paragraphs 13.355 – 13.361) and Accounting Separation obligations (paragraphs 13.363-13.366) in the Regional WCA market. Instead of using this market review and consultation process as an opportunity, in the light of a rapidly evolving technological and competitive environment, to critically examine the on-going necessity for the maintenance of the full suite of obligations outlined in ComReg’s Decision D08/10, ComReg merely takes the “easy way out” and imposes everything, regardless of the detrimental impact such stringent regulation might have on eir or the Industry in general.

The imposition of obligations in respect of Price Control, Cost Accounting and Accounting Separation has to be considered in the context of market size and increasing competitive conditions in particular markets.

ComReg are proposing to impose Accounting Separation and Cost Accounting obligations on Regional WCA markets and refers to the obligations mandated in its decision D08/10. However D08/10 outlines that Separated Accounting information can be provided in a number of different forms. These are published HCA Separated Accounts on a “fairly presents” basis, Additional Financial Statements (AFS) which may be required to be prepared on a “properly prepared” basis or as unaudited Additional Financial Information (AFI).

ComReg proposes to impose these obligations without outlining even at a summary level as to how eir is to fulfil these obligations. At a minimum we would expect that ComReg would outline where in the Regulatory Accounts they expect this data to be provided.

ComReg also proposes that the current Accounting Separation obligations will be maintained. eir currently prepares the following for Wholesale Broadband - an Income, a Mean Capital Employed and Average Revenue/Average Cost Statements in the HCA Separated Accounts. A further income statement is produced for each of the main WBA services in the AFS and a further detailed cost schedule is provided in the AFI.

As eir has outlined throughout our response, the whole of the WCA market is effectively competitive. Our expectation is that the obligation to produce Separated Accounts will not be required and it can therefore be included in the unregulated market.

Question 14: Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a six month sunset period? 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 does not agree with the proposed sunset period in a market that ComReg has determined as being competitive. The imposition of a 6 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, particularly given the time period between the consultation and the decision



caused by the delay in the pricing decision. eir expects at least a 6 months' delay from the date of this consultation.

The proposed sunset period would effectively result in a competitive market being subject to counterproductive ex-ante regulation until the effective decision date (which could potentially be delayed in light of delay that occurred in publishing the consultation itself). This would lead to distortion of the market. eir considers that a sunset period is not necessary as publication of the consultation serves as sufficient notice to OAOs

Question 15: 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.

eir considers that the RIA associated with this consultation is particularly poor, in this regard. For each of the WLA and WCA markets ComReg considers 4 options (having ruled out forbearance as it is required by the European Regulatory Framework to impose at least one of the five categories of obligations). The options considered by ComReg are combinations of the 5 categories:

- Option 1: Impose Access obligation only
- Option 2: Impose Access, Transparency and Non-Discrimination obligations
- Option 3: Impose Access, Transparency, Non-Discrimination and Price Control and Cost Accounting obligations
- Option 4: Impose Access, Transparency, Non-Discrimination, Price Control and Cost Accounting and Accounting Separation obligations.

The RIA for each market is then a subjective discussion regarding which category or categories of obligations to impose.

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 on eir. At no point does ComReg give consideration to the costs and benefits of the detailed requirements within each obligation. This is concerning given the potentially significant negative effects some of the detailed requirements may have, for example changing the price control methodology for VDSL will have a chilling effect on investment. Nor does ComReg provide sufficient information to allow an informed opinion to be reached regarding the proportionality of proposals including the imposition of Eol on CEI access which has a very material cost for eir.

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.

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.

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. Rather ComReg's proposal is simply to impose more intrusive obligations.

Draft Decision Instruments

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.

WLA: Draft Decision Instrument

Definition of 'Ancillary Services Cost model' - this should refer to the model approved by ComReg

Definition of 'Fibre Loop Unbundling' – this definition is unclear and should not just refer to the fibre loop. ComReg should define this more accurately using appropriate technical specifications. The term 'non-physical' is also unclear

Definition of FTTH – if it is FTTN then the last active component is the distribution point

Definition of 'Migrations' should not include migration from NGA to CGA as that is not economically efficient

Definition of "Ministerial Policy Directions" – should be deleted as these are no longer effective

Definition of 'Passive Access Records' - should be amended to delete the word 'available' in the first line and replace it with 'existing' as it needs to be clear that the records are just those in existence and that new records need not be created. 'Available' in the Oxford Dictionary includes 'obtainable' or 'accessible'. 'Existing' means actual and not merely possible.

Delete the definition of 'Reasonably Efficient Operator' as this test is inappropriate. Given the resources of eir's competitors the test should be one of an Equally Efficient Operator.

Definition of 'Revised Copper Access Model' should be amended by deleting the words in parenthesis in the second line and replacing them with '(approved by ComReg)'. ComReg needs to deliver regulatory certainty

Definition of 'Service Level Agreements' – the last two and a half lines should be deleted as the Decision Notice sets out how an SLA is determined but not its content.

8.2 eircom should only be required to provide concurrent access if this is reasonable. For example if the access request requires eircom to undertake further work that work should only be required to be undertaken in accordance with eircom's published product prioritisation request procedures.



8.3(v) the word 'direct' should be inserted before 'costs' in the 3rd line. This is accepted in (viii). Eircom should not be responsible for any indirect costs. The word 'reasonably' should be inserted before 'incur' in the same line. If AOAs want to make additional promises to End Users such as the provision of SLAs over and above those given by eircom or generally included in contracts for End Users then eircom should not be responsible. The costs have to be predictable.

8.3 (viii) insert 'reasonable' before 'loss' in the second last line for the reasons set out above.

8.6 – this should be amended so that the obligations in relation to SLAs are complied with prior to the launch of any product.

8.10(ii) eircom should only have to comply with 8.9 in the event of a refusal or partial grant as that is what 8.9 relates to. If it is agreement eircom should not be under obligations to provide objective reasons

8.10(iii) delete 'that' in the first line and insert 'whether or not'. It is the Undertaking's responsibility to provide the relevant information and eircom should not be responsible or liable if it does not do so.

8.10 (iv) insert at the beginning 'provided it has been provided with sufficient information as referred to in (iii) above'.

8.12 insert at the end 'and ComReg will ensure that it acts in such a way as to enable eircom to perform its obligations as set out in this Decision'.

9.4 Delete. Provision of CEI should be on an EoO basis.

10.15 insert the words 'after a public consultation on the terms of such directions' after the words 'from time to time' in line 7.

10.20 delete the word 'it' in the third line and insert the words 'appropriate extracts of such information'. It will not be appropriate for eircom to provide confidential wholesale information about one operator to another operator and some information about eircom may not be appropriate to publish, e.g. if it relates to other services, eg content or other unregulated services.

10.22 – this should be consistent with the Commitment agreement with the DCCA, which provides for publication more frequently and subject to anything agreed in any NBP contract – it would be disproportionate to have conflicting regimes and ComReg, as an advisor the NBP, will be aware of the relevant obligations

12.3 Delete. There should be no margin squeeze test in any case where there is a cost orientation obligation.

12.15 Delete – there is no need for this margin squeeze test, particularly in the light of the competition in the WCA market and the wide availability of backhaul products.

12.16 See eir's comment with regard 12.15

12.17 This should be deleted and if it remains the relevant test should be that of an equally efficient operator, given the age of the relevant services.

13.3 delete 'or a third party as determined by ComReg'. It is for ComReg to decide if eircom has complied with its regulatory obligations. It can be advised by a third party but cannot rely on a third party to fulfil its statutory obligations. (section 10(1) of the Communications Regulation Act 2002)



Wholesale Central Access: Draft Decision Instrument

Many of the comments in respect of the draft WLA decision apply also and are not repeated.

Definition of a 'Discount'. Insert the words 'in certain circumstances' before 'a price reduction' as refunds and reimbursements are not necessarily discounts, e.g. if there is non-performance

Definition of 'Revised Copper Access Model'. Delete the words in parenthesis in the second line and insert '(as approved by ComReg)'

Definition of 'Structured Information'. Delete the references to email messages. It is unclear from this definition what is intended to be included in the definition of 'Unstructured Information' and ComReg should make this clear. Perhaps make it clear that unstructured means that it is not part of a structured business process.

Part II – this should be expressly limited to the Regional WCA Market.

5. e-Nasc Éireann Teoranta (Enet)

enet response to ComReg’s Consultation Document and Draft Decision: Market Reviews of Wholesale Local Access provided at a fixed location and Wholesale Central Access provided at a fixed location for mass market products (ComReg Document 16/96)

enet is pleased with this opportunity to provide its response to the Consultation Document and Draft Decision issued by ComReg on its market reviews of wholesale local access (WLA) provided at a fixed location and wholesale central access (WCA) provided at a fixed location for mass market products (ComReg Document 16/69).

While enet is not directly involved in either the WLA or the WCA market it has an active interest in developments in both markets. In particular, enet is interested in how regulation may help to secure improved access to Civil Engineering Infrastructure (CEI) under the control of the SMP operator, in order to further its aim of deploying additional network. As a result, enet’s principal focus in responding to ComReg’s Consultation Document lies in its desire to provide comments on ComReg’s proposal to strengthen obligations on Eircom in the WLA market in the area of passive access, specifically relating to access to CEI under Eircom’s control.

enet very much welcomes ComReg’s proposal to put in place more robust regulatory controls in the area of CEI access and in this response we provide some comments about this proposal. As such our response to this consultation focuses in particular on providing comments to ComReg’s consultation question no.7.

enet also provides brief responses to each of the other consultation questions posed by ComReg in the Consultation Document.

Question 1: Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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.

enet agrees that ComReg’s narrative set out in Section 3 of the Consultation Document describes well the main developments relating to the provision of retail broadband services in Ireland in recent years. As the figures in ComReg’s analysis show, broadband speeds enjoyed by customers have continue to rise in recent years, with download traffic generated by customers also rising on an ongoing basis over the same timeframe.

In relation to NGA rollout, enet would observe that while both Eircom and SIRO have been extremely active in publicising their plans for FTTH deployment, neither has provided evidence to date of the rate at which customers are availing of FTTH-based services they offer.

Question 2: Do you agree with ComReg’s preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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.

enet agrees with ComReg’s preliminary conclusions on its assessment of the retail product and geographic markets in the context of the relevant WLA and WCA markets.

enet agrees with ComReg’s finding that retail broadband services provided over copper, FTTC, FTTH and CATV networks all reside in the same product market. Although there is increasing use of mobile broadband services and increasing substitution between 4G mobile and copper-based fixed broadband services, enet agrees that significant functional differences – relating to data speeds, reliability/availability of service and download allowances – still exist and that these are material enough to warrant a finding that mobile broadband services reside in a different product market.

FWA-based services have for many years been used by retail customers as a substitute for copper-based broadband for the simple reason that in many regional locations, in particular in rural areas, FWA-based broadband offerings are the only ones available. To this extent, FWA-based retail broadband has been used as a ‘substitute of last resort’ by end-users. As ComReg notes, however, the absolute numbers of customers using FWA-based services is low and falling and so the inclusion or exclusion of broadband services over FWA networks will not influence its market analysis either way.

Question 3: Do you agree with ComReg’s preliminary conclusions on the WLA Product Market 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 views.

Question 4: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WLA 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 preliminary conclusions on its assessment of the WLA product market. enet shares ComReg’s view that the relevant market comprises both current generation (LLU and line share products offered over copper networks) and next generation (VULA products provided over FTTx networks) WLA services. enet also agrees that the relevant geographic market for WLA is national in scope.

Question 5: Do you agree with ComReg’s assessment of SMP? 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 preliminary finding of SMP in the WLA market. Eircom’s high, stable market share – comprising both merchant WLA supply as well as self-supply, both of WLA services and WLA inputs to WCA services – is consistent with a position of dominance in the relevant market, a fact underlined by the absence of existing or potential competitive constraints.

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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 that ComReg has identified the usual kinds of competition problems and associated impacts on competition and, ultimately, end-users that may be expected to occur in a market where an operator holds a position of SMP. In light of ComReg’s preliminary finding that Eircom holds a position of SMP in the WLA market, it is extremely likely that these types of competition problems could occur in this market and that appropriate remedies are, as a result, required to counter Eircom’s dominance in the market.

Question 7: Do you agree with ComReg’s proposed remedies in the WLA 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 the comprehensive suite of remedies that ComReg proposes to impose on the SMP operator in the WLA market. While we support ComReg's proposals to put in place a number of different remedies to deal with Eircom's SMP in the WLA market, our comments in this response focus in particular on ComReg's proposal – which enet welcomes – to strengthen the obligation on Eircom to provide access to Civil Engineering Infrastructure (CEI).

enet believes there are several shortcomings in relation to the procedures and processes in Eircom's Duct and Pole Reference Offer. enet welcomes the fact that a number of these issues have been dealt with by ComReg in the context of its proposed strengthening of the CEI access obligations.

A major concern to enet had been the way in which Eircom had restricted the access offer so that it could only be used by the access seeker to provide broadband services to its customers and so could not be used for other services (e.g. backhaul, provision of leased lines etc.). Eircom's recent decision to remove this restriction from its Reference Offer is, therefore, one that enet greatly welcomes.

A separate concern for enet relates to ComReg's possible view that an enhanced CEI obligation may be seen as an enabler for widespread fibre network deployment which in turn could result in the early withdrawal of regulatory obligations in other areas. Our particular concern in this regard relates to the Wholesale High Quality Access (WHQA) market, where ComReg's preliminary plans (on which it consulted late last year) are for the withdrawal of regulation on Eircom in relation to the provision of wholesale leased lines.

While enet believes that ComReg's proposals for enhanced obligations on Eircom in relation to CEI access could prove to be of significant positive benefit in promoting the deployment of competing fibre infrastructure, it is far too soon to conclude that this will be the case in practice. Still less could these proposals – the finer details of which will need to be teased out in detail with Eircom, as has been the case when developing industry-level processes and procedures for several other regulated products – be used at this juncture to justify any planned roll-back of regulatory obligations in adjacent markets.

Instead, ComReg will need to oversee the adoption into Eircom's Reference Offer of the proposals to augment the obligations on Eircom in relation to the provision of CEI access. ComReg will also need to work with Eircom and the OAOs to ensure that the processes and procedures for CEI access are operating in a fit-for-purpose manner. Once they are, and other operators are deploying fibre using Eircom's

ducts and poles, then – and only then – should ComReg be contemplating the withdrawal of regulation in hitherto bottleneck areas such as the provision of WHQA services.

enet also has a number of detailed comments on ComReg’s proposals on CEI access (which are contained in paras. 8.186-8.279 of the Consultation Document), as follows:

- *Scope of CEI obligations (paras. 8.198 - 8.208):* ComReg’s proposal to ensure that access seekers’ use of Eircom’s access network CEI should not be limited to the defined boundaries within Eircom’s access network topology is a sensible and pro-competitive one. Eircom’s exchange boundary structure is based on historical copper loop limitations and is not at all relevant for how a local access fibre network would be deployed. As ComReg notes, limiting the geographic scope of CEI usage would be detrimental to competition and would artificially raise access seekers’ costs. enet therefore welcomes and strongly supports ComReg’s proposal to lift all restrictions in this area.
- *Allowable use (paras. 8.209 - 8.215):* enet notes that Eircom has already amended its Reference Offer to lift the restrictions it had originally placed on the services that could be provided over a fibre network deployed by an OAO on Eircom’s CEI. Nevertheless, enet welcomes ComReg’s recognition in the Consultation Document that any such restrictions have no validity and that the restriction of use of Eircom’s CEI to a subset of ECS and ECN services would have a distortive effect on competition. As a result, enet strongly supports ComReg’s preliminary view that the use of Eircom’s CEI should only be limited to the provision of an ECS and/or ECN and that there should be no restrictions on the types of communications services provided over such a network.
- *Granularity of CEI access obligations (paras. 8.216 - 8.221):* enet supports ComReg’s proposal not to preclude Eircom from developing new features and functionality above and beyond what is mandated. This approach ensures that regulation should not unintentionally act as a brake on any developments that could be used to improve network deployment.
- *Access to ingress and egress points (paras. 8.222 - 8.229):* enet welcomes ComReg’s proposal to require the SMP operator to provide access to CEI ingress and egress points. ComReg’s proposal would make the task of deploying an alternative fibre network using CEI access far easier to do, as it would give the OAO the ability to switch in and out of the duct network for short runs without having to build additional interface chambers.

- *Requirement for a tie connection service (paras. 8.230 - 8.239):* enet welcomes ComReg's proposal to require Eircom to provide access to a tie connection between the co-location point and the CEI ingress and egress points. The explicit requirement for such a service clears up any ambiguity about the use of CEI access for active electronic communications services.
- *Requirement for CEI co-location (paras. 8.243 - 8.247):* ComReg's proposal to require Eircom to provide CEI co-location access would be a positive development as it would promote faster network deployment and help to reduce power and facility provision cost by using rural exchanges as an OLT launch site. The rate charged to OAOs for this access will, however, be key to its effectiveness. Current co-location charges levied by Eircom are very high, designed as they are for higher cost LEA exchange type situations.
- *Requirement for access to chambers (paras. 8.248 – 8.255):* An obligation on Eircom to provide access to its chambers will be critical in a situation where only Eircom duct is available. This would mean that existing drop connections are fed in the same way that they would be in an urban environment. As a result, enet supports ComReg's proposal to oblige Eircom to provide access to its chambers.
- *Hosting of active equipment in chambers or on poles (paras. 8.256 –8.258):* enet notes that ComReg is not proposing to impose a specific obligation on Eircom to host active equipment on poles or in chambers. Instead it states that OAO interest in having this facility available could be considered under the obligation on Eircom to meet reasonable requests for access. enet agrees with this proposed approach – indeed, there is an argument that it would be better to keep all active equipment out of Eircom's chambers, as it would avoid potential issues regarding isolation, protection and earthing of relevant equipment.
- *Access to sub-duct and direct duct access (paras. 8.259 - 8.265):* enet welcomes ComReg's proposal to oblige Eircom to provide access to sub-duct and direct duct access. As ComReg points out, Eircom has an incentive to refuse an OAO's request for direct access to its ducts and to indirect access to ducts using installed sub-ducts.
- *Requirement for access to dark fibre (paras. 8.269 – 8.272):* enet welcomes ComReg's proposal to oblige Eircom to provide dark fibre access as an alternative to CEI access where dark fibre access is available. enet is of the belief, however, that access to dark fibre should be available in its own right as a regulated product, not just in circumstances where CEI access is not

available. As access to passive infrastructure becomes an accepted part of the regulatory toolkit it makes sense that dark fibre access is mandated in its own right along with duct and pole access. In this way, access seekers have all available passive infrastructure options from which to choose when deploying alternative local access fibre networks using the incumbent's infrastructure.

Question 8: Do you agree with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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.

enet agrees with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband market. enet shares ComReg's view that this market is likely to comprise asymmetric retail broadband services offered over copper, FTTC, FTTH and CATV networks and that it is possible that sub-geographic markets exist for the provision of such services, depending how many competing network infrastructures have been deployed.

Question 9: Do you agree with ComReg's preliminary conclusions on the product assessment for the WCA 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.

Question 10: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the WCA 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.

Although enet is not active in the WCA market, we would tend to agree with ComReg's preliminary views on its assessment of the market, both in relation to the products involved and its geographic scope. On the latter, ComReg has put forward a persuasive argument as to why the geographic market should be split between an Urban WCA Market and a Regional WCA Market.

Question 11: Do you agree with ComReg's assessment of SMP in the WCA 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.

Given the way in which ComReg has defined the two WCA markets, its assessment of SMP in each market follows logically from this. enet supports ComReg's preliminary conclusion that Eircom be designated with SMP in the Regional WCA Market and that no operator be designated with SMP in the Urban WCA Market.

Question 12: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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 agrees that ComReg has identified all relevant kinds of competition problems that could potentially arise in the Regional WCA Market, given Eircom's position of dominance in the market.

Question 13: Do you agree with ComReg's proposed remedies in the Regional WCA 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 proposed remedies in the Regional WCA Market, which remains necessary given Eircom's position of dominance within the relevant market.

Question 14: Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a six-month sunset period? 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.

ComReg's proposal to maintain a requirement on Eircom to continue to provide existing wholesale access at prevailing prices in the Urban WCA Market is sensible and will help to facilitate an orderly unwinding of regulation in this market.

Question 15: 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.

enet has no comments to offer on ComReg’s Regulatory Impact Assessment.

6. Sky Ireland Limited (Sky)



SKY RESPONSE TO DOCUMENT 16/69 "MARKET REVIEWS, WHOLESALE LOCAL ACCESS (WLA) PROVIDED AT A FIXED LOCATION & WHOLESALE CENTRAL ACCESS (WCA) PROVIDED AT A FIXED LOCATION"

Executive Summary

1. Sky welcomes the fact that ComReg has undertaken this long overdue market review. Since the last reviews in 2010 (WPNIA) and 2011 (WBA) and supplementary NGA Remedies Decision in 2013, Eircom Ltd's ("Eircom") market power in markets 3a and 3b has been on the rise.
2. Eircom's enhanced market power has been facilitated through a combination of:
 - The terms of its exiting examinership in 2012 when it's outstanding debt was written down by €1.4bn.
 - Its €400m NGA investment programme that was agreed as part of exiting that examinership process.
 - A lenient regulatory regime whereby a cost orientation obligation in the then WBA market was foregone in favour of a margin squeeze price control contrary to the EU NGA Recommendation. The delay in conducting the market review has allowed Eircom to benefit from a profitability perspective for a prolonged period of time.
 - The decline of Eircom's primary platform competitor, Virgin Media, in acting as a competitive constraint on its wholesale pricing. (Virgin's broadband base has been in decline for the last reported 3 consecutive quarters).
 - ComReg's failure to enforce Eircom's existing obligations during the review period.
3. Eircom's enhanced market power in the National WLA market and the Regional WCA market has already manifested itself in ways identified by ComReg as potential risks if remedies are not put in place to curtail its incentives and capabilities. Such examples include but are not limited to:
 - Exploitative practices e.g. excessive prices as evidenced by the significant FTTC port charge increases in mid-2015 and again in mid-2016.
 - Inefficiency/inertia - e.g. poor line fault index (LFI) performance reported regularly since last review (>95% of Eircom's broadband services relies on a working copper line) and inadequate resourcing during winter months with long lead times for service provisioning when "storm mode" is declared.
 - Delaying tactics e.g. delays in negotiating SLAs has led to a formal dispute in this area with another dispute (on appointing) pending.
 - Refusal to deal/denial of access/restrictions to access e.g. number of examples as evidenced in "Styles Report" including on address matching.
4. It is therefore appropriate that ComReg should conclude Eircom continues to have SMP in these markets. Given the failure of existing remedies (particularly with respect

to pricing) it is critical that ComReg implement a more robust set of remedies to deal with the market failures identified.

5. The regulatory forbearance exercised by ComReg during the last review not to impose a cost orientation obligation on Eircom in the NGA WLA market in accordance with the NGA Recommendation has long since ceased to be appropriate, if it ever was. Access Seekers has been subjected to significant wholesale price increases by Eircom in this market in the last 18 months. This has resulted in upward pressure on retail prices and an unjust subsidy from Access Seekers to Eircom.
6. Given the history of what has occurred with respect to NGA FTTC pricing in the absence of a cost control, Sky would issue a strong word of caution to ComReg with respect it plans to adopt a similar policy on FTTH. This is not to suggest that a strict price control regime may be required from the outset on FTTH merely that ComReg lays out in its final decision a clear contingency plan (that does not require waiting until the next market review) in the event that evidence of exploitative pricing practices begins to surface. Given Eircom's conduct in recent years it is imperative that on-going monitoring of developments in an uncertain market is seen to be carried out by ComReg.
7. In addition, a cost orientation obligation is clearly required (as proposed by ComReg) for FTTH ancillary services. A recent 80% price increase in FTTH connection charges by Eircom to €270 highlights the extent to which how important this is. Eircom's incentives around FTTH are not same as was the case with respect to its FTTC roll-out where it faced a degree of competition from a competing platform provider and so was motivated to have deferred pay-back strategy on connection charges in order to drive take-up. It may be the case that restricting take-up of FTTH is Eircom's short to medium strategy on this occasion provided areas targeted can be removed from the government's National Broadband Plan (NBP) intervention area. It has been well publicised that Eircom are contemplating an IPO in 2018 and short term balance sheet considerations may therefore trump incentives to drive take-up with appropriately priced connection and installation (including in-premises work) charges.
8. With respect to non-pricing issues Sky consider, while additional remedies proposed by ComReg with respect to transparency obligations connected with Eircom's FTTH network roll-out are to be welcomed, it is our view that the requirements do not go far enough. We are particularly concerned about the lack of clarity with respect to Eircom's plan around a recently announced 300k premises investment that seeks to have these properties excluded from the aforementioned government's NBP. In particular, greater transparency is required with respect to being able to identify customers that are capable of receiving a 'standard delivery' service at 'standard pricing'. It is Sky's view that those customers that cannot be facilitated in this manner ought to be included in the NBP intervention area based on the governments stated objectives of this project (i.e. 100% of premises to receive speeds of >30Mbps at level of pricing commensurate with the national norm). ComReg has a role therefore in ensuring that Access Seekers and by extension the government has clarity on this issue.
9. Sky has some reservations about maintaining an EoO standard on Eircom for WLA/WCA legacy services. While Sky acknowledges the higher costs associated with upgrading legacy systems in order to achieve an EoI standard, we would remind ComReg that many of the issues brought to light in the "Styles Reports"¹ could have been avoided under an EoI standard. The cost to industry of the multiple breaches outlined in these reports has not yet been quantified and may ultimately be

¹ Eircom's Regulatory Governance Model reports issued in August 2015 and May 2016.

significantly higher than if Eircom had been required previously to meet the Eol standard. With the benefit of hindsight, the suggestion that such investment would therefore only bring “incremental” benefit is highly questionable. The value of that information in taking a fresh look at Eol for legacy products should therefore not be lightly dismissed.

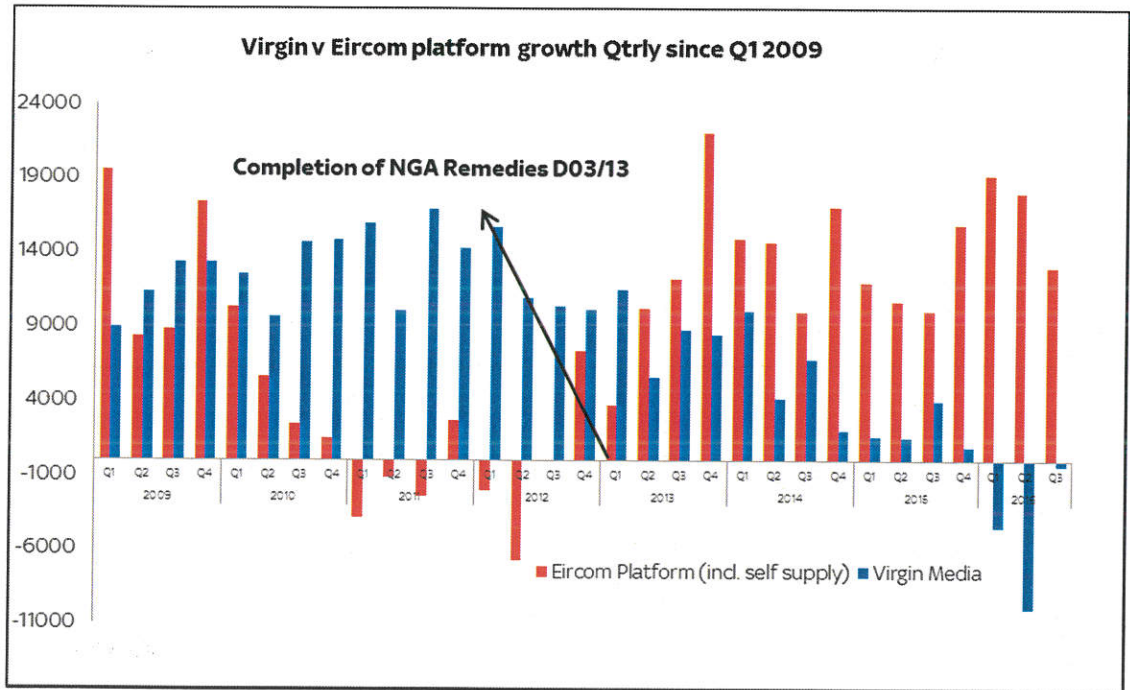
10. Finally Sky would propose a cautious approach to deregulation of the Urban WCA market and consider that a proposed 6 month sunset period should be complimented by extending that period by 6-12 months with respect to Eircom’s price transparency obligations in this market.

Question 1

Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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.

11. Sky broadly agrees with ComReg’s analysis of the developments in the retail market although it is deficient in pointing out some important developments. One the key trends in the market since the NGA Remedies Decision in 2013 has been the reversal of fortunes of the two main competing fixed broadband platform providers that provide service to more than 96% of fixed retail broadband customers; namely Eircom and Virgin Media. Sky highlighted this trend in its response to ComReg’s 13D request on 20 May 2015. The trend highlighted by Sky has in fact become considerably more pronounced since that time so it is surprising that ComReg make no reference to it in the consultation².
12. Provision of fixed retail broadband services over Eircom’s platform has significantly outperformed Virgin Media every quarter since the NGA decision culminating in Virgin Media experiencing its first quarter of negative net growth in Q1 2016 since it first launched services more than 10 years ago. Since that first reversal it has subsequently experienced 2 further quarters of negative net growth with a notable decline of 10,000 subscribers in Q2 2016 alone when by comparison Eircom’s platform enjoyed net growth of 18,000 broadband subscribers.
13. This prevailing trend (consistent since Q2 2013) is in sharp contrast to the period Q1 2010 to Q1 2013 when Virgin Media significantly outperformed Eircom who itself experienced several quarters of net negative growth during this period. These trends are stark and consistent as evidenced in Figure 1 below.

² However, ComReg do conclude at paragraph 5.150 that there is “evidence that Eircom faces a weak price constraint from Virgin Media in the WLA Market”.



14. The trend has been particularly pronounced since Q2 2014 and ought to have served as strong warning to ComReg that Eircom’s market power was substantially on the rise. It is therefore disappointing that appropriate remedies that seeks to address this Significant Market Power will now not be in place until at least Q2/Q3 2017. In July 2015, Eircom exercised its market power by increasing the price for Standalone FTTC (“SA FTTC”) by more than 11%. In May 2016 it announced a further 21% price increase for SA FTTC and a 35% price increase on POTS based VUA/Bitstream FTTC (“POTS FTTC”) port charges from €5.98 to €8.09. POTS FTTC serves more than 80% of subscribers on Eircom’s NGA platform so it is puzzling that this significant development (i.e. 35% price increase) is not covered anywhere throughout ComReg’s extensive analysis and consultation in particular as it considerably bolsters the case for the conclusions ultimately arrived at by ComReg.

Question 2

Do you agree with ComReg’s preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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.

15. Sky agrees with ComReg’s preliminary view that there is likely to be national market for retail broadband, absent regulation in the WLA and WCA market. Sky also agree that broadband provided over copper, FTTC, FTTH and CATV networks constitutes a single market based on the analysis conducted by ComReg in this section.
16. In particular Sky agrees with ComReg’s preliminary conclusion that Bundles, in which broadband is a key component, do not constitute separate markets, as the broadband access component of the bundle constitutes a relevant market in its own right. As ComReg notes a “sufficient number of customers could (and would) unpick a bundle if there were to be a hypothetical price increase in the price of the bundle which contained broadband access”. In this regard it is worth noting that despite having entered the Irish broadband market more than 4 years ago less than a quarter of Sky TV customers also have a Sky broadband service. This would tend to support ComReg’s preliminary

views that the broadband access component of a bundle constitutes a relevant market in its own right.

Question 3

Do you agree with ComReg's preliminary conclusions on the WLA Product Market 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 views.

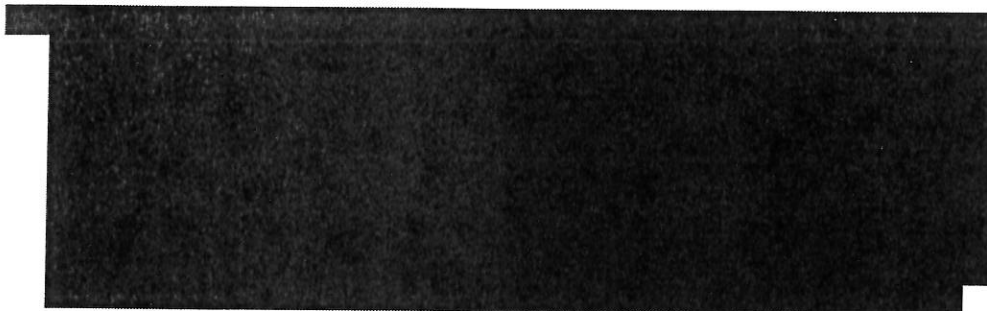
Question 4

Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the WLA 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.

17. Sky broadly agrees with ComReg's preliminary conclusions on the relevant WLA product and geographic markets as outlined in Chapter 5 of the consultation. The assessment is supported by outcomes evident in the market today based on relatively low number of competitors, Eircom's static/rising market share, the lack of differentiated pricing and limited differences in demand characteristic across regions.
18. Sky also agrees that given the direct and indirect constraints in the WLA market generally, the conditions of competition are sufficiently homogenous such that there are no sub-geographic markets. Evidence of localised competition is less in evidence than was the case following the NGA Remedies Decision in January 2013. This is because trends being observed prior to that decision i.e. substantial net growth in Virgin Media subscribers coupled with declining Eircom subscribers has been totally reversed. As outlined in Figure 1 below, Eircom's subscriber net growth in WLA (including self-supply) plus WCA has significantly out-performed that of Virgin Media's since Q2 2013 with the latter's market share and absolute subscriber base in decline for the last 3 consecutive quarters.

Comments on specific points raised in this section of consultation

SIRO



Product characteristics of VUA: Pricing

21. In this section ComReg note "Eircom's VUA products are currently priced at €23 per month (with higher prices for higher speeds)". Sky would note that Eircom's primary VUA product is its POTS FTTC service with current port rental charges of €8.09 a month (a 35% price increase from €5.98 as notified in May 2016). SA FTTC accounts for less than 20% of Eircom's NGA customer base (wholesale and retail). It is important that ComReg take and reference such facts as previously stated given it serves to bolster the majority of ComReg's preliminary conclusions.

Question 5

Do you agree with ComReg's assessment of SMP? 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.

22. Sky agrees with ComReg's assessment of SMP for the analysis carried out in this section and for reasons already outlined in response to Question 4.

Comments on specific points raised in this section of consultation

Assessment of Indirect Constraints (5.98 - 5.104)

23. Sky acknowledges that the analysis carried out by ComReg in relation to the EC guidance on effects of SSNIP by a hypothetical monopolist is appropriate. This assessment of indirect constraints is ultimately about determining the likely impact of a 5-10% increase in the price of WLA. However, we would note that this analysis is supported by more relevant and compelling data that reinforces ComReg's preliminary conclusion on SMP i.e. it can observe the actual impact of Eircom's two price increases for SA FTTC (11% in 2015 and 21% in June 2016) and its June 2016 35% price increase for POTS FTTC. Both price increases are significantly above the SSNIP level (even after feeding through to the retail level) yet as confirmed by the latest Eircom financial reports the increases were accompanied by a significant increase in sales of its WLA products.
24. These developments conclusively support ComReg's opinion that "Eircom faces a weak price constraint from Virgin Media in the WLA market" and that it can profit from price increases substantially above SSNIP.

Virgin Media (6.24)

25. ComReg note that as of Q1 2016 Virgin Media's retail subscriber base stood at "368k subscribers giving it a retail market share of 21.5% which is the same as it was in Q1 2015". However, this base has since declined by 5k subscribers to 363k subscribers. Coupled with growth in Eircom's WLA (including self-supply) and WCA subscriber volumes Virgin Media's market share in the WLA market is in fact in decline and now closer to 20%.

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA market?

26. Sky generally agrees with competition problems identified in relation to the WLA market. ComReg's analysis of 'what could' happen if remedies are not put in place to address the identified market failure (the existence of SMP) has in fact in many cases already occurred because the appropriate remedies are either not in place or not being enforced. It would have been appropriate for ComReg to call out these developments since the last market review in carrying out its analysis. Examples include but are not limited to;

- (a) Exploitative Practices - Evidence of exploitative practices/excess pricing was in evidence in July 2015 and September 2016 when Eircom introduced significant price increases for SA FTTC and for POTS FTTC. The latter change was announced in tandem with ComReg's decision to introduce a cost orientation obligation in the FACO market on Wholesale Line Rental (WLR). This effectively meant that Eircom immediately sought to replace revenues on a service previously priced considerably above cost by introducing above cost prices on another service in the WLA market. The move was demonstrative of Eircom's market power and the failure of existing remedies to curtail it.
- (b) Inefficiency/Inertia - Eircom's failure to invest adequately in its access network has led to the gradual but steady decline in performance on dealing with fault repair and provisioning challenges during poor weather months. In January 2016 lead times for WLR/broadband provisioning went from 5 days to 18 days overnight due to reprioritisation of fault repair over provisioning. The declaration of "storm mode" by Eircom which facilitated the reallocation of resources is a nebulous concept that can be arbitrarily utilised by Eircom to avoid penalties on failure to achieve performance targets. Despite spending more than a year seeking a SLA on appointing slots for provisioning, Eircom has shown no willingness to engage in negotiations in a meaningful way and matter is now set to go to formal dispute.
- (c) Refusal to deal/denial of access/restrictions on access - The Styles Reports (August 2015 and May 2016) exposed numerous areas of the business where Eircom restricted/denied access to competing operators to facilities/services made available to its own retail arm. In particular Sky had sought improved addressing matching capabilities since it launched retail services in early 2013. Despite repeated requests in this regard Eircom withheld, until March 2016, capability from Access Seekers that could greatly have enhanced their addressing matching function. However, the Styles report indicated the sought after capability was available to Eircom's retail arm throughout this period. This was just one example of vertical leveraging exercised by Eircom during the last review period.
- (d) Delaying tactics - As Chair of the various product forums held on a regular basis, ComReg is familiar with Eircom's strategy of delay in relation to initiatives that either are not in its own commercial interests or is in the commercial interests of its competitors. A cursory review of ComReg's well documented minutes of these meetings will attest to such behaviour from Eircom as evidenced by its consistent failure to provide information in a timely manner, complete agreed actions or be represented during negotiations with personnel empowered to make decisions.

Question 7

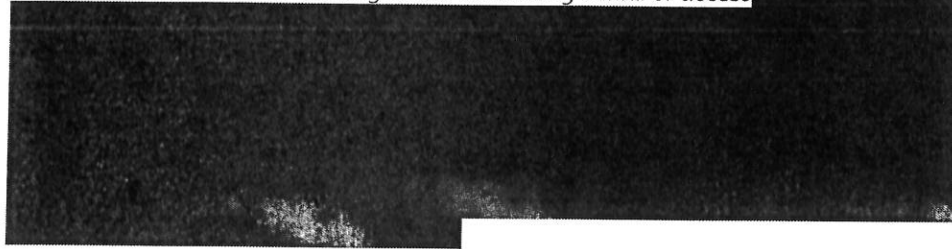
Do you agree with ComReg's proposed remedies in the WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

- 27. Sky agrees with ComReg's preliminary view that there will continue to be differences in bargaining power between Eircom and Access Seekers for the foreseeable future. While it is critical that appropriate remedies are put in place to address this imbalance upfront, of equal importance is ComReg's willingness and ability to enforce such remedies where it is clear Eircom has failed to meet its regulatory obligations. Eircom's ambivalence about meeting its regulatory obligations at best or its willingness to

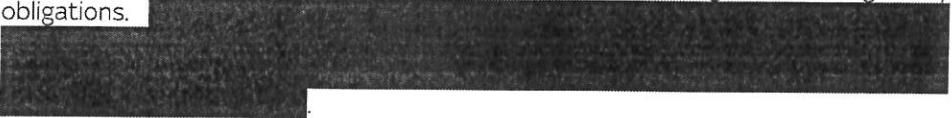
engage in a strategy of non-compliance at worst is in Sky's view correlated to ComReg's own ability and willingness to enforce those obligations.

28. In recent years ComReg has in Sky's view not performed well in this regard. It has failed to act in a timely fashion with respect to numerous incidences of non-compliance even where the evidence incontrovertible e.g. in relation to many issues raised in the Styles Report that ComReg has had detail on since no later than May 2015.

In this regard at paragraph 8.35, Sky is concerned that ComReg appear to negate the value of using its ex-post competition law powers. ComReg note that such powers, given the administrative overhead associated with pursuing this course of action "would not be effective in resolving issues concerning denial of access"



30. Equally, it is important that ComReg is capable of dealing with disputes in a timely and decisive manner. A fit for purpose and proper functioning dispute resolution procedure ("DRP") not only provides regulatory certainty to Access Seekers which is important from a business planning and investment perspective but is likely to promote better behaviour from Eircom in terms of meeting its own regulatory obligations.



In November 2015 a number of Access Seekers (Sky, Vodafone, BT and Magnet) raised a dispute in relation improving WLR repair SLAs (WLR is required for POTS FTTC so it is relevant to broadband market). ComReg were obliged to deal with this dispute within a four month timeframe save for 'exceptional circumstances'. As of 25 January 2017, fourteen months has now passed since this dispute was filed with ComReg yet, despite a draft decision being presented to the parties as far back as February 2016 (i.e. ComReg had considered the substantive argument in detail by this time) no final decision has been issued by ComReg notwithstanding no exceptional circumstances associated with the delay having been communicated to the disputing parties.



Comments on specific points raised in this section of consultation

Soft Migrations (8.118)

32. Sky agrees with ComReg's proposal that SB-WLR and VUA to standalone VUA or to standalone VUA combined with the transfer of a telephone number should be treated as a VUA soft migration. The majority of VUA customers on Eircom's network today are POTS FTTC. Any barrier to migrating to SA FTTC from this product could hinder the deployment of a VOIP solution to customers that has the potential to deliver savings to Access Seekers and by extension retail customers.

Negotiate in Good Faith (8.28-8.287)

33. Sky agrees that an obligation on Eircom to negotiate in good faith with Access Seekers is appropriate. ComReg lists a number of acts/omissions by Eircom that might lead it to draw 'adverse inferences' about its behaviour with respect to this obligation. While the types of behaviours listed would give a strong indication as to ones conduct in relation to the matter of good faith, Sky considers that there has been ample evidence of this sort conduct from Eircom since the last market review yet no enforcement action has been taken. It is important to understand that a remedy will only address a market failure if an obligation is complied with or failing that, is enforced by the regulator.

Requirement to provide access to Eircom's OSS (8.300)

34. Sky agrees with ComReg's view that OAOs would be put at "a significant competitive disadvantage relative to Eircom's retail arm in providing services" in the absence of the Access Seeker being able to gain effective and efficient access to Eircom's OSS

[REDACTED]

Problems associated with address matching have been highlighted by Sky and others to ComReg and Eircom at various industry fora as far back as Sky's entry to the broadband market. Notwithstanding a clear admission by Eircom that its retail arm had access to this information until at least February 2016 for several years, the matter of whether or not a breach was committed is still under investigation by ComReg.

Requirements with respect to SLAs (8.302 - 8.353)

35. As noted by ComReg at paragraph 8.312, Eircom "does not have an incentive to provide fit-for-purpose SLAs which support the delivery of effective or high quality downstream services". Sky agrees with ComReg's observation in this regard and as such supports all of the requirements ComReg is minded to impose on Eircom with respect to SLAs as outlined in this section.
36. Of particular importance is ComReg's preliminary view that SLAs for new products or amendments to existing products ought to be concluded before being notified to ComReg. Access Seekers has experienced a number of examples (E.g. Failed Provisioning, LNB order type - alluded to by ComReg at 8.331) in the last two years where Eircom has replaced processes that were complimented by previously appropriate SLAs with improved processes but with no SLA agreed. The result has been that although, new and improved processes are to be welcomed, their deployment should not coincide with an effective release from contractual obligations around SLAs. As such Sky agrees it is important that ComReg address this issue.

While many of the new requirements proposed by ComReg are to be welcomed, however, given ComReg's recognition of Eircom's incentives not to provide fit-for-purpose SLAs it is not only possible but highly probable issues including on the relevant level of credits pertaining to SLAs will not be resolved through negotiation. As ComReg has noted, the bargaining powers lays on the side of the SMP operator and as such a proper functioning DRP needs to be put in place and be seen to be working.

[REDACTED]

Non-discrimination Remedies - EoO for legacy WLA products (8.398-8.412)

38. Sky note ComReg's view that Eircom's OSS and wholesale interfaces are likely to require substantial investment in order to upgrade or replace them for purposes of achieving an EoI standard of non-discrimination and that this may not be justifiable or proportionate. ComReg further note that the such a requirement would "*involve costly systems re-development with little incremental benefit*".
39. Sky would note that ComReg came to a similar conclusion more than 4 years ago in its NGA Remedies Decision of 2013. However, it transpired that had Eircom been required to implement EoI standards for legacy WLA products substantial benefits may have accrued by preventing many of breaches of non-discrimination as outlined in the Styles Report. While the cost to OAOs is yet to be quantified (owing to on-going investigations) there is no question that damage was done to industry (and by extension to consumers) due to Eircom's failure to comply with its obligations. Whether or not these breaches were as a consequence of deliberate/accidental acts or omissions on its part, what is certain is that many of these could have been avoided under an EoI standard.
40. As such Sky would urge ComReg to carefully consider how such instances might be avoided going forward if it not to impose the EoI standard for legacy WLA products. In particular a more robust oversight process ought to be implemented and we would expect this can be best informed by the output of the Cartesian report ComReg has referred to in the consultation. Where issues of discrimination are identified it is important that Eircom are required to act on these quickly. This did not occur with respect issues identified in the Styles Report. For example, Eircom and ComReg were aware at the latest in May 2015 that Eircom enjoyed a significant advantage over its competitors with respect to address matching information. However it was not until February 2016 that Eircom removed access from its own systems to this "richer" information. There is no reasonable case for either Eircom's delay in rectifying this blatant breach of its non-discrimination obligation or for ComReg's failure to enforce that obligation having been in receipt of evidence of a breach for a considerable period of time.
41. As such Sky would ask that strict timelines be laid out for addressing any such breaches identified going forward and that Access Seekers are informed immediately of such occurrences including incidences where a possible breach has been identified but where it has not yet been confirmed. In Sky's view the plethora of issues covered in the Styles Reports were known to both Eircom and ComReg for a substantial period of time before any information was provided to Access Seekers notwithstanding these were the parties directly and negatively affected by these issues.

Proposed Transparency Obligation

42. Sky welcomes the fact that ComReg recognise the need for an amendment to the existing transparency obligations with respect to network roll-out and development, in particular where FTTH is concerned. The proposals with respect to notification periods for cabinet identification, expected Ready For Order ("RFO") dates and other relevant information will be critical to Access Seekers for the reasons outlined by ComReg. However, Sky consider that the proposed obligation with respect to FTTH on the information to be provided at least 28 Calendar days before the RFO date is not sufficient for marketing and business planning purposes.
43. On 12 October 2016, Eircom made a presentation³ to the NGA industry forum that outlined its plan for FTTH roll-out based on what it deemed to be "standard delivery"

³ "NGA FTTH Delivery" – presentation by Open Eir presented and circulated to the Industry 12 October, 2016.

criteria. It indicated that for 'standard delivery', it would run a new fibre 'drop for premises up to 50 metres from existing poles'. For delivery beyond 50m it would only facilitate this through a 'standard delivery' if there were suitable poles or ducts on the private property. If such infrastructure was not available/accessible in cases beyond 50m from the existing pole, the customer will be required to carry out the necessary work themselves and at the customers cost in order to receive delivery of Eircom's FTTH service.

44. Eircom currently have more than 30k addresses (with Eircodes) in its FTTH Order of Magnitude File ("OOM"). OAOs currently have no idea what percentage of these customers can receive 'standard delivery' of service as defined by Eircom. This makes business planning on FTTH an impossible task in terms of making assumptions about likely sales volumes and the processes that need to be adopted for various scenarios. As such making the necessary investment in IT development, a sales and marketing strategy, agent training etc. is simply not feasible when it is not possible to discern when a critical mass of premises will be 'sale ready' on Eircom's FTTH network. Sky consider it would be very poor customer experience to advise a customer in the first instance that they can receive a FTTH service by virtue of the customers address appearing in the APQ file and thereafter advise the customer they would have to carry out extensive work at their own cost in order to avail of the service. The level of drop out and associated inefficient use of resources following such a development would be extremely high, costly and potentially damaging to OAOs brand and reputation.
45. The problem could easily be rectified if Eircom carried out a comprehensive survey of its network as it is rolling it out. The end result needs to be an APQ file that contains either only addresses to which 'standard delivery' at 'standard prices' can be provided by Eircom or at least provides some mechanism that enables identifying these addresses from those to which 'standard delivery' is not possible.
46. It is matter of public record that the 300,000 rural premises Eircom announced in June 2015, as referred to by ComReg in Paragraph 8.516, is the subject of a negotiation between Eircom and Government. The matter under consideration is whether or not these premises ought to be included in the NBP intervention area. Eircom claim that they can provide service to these customers on a commercial basis. However, it is clear in the case of customers beyond 50m from the distribution point that this is not the case i.e. the service can only be provided following an investment by the customer in on premises infrastructure.
47. If the SMP operator is providing more detailed information to the Government regarding these 300,000 premises then it ought to also provide this information to other parties. It is difficult to see how Eircom can give certainty on providing service to customers in this footprint at standard pricing if it maintains its "50m connection rule" without conducting a full survey of its network in this this footprint. Sky consider it reasonable that Eircom should carry out this work not just from the perspective of justifying the removal of these premises from the intervention area but as a basic transparency obligation independent of the NBP given the implications for Access Seekers planning to sell FTTH in this footprint.
48. ComReg has a role to play in assisting the Government in ensuring transparency on this issue. If NBP is rolled out and a large number of customers find themselves outside the intervention footprint and exposed to exorbitant costs for FTTH installation questions will arise as to how that was permitted to occur. Sky's proposal in effect negates the possibility of such an outcome occurring and is in the interest of Access Seekers and customers, especially those with substandard broadband services today.

49. Sky would therefore urge ComReg, pursuant to this consultation, to include an obligation on Eircom to clearly delineate in its APQ file those premises which can receive a 'standard delivery' FTTH service at a 'standard price' and those premises that cannot. If ComReg fails to impose such an obligation the scope for engaging in discriminatory practices (due to asymmetry of information) by the SMP provider will be greatly enhanced.

28 Day Notice for FTTH APQ File is too short (8.534)

50. Sky further consider that given the differences ComReg itself has outlined with respect to Access Seekers '*degrees of certainty*' around the layout of FTTC and FTTH networks, a period beyond the current 28 days proposed (paragraph 8.534) for providing a list of premises uniquely identified should be considered for FTTH. Sky would suggest a more appropriate period of time to be 50 days for FTTH given these differences correctly called out by ComReg. For the avoidance of doubt Sky are not proposing that this need necessarily be time added to the broader notification timelines proposed e.g. we are not suggesting the 6 month period proposed for notice of Dual FTTC/FTTH cabinets at paragraph 8.520 needs to be altered as a consequence.

Transparency Requirement regarding trials (8.567-8.576)

51. Sky strongly endorses ComReg's view (paragraph 8.568) that "*trials should not be of a nature that the product or process being trialled is effectively being launched*". As ComReg is aware this is precisely what occurred in relation to Eircom's so-called 'Enhanced Provisioning Process'. Although Eircom claimed to be engaged in a "trial" on the service it was clear it was processing its entire new line provisioning sales through the new product and so did not observe the notification periods for new products that it was subject to. Enhanced Provisioning is available for a combined order type 'LNB' on Eircom's system and combines the provision of WLR with a broadband service. Sky's objections to Enhanced Provisioning service has been recorded in various correspondence from Sky to ComReg and we consider it is something ComReg should review again as part of new obligations being proposed for Eircom pursuant to this consultation. In particular it is Sky's view that neither Eircom nor ComReg ever satisfactorily addressed these issues when the service was first introduced.

Price Control and Cost Accounting Remedies

52. Sky agrees with ComReg's view that absent regulation Eircom has the ability and incentive to leverage market power into adjacent markets through price and non-price means. Concerns raised by industry on the impact of Eircom's significant price increases in the WLA market have been well documented. In this regard we refer you to Sky's letter to ComReg 5 July, 2016 (attached in Annex I).
53. The fact that Eircom was able to profitably increase prices (its base has in fact increased substantially since) by 21% and 35% respectively for SA FTTC and POTS FTTC is testament to its market power and to the fact that existing remedies and market forces are inadequate to act as a constraint on Eircom's prices. The 21% SA FTTC charge followed on from 11% increase just 12 months earlier. The price increases have coincided with periods of exceptional take-up of Eircom's FTTC service so much so that Eircom for some time now has been required to advise industry on a regular basis on the status of NGA cabinets that are at 100% capacity - something ComReg should take note of in assessing Eircom's costs during the Separate Pricing Consultation.

54. Sky agrees that a cost orientation obligation better provides for greater predictability of wholesale price levels for SPs as evidenced by outcomes in other markets .e.g. FACO.

Ancillary services (8.629-8.634)

55. Sky agrees with ComReg's proposal that ancillary services associated with current and next generation services in the WLA market ought to be subject to a cost orientation obligation. The requirement for such a remedy was highlighted recently by Eircom's announcement that it was increasing FTTH connection charges from €150 to €270, an 80% increase. No justification for the increase was provided and it represents a price point that in Sky's view may be designed to restrict take-up of the service in areas where Eircom's sub 8Mbps ADSL assets are in service but face no competition from other fixed platform infrastructure.
56. The approach is the opposite taken by Eircom when it rolled out FTTC where low connection charges (€2.50 + €28 in home install) were designed to drive take-up and compete with other infrastructure providers. It would appear Eircom are now intent on recovering a large chunk or all of its FTTH connection costs on an up-front basis from customers. It is a matter of record that Eircom are looking at a possible public floatation in mid-2018 so short term balance sheet considerations may also be a motivational factor in setting a €270 connection charge. Whatever the reason, what is clear is that Eircom enjoys a level of market power that allows it to act independently of its customers (wholesale and retail) in pricing its FTTH connection service. This means Access Seekers are exposed to a significant degree of uncertainty from a business planning perspective.
57. A further consideration as to why such ancillary services ought to be cost oriented pertains to the nature of FTTH installs versus FTTC installs. Under the existing FTTC install process Access Seekers can carry out their own in-premise work and thus are not reliant on Eircom technicians. This [REDACTED], Sky has concluded that the feasibility for Access Seekers to carry out the in-premise connection element of FTTH service delivery is unlikely. In the majority of cases customers would require 2 appointed visits from technicians and in many cases 3 appointments would be required. In Sky's experience it is difficult enough to get customers to commitment to one appointment (that often requires them to take time off work) so the prospect of securing 2 or 3 appointments would result in a very poor customer experience and that is even before cancellations and rescheduling is considered.
58. As such in-premises installations for FTTH will be a bottleneck service in contrast to what is currently on offer for FTTC. ComReg should be aware of this distinction when setting the price for this ancillary service given its potential impact on take-up rates and Access Seekers Subscriber Acquisition Costs ("SAC").

Retail Margin Squeeze (8.662-8.673)

59. Sky agrees with the preliminary view that an appropriate price control on Eircom obliging it to maintain an economic space between retail and wholesale products should be maintained. Sky note that ComReg proposes to address margin squeeze obligations at the retail level for bundles through a separate consultation. Sky considers the structure of the existing Margin Squeeze Tests (MSTs) are inappropriate and fail to remedy the market failure they seek to address. Sky therefore looks forward to providing a more thorough response on this point during that consultation process.

Question 8

Do you agree with ComReg’s preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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.

60. Sky broadly agrees with the analysis carried out by ComReg in Chapter 9 and note that in any event ComReg is not required to conclude on the precise scope of the retail market as part of its analysis in the section.

Question 9

Do you agree with ComReg’s preliminary conclusions on the product assessment for the WCA 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.

Question 10:

Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA 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.

61. Sky agrees broadly with ComReg’s preliminary conclusions on the product and geographic assessments. However, it is imperative that ComReg keep the issue of qualifying criteria for exchanges falling in or out of the Urban WCA market under review. This did not happen in the context of what was previously defined as Large Exchange Areas (“LEAs”) and this afforded Eircom flexibility on pricing ComReg had not intended when that criteria was initially devised.

Comments on specific points raised in this section of the consultation

POTS FTTC (10.33 and 10.81)

62. Sky would reiterate that ComReg does not refer to the pricing of the key FTTC bitstream product purchased by Access Seekers on Eircom’s network today i.e. POTS FTTC. Port charges for this service are currently €8.09 increased from €5.98 in September 2016. Sky considers an assessment of this development would reinforce ComReg’s preliminary conclusions on the market.
63. In paragraph 10.81 ComReg notes the copper Bitstream prices (€4.90 and €5.90, respectively) which are only offered where WLR is also purchased by the Access Seeker. As such the equivalent €8.09 rate for POTS FTTC is equally pertinent in assessing the market.

Criteria for identifying exchanges where competitive conditions differ (10.157)

64. Sky does not object to the criteria as proposed by ComReg. However, it is imperative that ComReg keeps this criteria under review in terms of its appropriateness. ComReg outlined a set of criteria for the same purpose in 2013 that on the face of it seemed reasonable. However, it relatively quickly emerged to be wholly inappropriate insofar as it assumed any exchange where NGA was available fell into the category of what was termed Large Exchange Areas ("LEAs"). However, many of these exchanges faced no platform competition from other operators and had not been unbundled so faced no competition in terms of port charges or backhaul. As a consequence Eircom faced a prolonged period of lighter touch regulation in these areas notwithstanding LEAs were supposed to mark out territories only where greater competition was in evidence.
65. The proliferation of inappropriately classified LEA exchanges and the prolonged period of time for which they have been misclassified is likely to have contributed to Eircom's enhanced market power. It is therefore vital that ComReg clearly state that it will examine the criteria outlined on an on-going basis and that it reserves the right to make interim amendments to that list of criteria before the next market review.

Question 11

Do you agree with ComReg's assessment of SMP in the WCA Markets?⁹¹⁴ 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.

66. Sky broadly agrees with ComReg's assessment of SMP in the WCA markets. However, given the implications of releasing Eircom from SMP obligations in the Urban WCA market it is critical that ComReg act quickly in the event there is evidence that its market power has not been diluted to the extent concluded on a preliminary basis by ComReg in the analysis of this geographic market. One approach ComReg might consider to ensure the market is operating as it expects would be to maintain a longer sunset period on Eircom's transparency obligations in this market. This would allow ComReg and the wider market to observe Eircom's behaviour for a period of time where it no longer faces obligations with respect to price and non-discrimination.

Question 12

Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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

67. Sky considers the competition problems identified by ComReg in this section are similar to those identified in the WLA market and consequently agree with ComReg's preliminary conclusions.

Question 13

Do you agree with ComReg's proposed remedies in the Regional WCA 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.

68. Sky broadly agrees with the remedies proposed with respect to Regional WCA market in particular the need for a cost orientation obligation. Sky would strongly recommend that the backhaul and port charge elements of the bitstream service are broken out in terms of determining cost oriented prices – **it is not sufficient** that the combined pricing meets the cost orientation obligation as occurs in the legacy WCA market today. Ensuring the individual elements are cost oriented will increase the prospect of competition in the WCA market as a clear signal 'build or buy' signals will be sent to prospective infrastructure providers as to the viability of building out backhaul links to Regional WCA exchanges. If Eircom is afforded flexibility on these two pricing elements it has the incentive and ability to exploit that flexibility in a way that discourages backhaul providers from investing in backhaul infrastructure.
69. Sky look forward to responding in more detail on this point in relation to the Separate Pricing Consultation as flagged in paragraph 13.309.
70. Sky would reiterate its comments made above in relation to the proposed WLA remedies with respect to current proposals for Regional WCA non-discrimination (EoO v EoI) and transparency obligations.

Question 14: Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a six month sunset period? 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.

71. Sky agrees with this proposal and given the risks associated with such a large scale deregulation programme, Sky would further suggest a period of 6-12 month sunset period on Eircom's pricing transparency obligation in order to give the market and ComReg comfort that Eircom's market power has been sufficiently diluted so as to constrain its incentives to charge excessive prices.

Eircom's correspondence seeking to delay market review further

72. Finally we refer to correspondence between Eircom and ComReg outlined in ComReg 17/2 Information Notice published on 13 January, 2016. Given the already lengthy delays in conducting the current review and the significant financial implications for Access Seekers as a consequence of that delay we welcome the fact that ComReg has not acquiesced to Eircom's attempt to further delay the process. Eircom note in its letter to ComReg of 6 January 2017 that the WLA and WCA market reviews and the Separate Pricing Consultation are inter-related matters "*that have a material impact on Eir's interest*".
73. Sky would note that any further delay in conducting the market reviews would have a "material impact" on its and other Access Seekers interests. We would reiterate that the significant price increases in the WLA market announced in May last year (21% and 35% increases for SA FTTC and POTS FTTC respectively) is resulting in an unjust financial transfer from Access Seekers to Eircom every month this above cost pricing level is maintained. We consider this goes some way in explaining Eircom's motivation for seeking further delays to the market review process.
74. Eircom's contention that it needs a "holistic" view of the proposed measures coupled with its position that it did not raise this issue previously because ComReg indicated that it '*would issue the Separate Pricing Consultation in Q4 2016*' appears contrived and seeks to put pressure on ComReg to resile from its own remit to conduct market reviews in a timely manner.

75. Sky considers that notwithstanding ComReg's intention to publish that consultation in Q4 2016, it ought to be of **no relevance** to any party's ability to respond to an assessment of the relevant market definition, the presence of SMP or whether or not a particular remedy in addressing SMP is appropriate. In fact Sky would contend it would be the exception rather than the rule across the European Union that a market review consultation would overlap with a charge control consultation pertaining to that same market review. There is nothing in European law or guidance that suggests ComReg ought to adopt the approach Eircom has requested.
76. Furthermore, Eircom already has significant sight of its costs from a regulatory point of view owing to its existing obligations around accounting separation. A deep understanding of how costs are allocated for this purpose means Eircom, if anything enjoys a significant advantage over Access Seekers on issues that are likely to arise as part of any Separate Pricing Consultation.
77. As ComReg has noted in paragraph 8.626 (b) "*Recent price changes indicate that pricing constraints in relation to Eircom's retail and/or wholesale broadband prices are of limited effectiveness and that existing price controls need to be updated to reflect new circumstances*". It would seem obvious that it is therefore in Eircom's commercial interest to do whatever it can to ensure existing price controls are not updated for as long as possible. It is Sky's view that this is the primary motivation behind Eircom's, otherwise odd request that a market review consultation be delayed until a separate cost consultation is issued. There is no flow of logic to Eircom's proposal. It is tantamount to seeking to establish whether or not it is raining depending on the price of umbrellas. The latter ought not have implications for an honest assessment of the former.
78. The same can be said for Eircom's reference to Phase II of the Cartesian report on the Regulatory Governance Model. The only reason Cartesian were appointed by ComReg in the first instance was following on from publication by Eircom of its own Styles Reports which documented its failure to comply with its regulatory obligations across multiple markets. It is now seeking that it be given the opportunity to enjoy the benefits of exorbitant pricing, delaying SLA negotiations etc in the WLA market for a longer period of time while the reasons for its self-confessed failures to comply with its obligations are being investigated. It would be perverse for ComReg to accede to such a request and has rightly denied the opportunity Eircom has sought to exploit as outlined in Information Note 17/2.
79. Sky therefore supports and welcome ComReg's view that an extension to the existing consultation (which was already generous in terms of time given to reply) is not required based on the grounds proffered by Eircom.

Sky
30 January 2017

ANNEX 1

1. Letter to ComReg 5 July, 2016 (attached)

7. Virgin Media Ireland Limited (Virgin Media)



Virgin Media response to:

Consultation and Draft Decision: Wholesale Local Access (WLA) and Wholesale Central Access (WCA) market reviews

ComReg 16/96

30 January 2017

Summary

Virgin Media Ireland Limited (**'Virgin Media'**) welcomes the opportunity to respond to ComReg's Consultation (**'the Consultation'**) on the Wholesale Local Access (**'WLA'**) and Wholesale Central Access (**'WCA'**) market reviews (**'ComReg 16/96'**).

Virgin Media has responded to ComReg's specific questions in the next section. The main themes of this response are as follows:

- 1. Overall the analysis and conclusions reached in ComReg's draft decision reflect the increasing intensity of competition in the retail broadband market.**
- 2. Infrastructure based competition is the best driver of investment, innovation and consumer welfare.** Platform-based competition has removed the need for WCA regulation. Virgin Media therefore supports ComReg's proposal to withdraw WCA obligations in urban areas.
- 3. There is a lack of clear evidence supporting ComReg's proposed definition of sub-national WCA markets.** In particular, there is no evidence of differentiated pricing or marketing strategies in the urban WCA market that would indicate the prevalence of different competitive conditions in that market. See Virgin Media's response to Q10 below.
- 4. Preserving incentives to invest in next generation broadband infrastructure.** The imposition of cost-oriented obligations on next generation access (**'NGA'**) services has the potential to undermine investment in competing broadband infrastructure. The availability of regulated cost-oriented access to Eir's fibre network could impact on decisions by operators, including Virgin Media, to deploy network.

Response to Consultation Questions

Question 1: Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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.

Virgin Media agrees broadly with the key trends identified by ComReg.

However, ComReg has failed to capture adequately the magnitude of the increase in download speeds (para. 3.33) and data traffic volumes (para. 3.35) that has taken place since the previous market review. These trends are salient in the context of ComReg's market review. They reflect the degree to which the industry (with Virgin Media acting as the first mover and catalyst) has invested in upgrading broadband infrastructure, which is driven by competition in the retail broadband market. The resulting increases in broadband speed have changed the way that businesses and consumers use their broadband service. In this environment, operators are continually being required to invest and adapt to the changing usage patterns in order to keep up with customer demand.

ComReg's analysis on retail bundles appears to focus primarily on broadband bundled with fixed voice telephone services, when in fact the inclusion of IPTV services in retail bundles by Eir and Vodafone was a more significant recent milestone in the broadband market. The launch of IPTV

meant that more choices are available for the sizeable group of consumers who wish to purchase both broadband and TV.

Virgin Media notes that infrastructure based competition has been the primary driver of investment, innovation and consumer welfare. In particular, Virgin Media's investment in a high-speed broadband network has triggered a wave of investment by other operators, resulting in higher speeds being offered across the market.

Question 2: Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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.

Virgin Media agrees with ComReg's large parts of ComReg's assessment of the retail broadband market. However, some areas of the assessment warrant further attention.

In paragraph 4.270 ComReg states that:

A significant number of customers also choose to purchase these services [broadband and TV] separately

ComReg presents a redacted statistic from the Quarterly Key Data Report quantifying the number of customers that purchase broadband and TV separately as single-play products. There is no obvious reason why this statistic should be redacted. In the interest of transparency, and in order for interested parties to audit ComReg's analysis, Virgin Media considers that this type of information should be published in an aggregated manner. Furthermore, it is not clear that the statistic captures customers that purchase broadband from one operator, and TV from another operator.

Market concentration is an important factor when assessing competition, and it is not clear that ComReg has recognised the significant shift in the retail broadband market concentration since the previous market review. In particular, the growth of Vodafone and Sky in the retail broadband market means that there are now four suppliers with substantial market share. A dynamic analysis of market concentration using the Herfindahl-Hirschman Index (HHI) would provide a useful insight in terms of the level of competition in the market-place over time.

Virgin Media proposes a correction to paragraph 4.171 ComReg states:

ComReg notes that the main retail providers of fixed broadband services (Eircom, Vodafone and Virgin Media) also operate mobile networks and have the ability to provide 3G/4G mobile broadband services.

Note that while Virgin Media does provide a mobile service, it does not operate a mobile radio access network.

Question 3: Do you agree with ComReg's preliminary conclusions on the WLA Product Market 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 views.

Virgin Media agrees broadly with ComReg's preliminary view on definition of the WLA product market, including the inclusion of current and next generation broadband in the same product market. Naturally, substitution will occur over time towards network infrastructure that is capable of delivering higher speeds. The rate at which this substitution takes place over time in a given location will depend on population density, the relative price of the services, and the willingness of customers to pay for additional speed.

Question 4: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the WLA 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.

Virgin Media agrees broadly with ComReg's preliminary view that there is a national WLA market.

Question 5: Do you agree with ComReg's assessment of SMP? 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 comment.

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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 its competition assessment, ComReg reached a preliminary view that Eir, as the proposed SMP undertaking in the WLA Market has the ability and incentive to engage in actions which could negatively impact on competition and customers in related retail and/or wholesale markets, as well as having the potential to reinforce its dominance in the WLA Market over time.

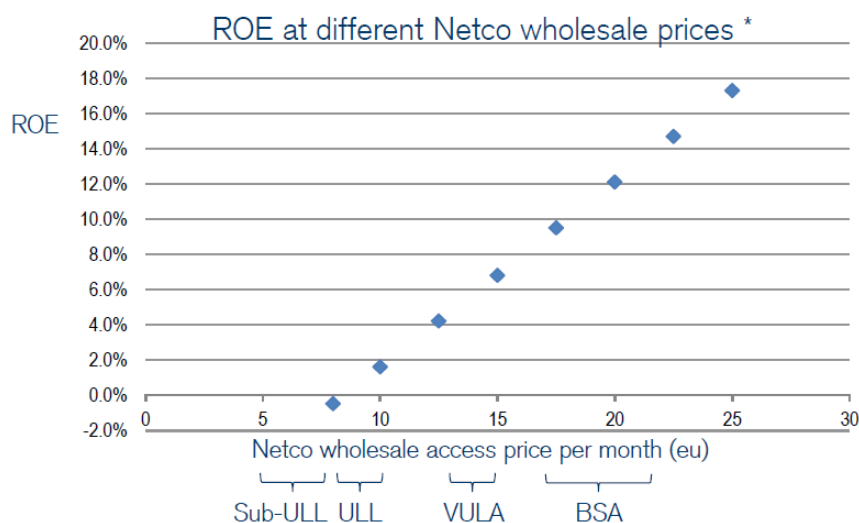
Virgin Media notes that Eir has an established wholesale business in place, and that this business represents a significant proportion of Eir's revenue and subscriber base. It stands to reason that, as Eir's wholesale business grows, it will become increasingly important strategically to the company, which will mean Eir will, and most likely already does, have an interest in preserving this base of customers/revenue. Therefore it is feasible that Eir could choose to provide wholesale broadband services even if it were not obliged to do so.

Question 7: Do you agree with ComReg’s proposed remedies in the WLA 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.

Virgin Media is concerned that cost-oriented obligations imposed on wholesale access to Fibre to the Cabinet (**‘FTTC’**) Virtual Unbundled Access (**‘VUA’**) and dark fibre have the potential to undermine investment in competing broadband infrastructure. For example, Virgin Media is planning to expand its broadband network to 200,000 households in a number of towns over the next 4 years. Yet the business case for deciding whether to deploy new network to a given town/location is sensitive to a number of factors related to the expected return on investment.

One of those factors is the price. The introduction of a cost-oriented price cap for wholesale access to Eir’s FTTC VUA and dark fibre will effectively cap the prevailing market price of NGA, and therefore limit the Return on Equity (**‘ROE’**) associated with investment in NGA.

The following chart, produced by Credit Suisse as part of a recent study, showed that the economic case for fibre deployment is directly related to pricing.



Source: Credit Suisse equity research

* i.e. assuming eu1000 cost per hp, 50% take-up, 60% leverage, maintenance cost of 3% pa

Imposing a cost-oriented price cap could therefore jeopardise the profitability of NGA network deployments. In some cases this could directly influence a decision on whether to build new network, potentially leading to reduced commercial investment in NGA infrastructure by Eir, Virgin Media, and other operators.

Virgin Media therefore disagrees with ComReg’s proposal to impose cost-orientation obligation on the provision of FTTC VUA and dark fibre by Eir. Virgin Media notes that, in any case, the pricing of FTTC VUA and dark fibre will be constrained by the availability of cost-oriented current generation WLA products (as implied by ComReg’s WLA product market definition, which includes current generation access and NGA in the same market).

Question 8: Do you agree with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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's approach to defining the modified retail broadband market appears to be inconsistent with its approach to defining the retail market in Section 4. Where in Section 4 ComReg defines a national market for retail broadband, in Section 9 ComReg leaves the question around geographic market definition open. This is despite noting in paragraph 9.25 that:

Despite some geographic variation in network coverage, ComReg has not observed differing competitive conditions in retail broadband pricing.

While ComReg notes that the functionality of services varies by location, ComReg does not make the case that this is caused specifically by variation in local competitive conditions. This variation in broadband functionality may be attributable to other factors including variation in population density, disposable income and age of the population, terrain, existing civil engineering that can support network deployment, the number of lines covered by a Main Distribution Frame in case of copper unbundling, etc. but these factors do not in themselves support the definition of sub-national markets.

As noted, other indicators such as homogeneity in pricing on a national basis, and the cost of advertising (the main media are national), support a national market.

Question 9: Do you agree with ComReg's preliminary conclusions on the product assessment for the WCA 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.

Virgin Media agrees for the most part with ComReg's preliminary view on definition of the WCA product market. However, Virgin Media disagrees with the proposal to include self-supply of cable retail broadband products offered by Virgin Media in the urban WCA market.

Under some circumstances, the SMP framework applied by ComReg in its market analysis allows for the inclusion of cable in the WCA market even when there is no WCA product made available over cable. In particular (a) when a WCA product would likely be made available on a cable network within a short timeframe in response to a small but substantial increase in the price of WCA; *and* (b) there was demand for a cable WCA product from access seekers; *or* (c) when there is evidence of an indirect constraint on the WCA market posed by cable retail broadband products.

ComReg considered each of these questions. In 10.44 to 10.49 ComReg made the following observations in relation to Virgin Media's potential to influence the WCA market:

1. Virgin Media has not expressed any interest in providing wholesale products (WLA or WCA)
2. Virgin Media has no incentive to offer such a product over its network given a significant portion of their network capacity is already consumed by their retail customers.
3. Wholesale products are unlikely to be offered over a CATV network within a sufficiently short timeframe, such that they could constrain the pricing behaviour of a HM supplier of WCA over a copper and FTTx network.

4. An insufficient number of retail broadband customers would be attracted to a WCA offer provided on Virgin Media's CATV network.

Virgin Media agrees with this assessment, and with ComReg's conclusion that there is no *direct* constraint arising from cable networks that would warrant including the self-supply of cable broadband in the WCA market. Further to these points, Virgin Media adds that the cost to Virgin Media to develop a WCA product would be prohibitive in light of the lack of prospects for cost recovery, given: (i) the limited addressable market based on Virgin Media's cable footprint (which is located in areas where there are strong competitors), and (ii) a lack of evidence of such access being sought.

Question 10: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the WCA 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.

ComReg's preliminary view is that there are two geographic markets for WCA. One market in urban areas, and the other in regional areas (defined in Section 10). This proposal represents a departure from ComReg's previous review of this market, in which ComReg defined a national market for wholesale broadband access.

The proposal appears to be based on the following factors:

5. Evidence of geographic differences in entry conditions
6. Evidence of variation in the number and size of potential competitors between urban and regional areas
7. Evidence of variation in the distribution of market shares between urban and regional areas

ComReg notes however that at the wholesale level, neither Eircom nor BT Ireland vary their wholesale prices for WCA services.

ComReg's proposal to identify sub-national WCA market appears to be inconsistent with its proposal to define a national retail broadband market. In particular, ComReg has observed national pricing strategies in both the retail broadband market and in the WCA market. Yet ComReg has arrived at different preliminary views regarding the geographic boundaries of these markets.

In order to define separate urban and regional WCA markets, ComReg must be satisfied that the conditions of competition are sufficiently different between these areas such that separate geographic markets can be distinguished. In Virgin Media's view, the most compelling evidence of different competitive conditions would be variation in the price or quality of the services between geographic areas that can be attributed to competitive pressure. For example, where there is evidence that lower WCA prices are available within particular exchange service areas due to competition from WLA operators.

While ComReg has pointed to variation in the quality of broadband products between regional and urban areas as being a feature of the market, no attempt has been made to control for other factors that could explain this variation. For example, quality variation is likely to be largely determined by population density. Without controlling for other factors, including those that we highlighted in our response to Q8, it is unclear the extent to which competition is driving differences in the quality (or the effective price) of broadband.

Question 11: Do you agree with ComReg's assessment of SMP in the WCA 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 comment.

Question 12: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Regional WCA Market (and related 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.

See response to Q6.

Question 13: Do you agree with ComReg's proposed remedies in the Regional WCA 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.

See response to Q7. For the same reasons set out in response to Q7, Virgin Media disagrees with ComReg's proposal to impose a cost-orientation obligation on the provision of FTTC based bitstream by Eir.

Question 14: Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a six month sunset period? 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 comment.

Question 15: 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.

See response to Q6 and Q13.

8. Vodafone Ireland Limited (Vodafone)



Non-Confidential Version

Vodafone Response to ComReg Consultation Document 16/96

Market Review

Wholesale Local Access (WLA) provided at a fixed location

Wholesale Central Access (WCA) provided at a fixed location

30 January 2017

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Executive Summary

- i. Vodafone welcomes the opportunity to respond to ComReg’s consultation on the future regulation of the WLA and WCA Markets.
- ii. Over the last 25 years, Ireland has fostered a climate that has attracted investment and delivered extraordinary levels of economic growth. However, this is no time to rest. If Ireland is to continue to be a place where business (and consumers) can flourish, **we need to be an international leader in the development of the Gigabit Society**: where all consumers and businesses benefit from widespread connectivity of 1 Gigabit per second delivered over future-proof fixed and mobile networks.
- iii. This entails all-fibre networks that connect our homes and businesses and which, in turn, can only be possible in the presence of a thriving competitive telecoms industry. We need to make sure that alternative network providers (in addition to Eircom) are present, and are ready to invest, in Ireland. The Government itself has recognised the importance of this and has put together its National Broadband Plan (the NBP) with a clear objective to achieve the European Commission’s broadband targets of coverage and take up.¹
- iv. Vodafone is keen to invest and contribute to building out Ireland’s digital infrastructure. In this context, the framework that will underpin the future regulation of the key wholesale access products in the WLA and WCA Markets is critical to achieving this vision for Ireland and Vodafone’s direct contribution to it. **[Confidential text removed]**
- v. In number of areas, Vodafone supports ComReg’s analysis of the market, the risks to competition and the remedies it is proposing to deal with them.
- vi. While we agree with many of the remedies proposed, and recognise that they are designed to address some of the known issues faced by access seekers over recent years, we remain concerned about the length of time taken to address and resolve issues when they emerge. For example, Eircom has had the incentive and ability to bring in high and unwarranted increases in wholesale charges. These charges remain – and continue causing harm and distortion to downstream competition – until the new regime is enacted.
- vii. Delays in reversing Eircom activity that damages access seekers has real effects on the market and on the success of competition. While well-designed access remedies are of course welcome, we call on ComReg to proceed with pace to bring into force the proposed changes. We recognise that ComReg needs to follow the formal process to bring changes into effect. Nevertheless, we must stress that there are significant gaps in today’s regime and that delays, and a continued absence of strong regulation, impose a significant burden on industry. This in turn hampers competition and its ability deliver much needed benefits to business and residential consumers in Ireland.
- viii. While we support many of the remedies proposed by ComReg, there are nevertheless a number of changes which, if not implemented, risk the competitiveness of the markets in scope of the current review.

The Urban WCA market

- ix. In its consultation, ComReg proposes a number of cumulative criteria which it uses to define a separate WCA Market for premises served by 88 Eircom exchanges that meet these criteria. ComReg considers this market (the ‘Urban WCA Market’) to be competitive. It therefore proposes that all existing remedies

¹ All EU citizens to have access to 30 Mbit/s and 50% of EU citizens take up 100 Mbit/s by 2020.

be removed (and that those remedies being proposed for the remaining exchange areas – the ‘Regional WCA Market’ – should not apply to this market).

- x. As we explain in our response, and further discussed in the Compass Lexecon expert report we commissioned, ComReg’s analysis is fundamentally flawed. We consider that Eircom’s WCA products at these 88 exchanges are not competitively constrained. There is only one other provider offering third party WCA services – BT Ireland. And the indirect constraints from retail providers serving customers in these exchange areas – most notably Virgin Media – are weak at best.
- xi. ComReg has failed to demonstrate that the Urban WCA Market is distinct or that it is competitive. And there are serious consequences to deregulation and removal of access and associated obligations in a market which is not competitive. These consequences may include: actual or constructive refusal to supply, increased wholesale charges (with squeezed margins for competitors who are unable to increase their retail prices given national pricing), poor quality (for example, around provision and repair) and discriminatory practices.
- xii. Given that Vodafone competes at a national level, with national retail pricing, such behaviours will seriously undermine our ability to gain and retain customers, or to have the prospect of returns that would allow us to invest as significantly as we aspire to. This negative impact would be uniquely the result of Eircom’s dominance being unconstrained by the proposed regulatory framework.
- xiii. **We urge that ComReg reconsiders its analysis leading to the definition of an Urban WCA Market which is then fully deregulated.**
Passive access
- xiv. Vodafone believes Eircom’s CEI products are not fit for purpose. We believe the experience has mirrored the LLU experience for the previous generation of broadband products, where it took several years to provide a product that was fit for purpose.
- xv. With CEI products, this must stop now.
- xvi. We know that competition in communications markets drives huge improvements to consumer outcomes, through incentives to minimise costs, and to innovate and improve the product set in response to customer demand. However, due to Eircom’s dominance in upstream markets, competition has required an intricate set of complex wholesale access remedies, backed up by intensive regulatory scrutiny of the market, including a need by ComReg to investigate compliance and resolve disputes. Because of this complexity, the competition that is created is imperfect and the benefits of innovation and investment are inhibited, as regulatory measures can never match an effectively competitive market in stopping problems with quality and pricing and preventing discrimination.
- xvii. The biggest prize of all, therefore, comes if the economics of digital infrastructure investment can support three or more competing end-to-end networks, covering as much of Ireland as possible in each case. Where this happens, dependency on Eircom by alternative competing operators diminishes. Eircom’s ability to discriminate to distort downstream competition lessens. Challengers can invest and innovate independently of Eircom, and safe in the knowledge that success in meeting customer demand will bring rewards not subsequently extracted by Eircom’s discriminatory practices.
- xviii. The presence of competitive end-to-end networks is potentially transformational. It brings the prospect of ever more responsive retail offerings, and the possibility of future de-regulation of Eircom’s active access products.

- xix. Where Eircom has existing passive infrastructure, and others do not, the economics of network build make it unviable for alternative operators to build their own infrastructure. This is why fit-for-purpose cost based passive access is vital to the long-term prospects for end-to-end network competition. Availability of CEI in a meaningful way could fundamentally transform the prospects of network investment and sustainable competition.
- xx. Vodafone is therefore supportive of the CEI remedies proposed in this consultation. They signal an intent by ComReg to ensure that passive access can contribute to Ireland's digital future. **However, in our view, the imposition of these remedies alone is not enough. If we are to avoid further delays, and releases of products that do not match customer needs, ComReg will need to take a more active role in the development of the CEI product set.**
- xxi. This will require ComReg to continue to chair industry discussions. While ComReg's presence at industry fora to date has been welcome, it has clearly been insufficient to prevent prevarication and delay by the incumbent and to secure progress. More is needed if we are now to drive improvements in the product set as needed.
- xxii. While ComReg will need to continue to participate informally, evaluating Eircom proposals and guiding discussion as needed, it will also need to demonstrate an increased willingness to intervene formally to drive progress should it be needed. Only if ComReg commits to push forward improvements in this way, will the impact of passive infrastructure availability for competitive network build be realised.

Service Level Agreements

- xxiii. Vodafone believes that the SLA regime in Ireland is failing. The specifications in contracts are weak and penalty payments are insufficient to incentivise Eircom to invest in network maintenance that reduces faults, and in engineers to repair those faults, and install new lines, when needed. Even if payments were sufficient, Eircom is unilaterally able to invoke suspensions in the obligation to make SLA penalty payments, with limited scrutiny or objective criteria. These suspensions apply to both provisioning and repair processes. One example is the application of 'storm mode' for winter 2015/2016 which impacted repair and provisioning SLAs. The storm mode at this time covered most of Ireland's territory for many weeks throughout the winter months. The storm mode status effectively neutralised any incentive on Eircom to provide increased resource to deal with the (entirely predictable) increased demand on engineer resource during the winter months.
- xxiv. Vodafone believes that the current 'industry' approach to developing SLAs is also clearly not working. This is evidenced by the slow negotiation process with Eircom on the WLR repair SLA. These negotiations commenced in 2012, escalated to dispute in 2015 and have still not concluded.
- xxv. It is imperative that, going forward, ComReg drives developments and uses formal powers to hold Eircom to account.
- xxvi. In particular, Eircom should be forced to consider the SLAs they will provide at the outset as part of any development. With this commitment, Eircom will need to have a clear understanding of what is required from the end customer perspective. SLA design can no longer derive uniquely from the standpoint of Eircom's system capabilities and limitations: outcomes must always be the driving force for change.
- xxvii. The impact on Irish consumers of the failed SLA regime is clear: a poor network with little incentive on Eircom to deliver timely installation and repair. Customers are left without service for prolonged periods and with little or no indication of when service will be provided or restored.

xxviii. The second impact, as ComReg has recognised, is that poor provisioning and repair favour incumbents and harms challengers. Underinvestment in network and engineer resource constitutes a discriminatory practice that distorts downstream markets and denies consumers the benefits that flow from competition: lower prices and higher quality products and services that better meet the ever-changing digital demands of consumers and businesses.

xxix. Vodafone therefore supports ComReg's proposed remedies for SLAs. They comprise a series of detailed specifications for SLAs that will help constrain the future system and set an expectation that we will move towards an effective regime in a timely manner.

xxx. **However, as with other remedies that pre-empt and set boundaries for subsequent complex and detailed negotiations and implementations, it is not enough for ComReg to invoke the remedies. ComReg will need to take a more active role in driving SLA negotiations.**

xxxi. It will need to continue to be chair of industry discussions to scrutinise Eircom proposals and drive progress. But ComReg will also need to enhance the guidance and leadership it provides on the acceptability of proposals. Most critically, ComReg will need to demonstrate an increased willingness to move to formal action in a timely manner, should progress be unacceptably slow. This is needed because Eircom will be incentivised to push for speedy resolution only if there is an adverse consequence for not doing so, i.e. a credible threat of enforcement action from ComReg.

KPI transparency

xxxii. Transparency around Eircom's performance in relation to its regulatory access obligations is a key measure in support of an effective SLA regime. For example, Vodafone has tried to reassure itself that Eircom's poor performance is affecting competitors and Eircom's retail businesses equally (i.e. that there is no discriminatory treatment). However, we have not been able to find the information we need to be able to carry out the necessary calculations.

xxxiii. To ensure non-discrimination and the benefits to competition and consumers that this brings, we need data to be made available that allows a full and detailed scrutiny of Eircom's performance across the full range of relevant metrics that relate to the quality of its access products, and allows full comparison of the service supplied to Eircom's downstream businesses with that delivered to its competitors.

Non-discrimination and the need for functional separation

xxxiv. Discrimination is the most significant threat from an unregulated – or poorly regulated – vertically integrated incumbent. No matter how strongly worded the non-discrimination obligation is, it will be ineffective if access seekers and the incumbent's downstream businesses are not consuming the same products. If access products, services and interfaces are not the same, then discriminatory behaviour becomes virtually impossible to detect.

xxxv. Vodafone therefore supports ComReg's proposal to extend the requirement for Equivalence of Inputs (Eol) to an increased product set, now covering CEI products as well as VUA, and extending over time to some key aspects of CGA products in the WCA and WLA markets. With Eol, Eircom and challengers will consume the same access products, using the same interfaces and systems. With the correct reporting, it will be possible to detect more easily if Eircom is giving itself a superior service.

xxxvi. However, Vodafone is convinced that Eol will not be effective, unless it is also accompanied by an improved model of functional separation. Only if the parties to an Eol transaction are distinct, is the concept of a transaction meaningful and relevant. Eol will not have the desired effect without functional separation. Indeed, without separation, it becomes too easy for the downstream

(competitive) arm of the incumbent to bypass deficiencies in the Eol product set (and associated systems and processes) through informal interaction between colleagues, and in a manner that is impossible to detect.

- xxxvii. **We therefore urge ComReg to push forward with its review of Eircom’s governance, and implement a system of functional separation that is sufficient to impact Eircom’s ability to discriminate (on Eol products), and to avoid detection and enforcement.** Only in this way will the positive impact of improved downstream competition (through more effective non-discrimination) ever be realised.

Product development

- xxxviii. Vodafone believes that the Eircom product development process is failing. As a retailer wishing to serve our customers well, we need to have the ability to develop and improve services and work with our suppliers to receive the inputs needed to secure these improvements. The product development process does not allow us to have these conversations productively with Eircom. Negotiations proceed slowly and without transparency.
- xxxix. Equally, we have limited visibility of product developments and prioritisation that appear requested, or inspired, by the needs of Eircom’s own retail business.
- xl. The impact therefore is that challengers are limited in their ability to innovate to meet their customers’ needs. And they are often restricted to pursuing only those developments that Eircom retail is pursuing. The inadequacies of the current system mean that Eircom’s ability to differentiate in favour of its own downstream businesses is further strengthened.
- xli. As with other issues, the result is weak competition that favours the incumbent, and denies end users the benefits that come from more effective competition in retail markets, including on price, availability, quality, and product specification.
- xl.ii. Vodafone therefore supports the product development remedies proposed by ComReg, including the more detailed specification of timelines that will improve the product development process and set expectations of what constitutes acceptable behaviour.
- xl.iii. However, if these enhanced remedies are to deliver their full impact, with better, fairer and more transparent product development processes supporting non-discrimination, innovation and competition, then there are several supporting measures that are also required.
- xl.ii. The impact of these remedies will be enhanced with the introduction of functional separation. Transparency and effectiveness require that the requesting parties (Eircom downstream and access seekers) are in all cases distinct from the product development party (Eircom’s access product unit).
- xl.v. **ComReg needs to be intimately involved in all aspects of the product development process, as an observer and providing guidance and leadership to help push things forward when needed.**
- xl.vi. **ComReg needs to have the capacity to, and be willing to, intervene formally if negotiations stall or take too long.** Where breaches are found, this should lead to enforcement action and the imposition of financial penalties. Only if Eircom knows that this is the consequence of continued poor performance will it be incentivised to prioritise and invest to deliver a product development function that meets the needs of **all** its wholesale customers.
- xl.vii. These additional measures will enhance the likelihood that ComReg’s proposed remedies deliver a fit-for-purpose and effective system for product development, and one that prevents Eircom from discriminating against its downstream rivals.

Links between broadband (WLA/WCA) markets and leased lines review

- xlvi. We would note Vodafone’s investment strategy. By following a ladder-of-investment approach, we have built up our customer base with a view to achieving critical mass of customers so we can invest deeper into the network.
- xlix. **[Confidential text removed].**
- l. **[Confidential text removed].**
- li. As a result, we would note that there is a key dependency between the leased lines market and the WLA/WCA Markets. For example, if ComReg were to (incorrectly) deregulate the Urban WCA and the leased lines markets, given lack of sufficient competitive constraints, Vodafone would be left unable to access a significant proportion of its customer base, and would be left exposed to anti-competitive and discriminatory practices by Eircom.

Introduction

1. On 11 November 2016 ComReg published its consultation on the Wholesale Local Access (WLA) and Wholesale Central Access (WCA) Markets (referred to as the 'ComReg Consultation').² We welcome the opportunity to respond to this consultation and we set out our views in detail in this document.
2. Ireland needs to be part of the Gigabit Society: where all citizens, businesses and government benefit from widespread connectivity of 1 Gigabit per second delivered over future-proof fixed and mobile networks. The markets in scope of the ComReg Consultation are key to achieving this overall objective.
3. Wholesale WLA and WCA inputs are used by Service Providers (SPs) in the supply of several downstream wholesale and retail services (including broadband and TV services) to both residential and business users. This makes it paramount that SPs have access to fit-for-purpose wholesale products, provided in a timely manner, at the requisite terms and conditions (including price and non-price aspects, such as quality) to enable them to compete on a level playing field with Eircom in the retail markets.

Our response

4. We have adopted the following approach in our response:
 - Our response is structured along three separate sections which align with the three key markets subject of ComReg's Consultation: Retail Markets, WLA Market and the WCA Markets.
 - We have responded separately to each question put forward in the ComReg Consultation. Where there are overlaps between various questions, we have provided one detailed answer and then referred to it where relevant and appropriate. For example, there are overlaps between some of ComReg's proposed remedies (and the reasoning supporting these) for the WLA and WCA Markets – in this context, we have summarised our position regarding a proposed remedy in detail once (in the WLA context) and then either referred to this response or captured specific differences between the WLA and WCA Markets.
 - We note that ComReg will set the details of some of its proposed new remedies (e.g. new cost orientation and margin squeeze obligations) in a separate consultation (referred to as the 'Separate Pricing Consultation'). Where this is the case, we have only provided a high-level response. We will discuss our detailed comments in the context of these other specific consultations.
5. We have also instructed Compass Lexecon to assess the merits of ComReg's finding that there is a competitive Urban WCA Market in Ireland. We attach Compass Lexecon's expert report (Assessment of ComReg's finding of a competitive Urban WCA Market in consultation 16/96) as an annex to our response.

² <https://www.comreg.ie/comreg-invites-comments-interested-parties-wholesale-local-access-wholesale-central-access-markets-public-consultation-draft-decision/>

Retail Markets

6. In this section, we provide an analysis of the key retail trends in Ireland and respond to ComReg’s preliminary conclusions on the retail product and geographic market assessment in Ireland.

Vodafone agrees with ComReg’s preliminary assessment of retail trends

Question 1: Do you agree that the main developments identified in the provision of retail services are those most relevant for the assessment of the Relevant Wholesale 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.

7. Vodafone agrees that the main developments identified in the provision of retail services are the most relevant for the assessment of the Relevant Wholesale Market.³ In particular, we expect the historic trend in download speeds and traffic on broadband subscriptions to increase at a much faster rate going forward and in the context consumers’ changing requirements emanating from the Gigabit Society.
8. We note that, while the share of broadband subscriptions for speeds in the range 30 Mbit/s to 99 Mbit/s has increased from 19.5% to 38.3%, the share of subscriptions for speeds of 100Mbps and above has only increased by 1.5% over the last two years.⁴ For Ireland to remain competitive (both in terms of infrastructure investments and in the provision of innovative digital services) ComReg should ensure the new regulatory framework for broadband services paves the way for the introduction of innovative wholesale services which will bring Ireland closer to achieving the Gigabit Society.
9. We agree with ComReg’s analysis of the speed increase trend,⁵ however we believe that further infrastructure investments are needed to increase NGA coverage and ensure Ireland is in a leading position amongst EU countries. According to the European Commission’s latest analysis, Ireland is ranked 15th on NGA coverage⁶ (Figure 1) and 12th on NGA penetration⁷ (Figure 2).

³ §3.47 of the ComReg Consultation.

⁴ Figure 10 of the ComReg Consultation.

⁵ §3.26 of the ComReg Consultation.

⁶ COMMISSION STAFF WORKING DOCUMENT - Europe's Digital Progress Report 2016 pp. 13. <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-187-EN-F1-1.PDF>

⁷ COMMISSION STAFF WORKING DOCUMENT - Europe's Digital Progress Report 2016 pp. 26. <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-187-EN-F1-1.PDF>

Figure 1:

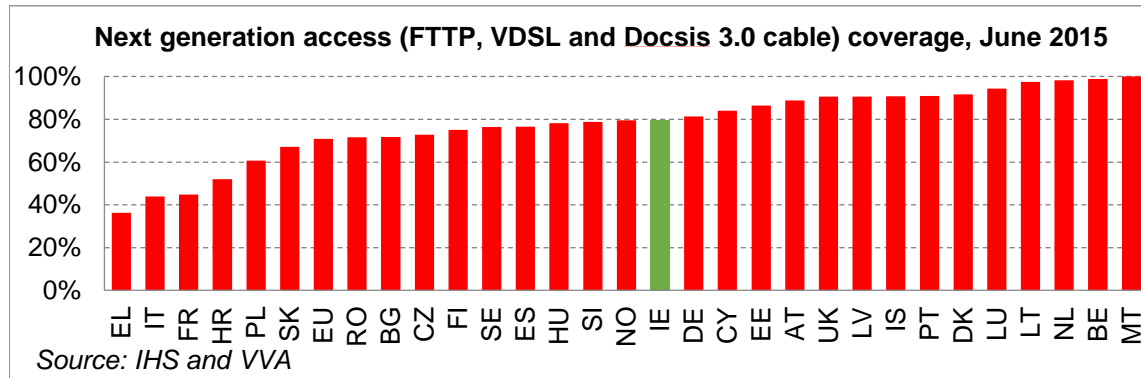
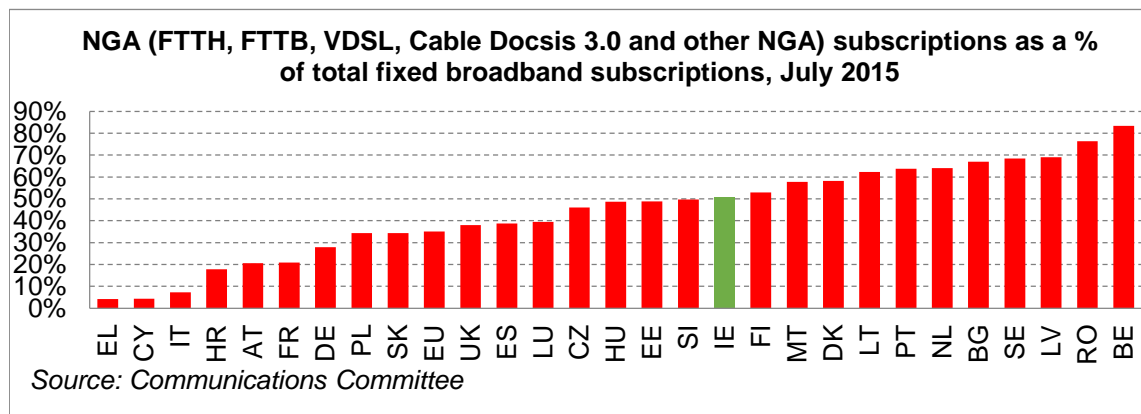


Figure 2:



10. Vodafone agrees with the analysis that broadband traffic has increased over the last years,⁸ a trend which we expect to continue during the course of the lifetime of this market review.
11. Vodafone agrees with the assessment of an increase in the share of bundling in the retail market.⁹ In order to maintain and support this trend, other Service Providers (SPs) would need to have access to regulated wholesale products that allow them a high degree of network management (such as passive access).
12. Vodafone has not identified a material issue with ComReg’s preliminary assessment of new FTTH network roll-out.¹⁰ However, we do not believe that within the lifetime of this market review, such new network roll-out will have material impact on the current market dynamics.

⁸ §3.35 and Figure 13 of the ComReg Consultation.

⁹ §§3.36 and 3.37 of the ComReg Consultation.

¹⁰ §§3.43 to 3.46 of the ComReg Consultation.

Vodafone agrees with ComReg’s preliminary conclusions on the retail product and geographic market assessment

Question 2: Do you agree with ComReg’s preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant WLA and WCA 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.

13. Vodafone agrees with ComReg’s overall preliminary conclusions on the retail product market assessment.¹¹ However, Vodafone wishes to make a number of specific observations.
14. Vodafone agrees with the assessment that narrowband Internet is not in the same market as retail broadband.¹² Given the differences in product characteristics, pricing and intended use, end users would not find dial-up internet access to be an effective demand-side substitute for broadband access. Dial-up internet is a legacy product, offering much lower functionality (e.g. download speeds) compared to broadband, which is today much less attractive for either end-users to buy or SPs to sell.
15. Vodafone agrees with the inclusion of copper, FTTC, FTTH and CATV in the same retail market on the basis that product characteristics, pricing and intended use of retail broadband services delivered over these networks are similar (a conclusion which does not apply to retail broadband services provided over FWA, satellite and mobile networks which ComReg proposes to exclude from the retail market).¹³ Moreover, ComReg has also demonstrated that there is a ‘chain of substitution’ between these products.¹⁴
16. Vodafone agrees with ComReg’s assessment that bundles are part of the same retail market, but prefers to leave the question open, as the result does not alter the definition of the wholesale WLA and WCA markets, as the wholesale products are substitutable between the bundled and unbundled offerings.¹⁵
17. As ComReg’s own analysis shows, consumers are increasingly using triple and quad-play bundles which include both TV and broadband services.¹⁶ These services can only be delivered at the required quality standards over fibre or CATV networks. In order to be a credible player in the provision of live IPTV services, Vodafone needs a certain level of control over the network elements that will ensure the required levels of quality of service. This will require the provision of high quality wholesale access products in both the WLA and the WCA markets.
18. Vodafone agrees with ComReg’s assessment that there is likely to be a single geographic market for retail broadband.¹⁷ This is supported on the demand-side. Looking at the supply side, we agree with ComReg’s observation that there are significant differences in network coverage in the different geographic areas.¹⁸ We note that these areas vary by the type of technologies that are available, the bandwidth of services offered and the associated service levels. These differences might mean Eircom has a stronger position in rural areas than in urban areas. However, the prevalence of national pricing firmly points to the existence of a single national market rather than separate geographic sub-markets.

¹¹ §4.296 of the ComReg Consultation.

¹² §4.67 of the ComReg Consultation.

¹³ §4.252 of the ComReg Consultation.

¹⁴ §§4.250 to 4.252 of the ComReg Consultation.

¹⁵ §4.272 of the ComReg Consultation.

¹⁶ Figure 14 of the ComReg Consultation.

¹⁷ §4.296 of the ComReg Consultation.

¹⁸ §4.281 of the ComReg Consultation.

WLA Market

19. In this section, we comment on ComReg’s assessment of the WLA market along the three main dimensions including market definition, SMP and remedies.

Vodafone agrees with ComReg’s preliminary conclusions on the WLA Product Market assessment

Question 3: Do you agree with ComReg’s preliminary conclusions on the WLA Product Market 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 views.

20. **Vodafone agrees with ComReg’s preliminary conclusion that the WLA Product Market includes Current Generation WLA (e.g. LLU and Line Share products) and Next Generation WLA products (e.g. VULA products over FTTx networks), for both business and residential users.**¹⁹
21. ComReg’s assessment of the WLA product market follows a standard economic approach which is based on identifying the:²⁰
- a) *focal product*,
 - b) alternative WLA products that should be included in the relevant wholesale market based on the effectiveness of any *direct constraints* emanating from demand and/or supply-side substitution, and
 - c) retail products that should be included in the relevant wholesale market based on the effectiveness of any *indirect constraint* they might impose. When testing the strength of any indirect constraints, ComReg then assesses²¹ a) the extent to which a hypothetical WLA price increase would be passed through to consumers at the retail level; b) the extent to which there would be sufficient demand side substitution (to alternative networks) at the retail level to make such a price increase unprofitable and c) whether Eircom would be expected to recapture some of this demand substitution.
22. ComReg conducts its analysis using the Commission’s modified Greenfield approach where it defines the scope of the WLA Market absent any SMP remedies in it.
23. The *focal product* is the starting point for any market definition exercise. We agree that WLA access provided over Eircom’s copper network (referred to as Local Loop Unbundling, LLU), is the narrowest focal product to start the analysis from.²² We also agree that the focal product should not distinguish between wholesale local access that is used to provide business services and residential services - at the access level, the connections used to supply business and residential end users are essentially identical, even if the downstream services (including features such as quality of service guarantees) may differ.

¹⁹ §5.201 of the ComReg Consultation.

²⁰ §5.7 of the ComReg Consultation.

²¹ This approach is in line with the Commission Guidance to the 2014 Recommendation.

²² §5.13 of the ComReg Consultation.

24. We agree with the principle that *self-supply* of SPs' WLA to their retail businesses should be part of the WLA market, since SPs can readily divert such supply to serve the wholesale market.²³ In this context, it is Eircom's own self-supply that is relevant, given ComReg's preliminary conclusion is that, on an analysis of supply-side and indirect substitution, WLA products delivered over alternative networks are not part of the WLA Market (see further discussion below).
25. We agree, in principle, with ComReg's preliminary view that Eircom's *fibre based WLA products* (e.g. Eircom's VUA products provided over FTTH and FTTC networks) should be included in the WLA market, on the basis that they have sufficiently similar product characteristics, intended use and pricing.²⁴
26. We agree that on principle, and on a forward-look basis, WLA products provided over SIRO's FTTH network could be included in the WLA market.²⁵ However, **we stress that, in practice, due to its limited coverage, the SIRO network is unlikely to impose an immediate and effective constraint on Eircom during the lifetime of this market review.**
27. We agree that, based on an assessment of supply-side constraints, *WLA services supplied over alternative network infrastructures* (including CATV, FWA, alternative localised FTTH networks, mobile 3G/4G networks and leased lines) are not included in the WLA market.²⁶ We note that ComReg had already preliminarily concluded that retail broadband services provided over FWA, satellite and mobile networks are not included within the Retail Broadband Market and therefore would not have been relevant for the WLA product market assessment. Similarly, the very high entry barriers to establishing a substantial new fixed network (or the low probability and the high cost implications associated with opening the Virgin Media network) mean that supply-side substitution over alternative networks would not be plausible.
28. We also agree that, on an assessment of indirect constraints, *retail services supplied over alternative network infrastructures* (including CATV, FWA, alternative FTTH networks, satellite and mobile broadband) are not included in the WLA market.²⁷ In particular, we agree that retail services provided by Virgin Media do not constrain Eircom's prices in the WLA market. First, Virgin Media's network coverage is limited (to 45% of households in Ireland, mainly in urban areas, and with minimal provision to business users) and this would severely constrain consumers' ability to switch.²⁸ Second, Eircom has recently implemented a number of price increases in this market: it has increased the price of its FTTC based VUA by €3.50 and FTTH based VUA products by €3.00, effective from 1st September 2016.²⁹

Vodafone agrees with ComReg's preliminary assessment of the WLA Geographic Market assessment

Question 4: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the WLA 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.

²³ §5.15 of the ComReg Consultation.

²⁴ §5.47 of the ComReg Consultation.

²⁵ §§5.52 to 5.54 of the ComReg Consultation.

²⁶ §5.97 of the ComReg Consultation.

²⁷ §5.168 of the ComReg Consultation.

²⁸ §5.145 of the ComReg Consultation.

²⁹ §5.150 of the ComReg Consultation.

29. **Vodafone agrees with ComReg’s preliminary conclusion that the WLA Product Market is national in scope.**³⁰
30. As in the case of the product assessment, the WLA geographic market assessment would also need to be based on an analysis of the demand and supply-side substitution in the WLA market. This would look to identify whether customers would substitute to other geographic areas in the face of a hypothetical rise in the price of WLA products and also whether any firms supplying different areas would begin to supply the geographic area in question as a result of the price increase.
31. However, local access networks, and telecommunications networks more generally, have a fixed and pre-defined geographic presence. This means that a wholesale buyer of a WLA product would only be able to switch its demand to an alternative area if the retail customer is willing to move to that alternative area. This would only be possible if a sufficient number of downstream customers would move location (house, business premise, etc.) in response to the hypothetical price rise at the wholesale level, such as to make it unprofitable. Given the cost associated with moving location is likely to be significant, it would be reasonable to conclude that geographic demand-side substitution is either a very weak or non-existent constraint.
32. Similar to demand-side substitution, supply-side substitution is likely to be limited by the need for an operator in a different geographic area to invest in new infrastructure. In the case of local access networks this would involve significant sunk costs and therefore make it very unlikely that there would be supply-side substitution from one geographic area to another in response to a hypothetical increase in the price of WLA services.
33. Given the above, demand and supply-side substitution would generally lead to the definition of very narrow geographic markets, which are unlikely to be practical to analyse or be representative of the competitive constraints that exist. This is why the geographic scope of local access markets is usually based on an assessment of other relevant factors, such as the presence of common pricing constraints between different geographic areas.
34. ComReg’s own analysis demonstrates that there is a lack of any direct and indirect constraints in the WLA market, despite the emergence of some local competitive constraints. We agree with ComReg’s preliminary conclusions that the WLA market is national in scope on the basis that:
- a) There is insufficient evidence to suggest clear differences in geographic entry conditions;³¹
 - b) The number and size of potential competitors is insufficient.³² In particular, SIRO’s roll-out of its FTTH network which the consultation states has been slower than expected³³;
 - c) The distribution of market shares is not suggestive of differences in competitive conditions across different geographic areas – given SIRO’s limited network roll-out and Virgin Media’s static retail market share (self-supply) Eircom is likely to maintain its relatively high market share;³⁴
 - d) Eircom’s pricing of WLA products is national (pointing to the existence of common pricing constraints) and any geographic differences arise as a result of the availability of different WLA access products.³⁵

³⁰ §§5.198, 5.202 of the ComReg Consultation.

³¹ §5.184 of the ComReg Consultation.

³² §5.188 of the ComReg Consultation.

³³ §5.186 of the ComReg Consultation.

³⁴ §5.190 of the ComReg Consultation.

³⁵ §5.194 of the ComReg Consultation.

35. Furthermore, ComReg notes that Virgin Media, as the main alternative network operator, covers only 38% of the 2m premises in Ireland.³⁶ It also does not provide any wholesale products in the WLA market (which, in any case, would not be technologically feasible), nor wishes to do so.

Vodafone agrees with ComReg's preliminary assessment of SMP in the WLA Market

Question 5: Do you agree with ComReg's assessment of SMP? 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.

36. **Vodafone agrees with ComReg's preliminary conclusion that the WLA Market is not effectively competitive and that Eircom should be designated as having SMP.**³⁷
37. In coming to its preliminary conclusion, ComReg has analysed the presence of existing and potential competition in the WLA Market and the strength of any countervailing buyer power (CBP).³⁸
38. Eircom's actual pricing behaviour is the most powerful evidence that it is not currently constrained in the WLA Market. As noted by ComReg, LLU prices have only decreased as a result of ComReg's regulatory intervention, while Eircom has increased the price of its FTTC and FTTH VUA products (which were only subject to a margin squeeze obligation) twice since 2014.³⁹
39. Moreover, Vodafone agrees with ComReg's analysis that, despite the presence of SIRO, Eircom has nearly 100% market share in the WLA Market and this is unlikely to change materially during the lifetime of this market review.⁴⁰
40. Vodafone also agrees with ComReg's preliminary conclusions that the lack of effective indirect pricing constraints emanating from alternative networks (especially CATV and alternative fibre networks) will continue. Furthermore, even when ComReg includes the self-supply of vertically-integrated alternative network operators providing retail services in the WLA Market, Eircom's notional market share would only decrease to around 68%.⁴¹
41. Furthermore, and as per ComReg's preliminary conclusion,⁴² Eircom is also unlikely to be constrained by prospective competition. Barriers to entry and expansion remain high - and new entry continues to involve significant upfront (sunk) costs which makes it extremely risky.
42. Finally, Vodafone agrees with ComReg's preliminary conclusion that CBP is not likely to be a relevant factor constraining Eircom's behaviour in the WLA market.⁴³ Eircom is by far the largest purchaser of WLA products, while BT Ireland is the largest third-party purchaser in this market. However, BT Ireland is unlikely to have a strong bargaining position given it currently does not have any other external sources of supply (with a national footprint) and Eircom can easily convert any wholesale revenues it earns from BT Ireland into retail revenues.

³⁶ §5.187 of the ComReg Consultation.

³⁷ §§6.126 to 6.129 of the ComReg Consultation.

³⁸ §6.14 of the ComReg Consultation.

³⁹ §§6.37 to 6.41 of the ComReg Consultation.

⁴⁰ §6.17 of the ComReg Consultation.

⁴¹ §§6.21 and 6.22 of the ComReg Consultation. We note that ComReg includes self-supply by Virgin Media, FWA and other retail FTTH networks in its calculations.

⁴² §6.102 of the ComReg Consultation.

⁴³ §6.124 of the ComReg Consultation.

Vodafone agrees with ComReg’s preliminary assessment of the competition problems that could potentially arise in the WLA market

Question 6: Do you agree that the competition problems and the associated impacts on competition End Users identified are those that could potentially arise in the WLA 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.

43. **Vodafone agrees with ComReg’s preliminary analysis of the competition problems and associated impacts on competition/consumers in the WLA market as presented in Section 7 of its consultation.**
44. In the WLA market, the high cost associated with building local access networks has meant that SPs have had to rely on gaining access to Eircom’s ubiquitous network to reach their customers and deliver services to them.
45. This dependency has given rise to (and in the absence of an effective regulatory framework can continue to give rise to) two main problems.
46. **Given the absence of competition at the local level, Eircom is the dominant provider of WLA services.** As a result of this, and absent regulation, Eircom has the ability and incentive to abuse its dominant position by engaging in anti-competitive behaviour, such as charging high wholesale access prices. In addition, it also has reduced incentives to achieve cost efficiencies as it can pass these higher costs to its wholesale and retail customers without the fear of losing out to its competitors. Furthermore, and in the absence of competitive rivalry at the local level, Eircom would be less motivated to invest and innovate (at least, at an acceptable pace) leading to poor quality local infrastructure and products/services.
47. **Eircom, as its rivals’ main supplier at the wholesale level (and the only supplier at the local access level for Vodafone to reach its own customers), is also the main competitor for the retail services it is trying to sell.** The result of this vertical integration is that Eircom has the incentive to use its dominance at the local access level to favour its own downstream businesses. This can lead, for example, to:
- a) outright, or a constructive refusal to supply WLA products and services to its rivals;
 - b) exclusionary practices such as margin squeeze, predatory pricing and/or raising switching costs;
 - c) developing wholesale access products that favour its own downstream businesses’ needs;
 - d) providing wholesale access products at lower quality; and
 - e) information asymmetries, such as a lack of transparency in how products are both developed and implemented.
48. Vodafone therefore agrees with ComReg that, absent regulation, Eircom has the ability and incentive to engage in these anti-competitive behaviours. We therefore agree that it is justified and proportioned to impose regulatory obligations on Eircom relating to access, transparency, non-discrimination, price control, cost accounting and accounting separation in the WLA market.⁴⁴

⁴⁴ §§7.50 and 7.51 of the ComReg Consultation.

Vodafone agrees with ComReg’s proposed remedies in the WLA market

Question 7: Do you agree with ComReg’s proposed remedies in the WLA 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.

49. **Vodafone agrees with ComReg’s proposed remedies in the WLA Market.** However, there are several areas where there would be merit in tightening the proposed remedies.

Introduction

50. Sustainable and effective competition is key to the ability of Ireland’s communications infrastructure to deliver to the needs and expectations of households and businesses. This in turn relies on deep network investment in alternative infrastructure. Competing modern infrastructure will create the conditions of rivalry needed to incentivise the investment and innovation needed to make sure Ireland benefits from leading-edge communications services which are responsive to users’ changing needs.
51. Vodafone has demonstrated that it forms a key part of this vision for Irish digital communications. We are doing so by investing heavily in modern network infrastructure that will deliver superfast broadband to an increasing number of premises either directly.
52. But the vision of a more competitive, innovation-rich and responsive digital economy is entirely contingent. It relies on the remedies in place to deal with Eircom’s dominance in large parts of the market. As outlined in our response to Question 6 in ComReg’s consultation, and as set out in Section 7 of ComReg’s Consultation Document, there are a series of significant competition problems that would be present in the WLA market if relevant remedies are not introduced or if they are introduced but not adequately policed to secure full compliance.
53. It is vital therefore that the correct set of remedies is introduced, and that these include the additional remedies needed for detection of non-compliance, and to ensure incentives are in place to ensure compliance.
54. Our comments on Question 7 below begin with a description of Vodafone’s current investment strategy. Our strategy will always remain predicated on the effectiveness of ComReg activity to prevent competitive problems resulting from Eircom’s dominant position. We then outline our specific comments on ComReg’s proposed remedies, under the following headings:
- a) Access;
 - b) Transparency;
 - c) Non-discrimination;
 - d) Price control;
 - e) Cost accounting and accounting separation; and
 - f) Statement of Compliance.

Vodafone’s investment strategy

55. Vodafone’s investment history follows the ladder-of-investment approach. Where the regulatory and commercial conditions have been favourable, we have accessed our customers using wholesale

products that have been appropriate to our customer base at that time. This has enabled us to build a critical mass of customers that has then justified investments further into the network. Vodafone believes that ComReg needs to continue to regulate in a way that recognises this sequence of growth and investment if there is to be competition and alternative infrastructure development as Ireland moves towards a Gigabit future.

[Confidential text removed]

56. Vodafone has to date invested in VUA **[Confidential text removed]**.

57. **[Confidential text removed]**.

58. **[Confidential text removed]**.

59. **[Confidential text removed]**

60. **[Confidential text removed]**.

[Confidential text removed]

61. **[Confidential text removed]**

Investment using Eircom's duct, pole and dark fibre

62. Vodafone would be interested in using fibre passive access (using pole, duct and dark fibre) where the business case justifies, including where there is a sufficient critical mass of customers that would be served by the network.

63. However, we believe that it took several years before copper passive access (LLU) from Eircom was fit-for-purpose and able to be used by Eircom's downstream competitors. Given the pace of change in the digital economy, we cannot afford for this to repeat itself with the introduction of fibre passive access. It will require proactive participation throughout implementation by ComReg if we are to avoid this path. We discuss this further as we consider access remedies proposed for the WLA market.

Potential regulatory threats to Vodafone's investment strategy

64. We are facing two major threats to our investment strategy:

a) Eircom has proposed to re-designate 'child' exchanges as 'parents' increasing the cost to operators that use VUA and undermining access seekers' VUA business case. This needs to be controlled such that 'child' exchanges should not be unilaterally re-designated as 'parent' exchanges as it undermines the VUA investment case.

b) Another major threat to Vodafone's commercial strategy and investment plans comes from the proposed de-regulation of the WCA Market in 88 exchanges which would result from a finding that there is no SMP in the 'Urban WCA Market'.

65. We discuss these in turn below.

66. Upgrading a 'child' exchange to a 'parent' increases the number of points of interconnection (POI) at which Vodafone needs to be present to pick up NGA user traffic. Moreover, VUA is only available at parent exchange locations.

67. An increasing number of NGA parent exchanges has the consequence of increasing an access seekers requirements for backhaul connectivity, housing and equipment. It also has the effect of devaluing an operator's investment as the density of NGA subscribers per parent reduces – making it less commercially viable for an operator to build backhaul capability to those exchanges.

68. **Vodafone calls on ComReg to enforce tight controls to limit the number of new NGA parent exchanges allowed.** For example, ComReg could achieve this by imposing a requirement that an exchange must have a minimum number homes passed to qualify for parent status as well as agreement from industry and ComReg.
69. As we have sought to demonstrate later in our response, ComReg’s evidence and analysis that sit behind the geographic market definition for the Urban WCA Market is fundamentally flawed. **[Confidential text removed]**
70. Given the declining CGA base, there will not be a future case to purchase LLU to serve these customers. A flawed de-regulation of the Urban WCA Market could leave a substantial dent in Vodafone’s investment plans. We do not believe that these 88 exchanges are competitive for WCA purposes, even taking account of indirect constraints which we consider to be very weak. Following de-regulation, we fear restrictions in WCA supply at these exchanges, with either refusal to supply or increases in wholesale prices. **[Confidential text removed]** And given that retail broadband pricing is national, as ComReg has acknowledged in its consultation document, we would be unable to pass these price increases onto retail customers.
71. There would be a deterioration of our investment case across all areas of competitive broadband provision, with a possible diminution of investment and competition. The result would be an impediment to competitive intensity, with Irish business and consumers negatively impacted.
72. In this consultation response, we make clear that ComReg would be incorrect to define an Urban WCA Market and remove Eircom’s obligation to supply WCA products at these exchanges. We believe ComReg’s analysis is defective: the market is not competitive and de-regulation would seriously harm competition in the national retail market and investment in NGA.

Proposed Access Remedies⁴⁵

73. Vodafone is supportive of the passive access remedies proposed by ComReg.⁴⁶ Eircom’s dominance in the WLA market means that a full and comprehensive suite of access remedies is needed to ensure that challengers can gain access to their customers. Equally, a number of associated remedies are required to ensure that the access granted is fit-for-purpose and able to support full and effective competition.
74. Nevertheless, Vodafone is concerned that Eircom may still be able to avoid providing fit-for-purpose access products where there are damaging practices that are difficult to detect or where delays mean that the lack of required services causes irreparable commercial damage to those seeking to use WLA products to challenge the incumbent.

Requirement to meet reasonable requests for access to WLA and associate facilities

75. Vodafone agrees that there needs to be a requirement to meet reasonable requests for access to WLA and associated facilities. Ex-ante obligations are required as a combination of dispute resolution and competition law would be ineffective in ensuring competitors can have the access they need in order to compete with Eircom in downstream markets.

Requirement to provide unbundled access and virtual unbundled access

⁴⁵ §§8.31 to 8.392 of the ComReg Consultation.

⁴⁶ §8.390 of the ComReg Consultation.

76. **[Confidential text removed]** However, Vodafone recognises the role that LLU plays in the competitive environment in Ireland, providing an alternative route to customers for providers (especially BT Ireland) that have chosen this investment path. Vodafone is therefore supportive of a continuation of obligations relating to LLU for the purposes of serving customers using CGA broadband.
77. However, we would note that, **[Confidential text removed]**. Where regulated access to WCA products to be withdrawn in the Urban WCA Market, as proposed by ComReg, we believe that competitive conditions are insufficient to secure the continued provision of the WCA services we depend on. Given this,⁴⁷ **[Confidential text removed]**
78. Although we expect **[Confidential text removed]** **To achieve the full benefits associated with VUA, Vodafone calls on ComReg to require Eircom to provide a CGA variant of its VUA product.**
79. Vodafone agrees with ComReg that VUA products are necessary to ensure the development of effective downstream competition. Absent regulation, competitive carriers would be unable to access customers efficiently for the provision of NGA services, especially in more densely populated urban areas. We agree that Geographic Number Portability (GNP) is required to support switching and minimise disruption for those customers choosing to change providers. **[Confidential text removed]**
80. VUA is, therefore, a significant part of Vodafone’s activity as it seeks to build its presence in the NGA market and thus provide a competitive challenge to Eircom in this market. The absence of a properly regulated VUA product would seriously undermine our ability to do so.
81. ComReg states that ‘...it appears that VUA will eventually become one of the mainstay wholesale products supporting the development of sustainable infrastructure competition.’⁴⁸ Vodafone’s investment to date, and its future investment strategy, provides firm evidence for this view.
82. Vodafone agrees with ComReg that fibre loop unbundling (FLU) is not likely to be the predominant means of supply in the WLA market during the lifetime of the review. We agree that this could change and support ComReg’s proposal that there should be an obligation on Eircom to meet reasonable requests for FLU, but that it does not at this stage need to mandate a specific product obligation relating to FLU or other forms of fibre unbundling. If there is a change in the technical or commercial viability of these access technologies, ComReg will need to move quickly to ensure competitive access products can be developed in a timely manner.

Requirement to provide co-location, co-location resource sharing and co-location rack interconnection

83. Access to co-location and associated services is a prerequisite to effective access to Eircom WLA products. Without mandated access to these services, there is a risk that Eircom would use its dominant position to frustrate access and distort competition in downstream markets.
84. Vodafone therefore supports ComReg’s proposal for access obligations related to co-location services.

⁴⁷ Vodafone’s concern stems from the fact that at the 88 exchanges proposed for deregulation there would be, at most, two operators offering WCA services. This is insufficient for competitive constraints to prevail, and indirect constraints on these two operators will be weak at best. In a deregulated Urban WCA Market, both Eircom and BT Ireland will be in a position to raise prices, with serious consequences for those – like Vodafone – seeking to compete in retail markets.

[Confidential text removed].

⁴⁸ §8.80 of the ComReg Consultation.

Requirement for migrations

85. As with co-location, effective migrations processes are vital to the competitive landscape. Migration processes are required if customers are to switch providers. They are also needed as alternative providers using Eircom access products pursue their plans to invest deeper into the network across a greater part of Ireland and thus seek to migrate existing customers to new access products as alternative networks are developed and expanded. Finally, migration processes are needed as providers seek to encourage customers to move to faster and better broadband products (with the associated services that they enable) – for example a move from CGA to NGA.⁴⁹ It is vital therefore to Vodafone's competitive and investment strategy – and the consequent value that accrues to Irish consumers and the economy generally – that customers can be migrated seamlessly and effectively. **[Confidential text removed]** We are also seeking to acquire new customers from other providers by making sure our products meet customer needs and are provided at an attractive price.
86. Without effective migrations, it is simply not possible for challengers such as Vodafone to use Eircom WLA products to compete for customers, to invest and maintain the customer base accordingly, or to meet customer demand for new and better products.
87. Vodafone therefore supports ComReg's proposal that there should be a requirement for migrations.
88. ComReg also specifically proposes that migrations from SB-WLR and VUA to standalone VUA or to standalone VUA combined with porting should be treated as a VUA Soft Migration.⁵⁰ ComReg describes a soft migration as the facility which allows an end user to be switched between access products without the need for physical network intervention at the time of provisioning.
89. Vodafone strongly supports this requirement.
90. The current process means that changes (bulk migration or individual transfer) can only take place when there is a field engineer available to recover the physical 'jumper'. This is hugely inefficient, and constitutes a serious artificial impediment to access seekers, given that migration volume throughput is severely limited by the absence of a soft migration feature.
91. We therefore support a rapid move to a 'soft migration process', where low cost software-based transfers can be carried out in a timely manner and without caps on numbers being migrated. The 'jumpers' can then be recovered by Eircom engineers at a later stage, at the company's discretion, as and when field engineering resource becomes available.
92. The driver for recovering the 'jumper' is Eircom's desire to make it available for re-use, not the transfer of the customer. This is a commercial and operational decision for Eircom that should not interfere with the process of migrating customers between access technologies. For this reason, also, the cost incurred for recovering jumpers should not form part of the cost attributed to the migration and recovered from access seekers – only the incremental cost of the soft migration should constitute the charge levied on the access seeker.

Requirement for interconnection services

93. As ComReg notes, interconnection is needed to connect competitors' networks to Eircom's network. There can be no WLA access without an associated obligation to deliver fit-for-purpose products for the actual interconnection of networks.

⁴⁹ We need to ensure that we have bulk and individual migration capabilities between all relevant access products. Most of these do exist already, but we need to ensure there are no gaps.

⁵⁰ §8.118 of the ComReg Consultation.

94. Vodafone therefore supports ComReg's proposal that there should be a requirement for interconnection services.
95. ComReg proposes a continuation of the existing range of interconnection handover alternatives (in-span, customer-sited, in-building and edge node). Vodafone supports a continuation in the obligation to supply each of these products, to recognise and support the differing needs of different access seekers. As ComReg notes, this supports a model of competition consistent with the ladder of investment. We also note that, as products and technologies change over time, so will the specification for particular interconnection products.
96. ComReg is proposing that Eircom be required to seek approval from ComReg in writing for changes to the rules or technical standards for the deployment of telecommunications equipment in the access network when they have the potential to impact on services already available and in use.
97. Given Eircom's ability and incentive to implement changes that could restrict existing access by competitors, Vodafone is supportive of this requirement. It is of course essential that ComReg seeks input from access seekers as it considers whether to grant approval to any such request from Eircom. In this context, we support ComReg's proposal that all operators should be made aware of any proposed changes, and be given the opportunity to input on existing services and review test and trial results.

Requirement to include the Vectoring protocol in the ARO

98. ComReg acknowledges a solution to the challenges around vectoring has been agreed by industry and is now included in the Access Reference Offer (ARO). Vodafone supports Eircom's proposal that there should be an obligation to include this approach in the ARO.
99. However, we note the continued risks to competition from vectoring technology, and that multiple-operator vectoring (MOV) is still at a relatively early stage of development. We therefore support ComReg's intention to monitor the rollout of vectored EVDSL and consider whether a further regulatory intervention is necessary should issues of concern arise. Given the risks, we would encourage a proactive approach to monitoring and a readiness to act should there be developments that put the future of competition in the provision of competitive NGA services at risk.

Requirement for associated facilities

100. Given the growth in the importance of bundled services, Vodafone fully supports the requirement for access to multicast for VUA. **[Confidential text removed]**
101. **[Confidential text removed]** We are dependent on the availability of class of service (CoS) parameters as part of the VUA service we procure from Eircom. We note that Vodafone currently provides services to both its consumer and enterprise customers that depend on the continued availability of CoS features.
102. Vodafone therefore supports ComReg's proposal for a requirement for traffic and circuit based CoS.

Requirement for access to civil engineering infrastructure

103. ComReg proposes to require Eircom to provide access to civil engineering infrastructure (CEI) and, in particular: duct and pole access; ingress and egress points; co-location; tie connection service; chambers; both direct duct and sub-duct access; dark fibre, where CEI is not available; and passive access records.
104. Vodafone fully support ComReg's view that allowing competitors the means to build their own network infrastructure represents a significant opportunity for a more competitive model of service delivery –

one that truly rewards competitive investment and innovation and could reduce the dis-benefits created by Eircom dominance of the access network.

105. For the future of Ireland's digital economy, it is a prize worth pursuing. Where the economics support such investment, it should be encouraged, because competing end-to end networks are the building blocks for the creation of the Gigabit Society.
106. The availability of fit-for-purpose passive access products can fundamentally change the economics of network build in some key areas. We are fully supportive of the obligations set out by ComReg in its consultation document.
107. We support ComReg's specific proposals in relation to CEI:
 - a) We agree that access seekers should not be limited to Eircom's network typology boundaries.
 - b) We support the proposal that there should not be artificial restrictions on the subset of ECS/ECN products that can be supplied using CEI.
 - c) We agree that the imposition of a high-level obligation has not resulted in the development of suitable fit-for-purpose CEI products and that more granular CEI access obligations, detailing specific aspects of the product, are necessary.
 - d) It is vital that access seekers should be able to request, and make use of, the particular ingress and egress points needed to serve their customers.
 - e) And as with active products, the CEI obligation needs to include requirements to provide the services that allow networks to connect, including a tie connection service and co-location.
 - f) We also support the requirement for access to chambers, which is needed to allow access seekers to install and maintain their networks, and to carry out necessary repairs as needed.
 - g) We agree that efficient network provision requires that the CEI obligation extend to both sub-duct and direct-duct access. This flexibility is required so as to prevent inefficient and costly duplication of network investment.
 - h) We support the requirement for access to dark fibre where CEI is not available.
 - i) We support the requirement for access to passive access records (PAR).
108. We would particularly single out the requirement for PAR as an important feature required if duct and pole access is to be a viable route for those seeking to deploy alternative networks. We note that this is likely to have been an important feature in Portugal and Spain, both of which have enjoyed some success in the development of alternative FTTP networks relying on incumbent passive access. Access to PAR will ensure those seeking to invest are able to plan their network investments and estimate costs for business planning purposes accordingly. The cost of ad-hoc on-site work to assess viability of particular deployments would make investment using CEI uneconomic. We would also advise that ComReg, and the industry, learn from the experience of copper LLU in Ireland. In our view, it took too long for a fit-for-purpose LLU product to be made available and this delayed competitive development and benefits that accrue for a considerable period. It is vital that ComReg prioritise its supervision of product development and show a willingness to act quickly and firmly should obstacles to effective employment of CEI continue.

109. The Cartesian Report provides solid independent evidence, once again, that Eircom has implemented an access product for its rivals that is not fit-for-purpose. As expressed by ComReg in its consultation:⁵¹
- ComReg considers that the current CEI access products require significant improvement. Eircom's delivery of the CEI product set . . . may have curtailed the development of effective CEI access products to the detriment of competition and End Users (through effective denial of access).*
110. As a result, an opportunity to ease the transition to competitive provision of pure fibre products has been delayed. However, as Eircom moves to develop a set of CEI products that are actually usable by competitors, there is a significant risk that issues will emerge that act as obstacles to the timely development of an effective product.
111. **Vodafone therefore reiterates that this is an area that will require significant direct supervision by ComReg throughout, and we call on ComReg to prioritise this area accordingly.** This means providing firm guidance to parties where there are debates and decisions to be made during product development discussions. It also means being ready to intervene quickly using formal powers (including dispute resolution and investigation of breaches). We would also ask that ComReg use its good offices to encourage Eircom to commence improvement of the CEI product set in advance of the introduction of the new (EoI) obligations. This may require consideration of whether there may be breaches even of the current (weaker) set of access and non-discrimination obligations.
112. We note that ComReg is not proposing to impose a product specific obligation on Eircom to allow access seekers to host active equipment on poles and chambers (for example for the deployment of G. Fast).
113. We note however ComReg's view that access seekers could seek such a product and that it would, in principle, need to be considered under Eircom's obligation to meet reasonable requests, and that it would also be covered by Eircom's non-discrimination obligations.
114. As we look to the detail of the current proposals, **Vodafone would like to express our concern at the lack of remedies relating to the de-congestion and optimisation of ducts and we call on ComReg to consider the introduction of remedies in this regard.** It is a risk to the potential for competitive transformation resulting from duct access that Eircom dominance gives it the incentive and ability to avoid proactive management of its network and therefore reduce availability of duct capacity for competitors. It could do so by not having sufficient systems in place to monitor and remove redundant cables, thus showing ducts to be full when efficient management would create capacity along the same network routes.
115. ComReg argues that refusal of access to CEI, where redundant cables are not removed from ducts and poles, may be seen as an unjustifiable refusal of access. However, ComReg has not set out how access seekers, or indeed ComReg, would be able to detect when refusal of access has arisen from full capacity with fully active circuits, as opposed to a situation when refusal results from circuits which are redundant.
116. We urge ComReg to consider its position in this area, and to proactively monitor the situation to ensure this situation does not arise.
- Requirement to negotiate in good faith
117. It is a feature of access regulation in communications markets that regulators place obligations intended to remedy the adverse features that result from incumbent SMP, but that the protracted

⁵¹ §8.434 of the ComReg Consultation.

process of negotiations that follow mean significant delays. This sometimes results in access seekers ultimately accepting products and specifications that are below an acceptable standard because the alternative of still further delay has even more adverse consequences.

118. Vodafone therefore supports the requirement for Eircom to negotiate in good faith. We urge ComReg to enforce this obligation vigorously as it is pivotal to achieving the outcomes that the access remedies are intended to deliver.

Requirement not to withdraw access to facilities already granted

119. Vodafone supports the proposed requirement on Eircom not to withdraw access to facilities already granted, and the associated measures needed to give full effect to this requirement.

Requirement to grant open access to technological interfaces, protocols and other key technologies

120. Vodafone supports the proposed requirement to grant open access to technological interfaces, protocols and other key technologies.

Requirement to provide access to Eircom's OSS

121. Vodafone supports the proposed requirement to provide access to Eircom's Operational Support Systems (OSS).
122. Access seekers cannot compete with Eircom's downstream business unless they have effective and efficient access to the OSS. Indeed, lack of reasonable access is a mechanism by which Eircom would have the ability to use its upstream dominance to distort competition downstream. It is vital therefore, not only that access is provided, but that access is fit-for-purpose and of high quality, and that Eircom's competitors have the same access as that relied upon by Eircom's downstream businesses. We discuss this further when we consider non-discrimination remedies (see paragraph 155).

Requirement governing fairness, reasonableness and timeliness of access

123. Vodafone supports the proposed requirement governing fairness, reasonableness and timeliness.
124. Eircom's dominance means it does not have the incentives to provide adequate access to competitors. Where there is opacity as to the products that Eircom supplies its own downstream businesses, there is an incentive for Eircom to supply itself a superior quality access product set than it does to its competitors.
125. However, even where there are mechanisms in place to ensure access for Eircom and competitors is the same, Eircom will have an incentive to underinvest, and to save cost by supplying a poor-quality service.
126. The reasons are two-fold. First, because of Eircom's dominance and the lack of alternative supply, Eircom's wholesale customers do not have sources of alternative supply and must simply 'put up' with whatever quality service Eircom chooses to offer. It will not lose significant custom as a result of poor quality. Second, poor quality access products – for example slow and unpredictable installation, or slow and unpredictable repair times – will hinder challengers and favour the incumbent.
127. As a result, Eircom does not have an incentive to produce adequate Service Level Agreements (SLAs) that will ensure access that is fair, reasonable and timely.
128. This lack of incentives has translated itself into an SLA regime in Ireland that is failing. The specifications in contracts are weak and penalty payments are insufficient to incentivise Eircom to

invest in network maintenance to reduce faults, and in engineers to repair those faults, and install new lines, when needed.

129. Even if payments were sufficient, Eircom is unilaterally able to invoke suspensions in the obligation to make SLA penalty payments, with limited scrutiny or objective criteria. These suspensions cover both provisioning and repair. One example is the application of 'storm mode' which covered most of Ireland for many weeks throughout winter 2015/2016. The application of storm mode effectively neutralised any incentive on Eircom to provide increased resource to deal with the increased winter demand on engineer resource.
130. Vodafone believes that the current 'industry' approach to developing SLAs is also clearly not working, as evidenced by the slow negotiation process with Eircom on the WLR repair SLA. These negotiations commenced in 2012, escalated to dispute in 2015 and have still not concluded.
131. ComReg describes the problems with the SLA regime in its consultation:⁵²
- Sub-standard SLAs or delays in finalising SLAs and making them available to Access Seekers have more significant impacts on Access Seekers who are trying to grow market share and win customers from established SPs with significant market shares, such as Eircom. ComReg is of the view that as the incumbent operator with SMP in the Regional WCA Market, Eircom does not have an incentive to provide fit-for-purpose SLAs which support the delivery of effective or high quality downstream services.*
132. Vodafone fully supports this view. It is evidenced throughout the history of development, implementation and adherence to SLA regimes in Ireland. We cannot emphasise enough the damaging effect of the weak SLA regime that has prevailed in Ireland. As a result of a series of failings, Irish consumers have had to put up with an experience of installation and repair that is simply not acceptable.
133. This has damaged competition, harmed competitors and inhibited the business case for new investment. Consumers suffer doubly, not just directly through unacceptable levels of service, but also because they miss out on the benefits that come from effective competition and the innovation and investment that comes with it.
134. The issue has been one of the key damaging features of the Irish telecommunications market over recent years. ComReg's discussion and proposals⁵³ show that it has understood the severity of the problem and the priority that needs to be given to this area if it is to be removed as a significant obstacle to competition and good consumer outcomes.
135. Vodafone itself has experienced several key failings in current performance, some of which are recognised in ComReg's discussion. Some examples include:
- a) SLA targets that are too low, with no 'second order' target for remaining orders or repairs that are caught in the 'tail'.
 - b) Service credits (SCs), resulting from failure to meet SLAs, which are too low. SCs must be at a level where Eircom faces a lower cost by meeting the SLA than it does by missing them and paying out service credits. Putting it more precisely, SCs must be at a level such that if Eircom fails to perform, for example as a result of under-investment, then the penalty is sufficient to incentivise Eircom to invest in its access network and resources.

⁵² §8.312 of the ComReg Consultation.

⁵³ §§8.302-8.353 of the ComReg Consultation.

- c) SCs must also be at a level that allows access seekers to meet all their costs and provide a sufficient level of compensation to affected retail customers. This is key if we are to support competition and good consumer outcomes.
 - d) Significant delays in concluding SLAs which results in Eircom not introducing or amending SLAs in a timely manner.
 - e) Unilateral suspension of SLAs due to 'storm mode' with no transparency as to the objective reasons for the delay, or timings for resolution.
 - f) SLAs not applying to 'non-standard provisions', with little transparency or comfort on the criteria that make a provision 'non-standard' and no alternative commitment for delivery of these orders.
 - g) Lack of any specific timeline for renegotiation of SLAs on existing products, with the result that discussions continue for prolonged periods and existing (inadequate) SLAs remain in force in the meantime.
 - h) New products being launched before a fit-for-purpose SLA arrangement is in place, the result of which is that the service is offered to customer with no (or ineffective) SLAs and therefore no (or insufficient) commitment on provision and repair times.
136. ComReg's discussion and proposals on the suspension of an SLA seeks to address concerns about the pernicious impact of the current system. It suggests that access seekers should be able to consider and input into the rules and processes that would invoke a suspension, and that the decision should be based on objective criteria.
137. We welcome this approach and the proposed new condition.
138. However, there is an alternative approach worthy of consideration, in which there is no possibility of suspension. **Vodafone calls on ComReg to require Eircom to pay SCs even in circumstances where objective criteria (such as extreme weather conditions) have made meeting the SLAs difficult.**
139. While such an approach might mean that some allowance will need to be made in standard cost recovery for regulated WLA products, it would have two key advantages: (i) it would eliminate the need to determine a detailed specification of when an SLA suspension should be permitted (which may be difficult to arrive at and may lead to protracted disputes); and (ii) it would mean that Eircom would have an incentive to continue to deliver a high quality and timely repair and installation service throughout. At present, the problem is not only that there is a lack of transparency on why SLAs are suspended with the suspicion that they are suspended too easily and without sufficient justification, but also that during the suspension period, Eircom loses all its SLA-based incentive to deliver.
140. ComReg has proposed a series of detailed obligations to be placed on Eircom to secure timely negotiation of effective SLAs on existing products and on new products in advance of launch. We are supportive of ComReg's proposals: such an approach is clearly necessary in the context of the significant failings to date.
141. However, given the detailed nature of negotiations, specification and adherence to an SLA regime, specification of regulatory remedies will not be enough to deliver an effective SLA regime. Negotiations may well fail leading to disputes or alleged breaches of SMP conditions. This will necessarily involve ComReg.
142. The success of negotiations will rely on there being a credible threat of enforcement action if Eircom does not deliver to the intent of the enhanced remedies. And the fall back will necessarily involve

dispute resolution and breach investigations by ComReg. Given the complexity of this area and its importance to the operation of the sector, we call on ComReg to prioritise this area during the negotiation and implementation period.

143. **Vodafone calls on ComReg to take a more proactive stance in relation to industry negotiations and stand ready to guide and intervene as necessary.**
144. Vodafone welcomes the active role that ComReg has played to date through its hosting of industry forums across regulated products. This oversight must continue and with enhanced controls delivered under this market review many of the issues that have been subject to ongoing extended negotiation and delay will now need, with ComReg oversight, to be resolved in defined and short timelines.
145. Only in this way is there any prospect that Ireland will see an SLA regime that is fit for the needs of a modern competitive digital infrastructure.

Requirement regarding timeliness of product development

146. It is a challenge of access regulation that it typically involves making a party do something it does not otherwise want to do. If effective competition was present, suppliers would need to develop quality products at an affordable price, and to do so in a timely fashion. A failure to do so would result in a loss of customers to competing suppliers. Where there is only one supplier, however, the incentive is weakened. And where that supplier actually benefits from supplying a better product to its own downstream businesses, then there is actually an incentive on it not to deliver quality affordable products in a timely manner.
147. This is why ComReg is continuing with a series of remedies intended to oblige Eircom to deliver the products needed by wholesale customers to serve their own retail and wholesale customers.
148. Evidence to date, from the Styles Report (May 2016), clearly demonstrates that product development processes and practices are not meeting the needs of Eircom's wholesale customers. For example:
- a) The majority of Regulated Access Product (RAP) change requests from wholesale customers (12 out of 17) have taken more than one year to be delivered – as a consequence of system changes which take time to schedule, design, build and test.⁵⁴
 - b) It has taken Eircom more than 2 years to introduce enhanced business grade SLAs for Bitstream and NGA products – the original request was received in July 2014 and Eircom missed its own delivery target date of April 2016 due to 'resource constraints', noting however that this was on track for delivery in August 2016 and then finally moved to delivered in December 2016.⁵⁵
149. Vodafone therefore fully supports the new and detailed requirements regarding timeliness of product development. We have experienced difficulties with Eircom on product development. Vodafone considers that there needs to be far better transparency and oversight of Eircom's product development, particularly where Eircom itself has initiated development requests.
150. As with the SLA process, the detailed specification of particular obligations constitute a significant step in the right direction. But we anticipate that they will not of themselves eliminate difficulties. This is because of the complexity of the process, Eircom's continued incentives and the uncertainty of the regulatory process for dispute resolution and enforcement of SMP remedies.
151. Vodafone would therefore argue that as well as the obligations placed on Eircom for timeliness, more will be needed by way of direct oversight of the product development process. **Vodafone calls on**

⁵⁴ Industry update on eir's Regulatory Governance Model (RGM), May 2016, pages 42-43.

⁵⁵ Industry update on eir's Regulatory Governance Model (RGM), May 2016, page 45.

ComReg to provide this oversight rather than rely on updates provided via the Styles report.

This will serve two purposes: (i) ComReg's contained presence will help guide the discussion where obstacles emerge; and (ii) where the issue ends in formal referral to the regulator, ComReg will be able to push forward with resolution for more quickly given direct familiarity with the issues and a stronger ready-made evidence base.

Withdrawal of Access Obligations imposed in 2013 NGA Decision

152. ComReg proposes de-regulation of four existing obligations: access to cabinet space co-location; access to backhaul; access to buildings; and requirements to notify ComReg in advance of potential co-investment decisions.
153. The proposed de-regulation is either due to a perceived lack of demand, or because sufficient mechanisms exist elsewhere to deal with the concern that gave rise to the obligation.
154. Vodafone has no objection to ComReg's proposals.

Proposed non-discrimination remedies⁵⁶

155. Effective non-discrimination remedies are key to the prospects for downstream competition. The need for intervention is exactly as set out by ComReg in its consultation:⁵⁷

These obligations are intended to ensure that Eircom does not favour its downstream arm, or unduly favour any particular Access Seeker in the provision of WLA products, services and facilities such that it might otherwise restrict or distort competition in any downstream or adjacent markets, ultimately impacting on the development of sustainable retail and/or wholesale competition.

156. Given the ladder of investment, it is also key that downstream competition is not hindered by discriminatory practices if there is to be competitive investment deeper into the network, thereby further strengthening the intensity of competition across the market, and the benefits that this brings.
157. Vodafone does not have confidence that the regime to date has been effective in preventing discriminatory practices by Eircom. Our own analysis, and evidence from the Styles report, demonstrate that behavioural remedies alone cannot deliver a regime that prevents Eircom from favouring its own downstream businesses.

Non-discrimination obligation for VUA

158. Vodafone supports the tighter non-discrimination obligation for VUA, and in particular the continued adoption of Equivalence of Inputs (Eoi).
159. Evidence shows that the regulatory regime intended to prevent non-discriminatory practices is simply not working:
 - a) At a high level, and based on the evidence presented in the Styles report (May 2016), it has taken Eircom around 15 months to reduce identified equivalence issues from 20 (in December 2014) to 4 (in March 2016).⁵⁸
 - b) Some key equivalence issues remained open. For example:

⁵⁶ §§8.393 to 8.443 of the ComReg Consultation.

⁵⁷ §8.400 of the ComReg Consultation.

⁵⁸ Industry update on eir's Regulatory Governance Model (RGM), May 2016, page 51

- i. while Eircom's downstream business can arrange a fault appointment from current/next day in a 2-hour slot, wholesale customers need to wait at least 2 days and can only book an AM or PM slot.⁵⁹
 - ii. Eircom introduced all-day appointments without adequate discussion or communications with access seekers prior to its introduction.
 - iii. Vodafone has raised concerns with Eircom in relation to enhanced provisioning. These have been largely ignored by Eircom in its design which appears more driven by Eircom's own needs than that of access seekers.
 - c) We are not confident that Eircom is providing information regarding future network roll-out at the same time to its downstream arm and other rival operators. Given the opaque structure of dealings between Eircom's wholesale and retail businesses, we have serious concerns that Eircom retail may be getting key information, for example on FTTC rollout, in advance of its competitors. For example, ComReg has found that Eircom had provided information regarding its plans to roll out Fibre to the Home ('FTTH') to the Director of Managed Network Services (i.e. a downstream arm of Eircom) three weeks before it was provided to Eircom's downstream rivals. ComReg found that this conduct meant that Eircom was in breach of its non-discrimination obligations.
160. Eol is a key component in securing adherence to non-discrimination principles. If Eircom's downstream retail arm is obliged to purchase exactly the same products, using the same processes and interfaces as those used by its downstream competitors, then it becomes far harder to provide a different quality of service in a manner that harms competition.
161. However, the adoption of Eol may be insufficient to secure non-discrimination if there is a weak delineation between the Eircom upstream and downstream units engaged in the wholesale transaction that is susceptible to the Eol standard.
162. Put quite simply, the concept of Eol is rendered meaningless if there is not a clear distinction between the Eircom units engaged in the trade. Without this, problems will continue and will be very difficult to detect, precisely because dealings between parties that are not distinct cannot be equivalent to transactions that take place between independent parties.
163. Where organisational and personal bonds continue to exist, then mechanisms are found that, for example, compensate for inadequacies in orderings systems, products and processes. These bonds can only be invoked within the Eircom Group business. They will take place informally, outside the formal process setting, and will be very difficult to detect or police.
164. And regardless of the precise nature of actual practice, inevitably suspicion will remain amongst access seekers with the consequent result that it will dictate confidence and the desire to invest to compete more effectively with Eircom.
165. Vodafone therefore questions whether Eol can be truly effective and enforceable in the absence of some form of strong separation of Eircom's upstream and downstream businesses.
166. We are aware that this is the subject of ComReg's review of Eircom governance. **Vodafone urges that ComReg continues to prioritise this review, and the outputs from the review, as the effectiveness and success of ComReg's efforts to eliminate existing non-discriminatory practices (and prevent new ones) rely as much on the governance structure within Eircom as they do on the remedies imposed as a result of this market review.**

⁵⁹ Industry update on eir's Regulatory Governance Model (RGM), May 2016, page 13.

167. A regulatory obligation can only be effective if non-compliance can be detected and action taken that eliminates Eircom's ability to continue discriminatory practices in defiance of the regulations that are in place.

Non-discrimination obligation for migrations

168. Vodafone supports ComReg's proposal for the non-discrimination obligation for migrations. We support also that the non-discrimination obligation should be according to EoI for migrations to and between VUA and CEI.
169. The potential for distortion through discriminatory practices in migrations is considerable, and a non-discrimination obligation for VUA or CEI will not be effective if it does not apply to migrations to, within and between these products.

Non-discrimination obligation for CEI

170. Vodafone supports ComReg's proposals for the non-discrimination obligation for CEI. In particular, we support the move from EoO to EoI. Ireland has suffered for too long from the consequence of a sub-standard CEI offering. The Cartesian report prepared for ComReg demonstrates that Eircom has effectively been providing its own business a CEI service that is superior to that available to access seekers.
171. VUA and CEI are the two key inputs needed by Eircom's competitors to deliver the future-looking digital products that Irish consumers and businesses need. The changes proposed by ComReg are a vital step in securing a set of CEI products that can be used by Eircom's competitors and that will allow them to invest with confidence to compete with Eircom as is necessary to secure the creation of a digital Ireland fit for the 21st century.
172. Vodafone supports the proposed improvements outlined in the Cartesian Report. We agree that recent history demonstrates that the EoO standard is insufficient to ensure effective equivalence for CEI access.
173. We note ComReg's suggestion⁶⁰ that the model used for Eircom's outsourced contractors for access to ducts and installation of sub-ducts could be a good model for developing a usable EoI product set to be made available to access seekers and to be used identically by Eircom's downstream businesses. We agree that this could form a good model for the development of a usable fit-for-purpose set of CEI access products.
174. However, there are two areas where we would like to express caution, or disagree with the proposal as set out by ComReg.
175. First, ComReg asserts that *'...for the avoidance of doubt while ComReg is proposing the imposition of EoI, the solution to be implemented would be a matter for Eircom'*.⁶¹
176. We would advise caution as the imposition of EoI alone will not be sufficient to secure the timely development of a usable set of CEI products. We have seen with the SLA regime that Eircom does not have a sufficient incentive to secure standards that are of sufficient quality, and that this situation can hold even when the regime requires it to consume the same products that are offered to its downstream competitors.
177. There is a reasonable possibility that Eircom will not produce a CEI product of sufficient quality in a timely fashion regardless of the new obligations placed on it. This would then require ComReg to

⁶⁰ §§8.418-8.439 of the ComReg Consultation.

⁶¹ §8.439 of the ComReg Consultation.

intervene either through dispute resolution procedures or through enforcement of Eircom's SMP regulations. **Given this risk, we urge that (i) ComReg should continue to participate in and oversee the product development process, with industry, to show leadership and provide guidance as issues emerge; (ii) ComReg should stand ready to intervene formally if sufficient progress is not being made; and (iii) Eircom should be encouraged not to wait until the new obligations come into force, but should commence development of a fit-for-purpose set of CEI products right away.**

178. Second, ComReg is asserting that an implementation of 10 months is reasonable.⁶² It has come to this view not through engagement with Eircom (or indeed with other industry players), but by relying on estimates in the Cartesian report.
179. Given the importance of adequate CEI products to the future of competitive investment in Ireland, and given the benefit already derived by Eircom through its failure to offer a product that is fit-for-purpose (and the superiority of the products it relies on for its own network roll out), Vodafone considers a 10-month product development period from the date of ComReg's decision to be the maximum acceptable timeframe and where possible should be reduced. **Vodafone urges ComReg to tighten up its proposals in this regard.**

Proposed transparency remedies⁶³

180. Transparency remedies are key to the effective functioning of a market where a vertically integrated provider is dominant in the provision of services relied upon by its downstream competitors. ComReg has set in its consultation some of the principal reasons that regulation cannot be effective in this area unless there is a sufficient, and correctly specified, set of transparency remedies.⁶⁴
181. In particular:
- a) Transparency remedies are needed in order to monitor compliance and effectiveness of other key remedies, such as access and non-discrimination conditions. Both ComReg and access seekers need visibility of the data that reveals bad practice.
 - b) Transparency therefore further serves the purpose of incentivising compliance by Eircom (so long as non-compliance results in enforcement action the threat of which is sufficient to induce compliance).
 - c) In addition, transparency can give access seekers confidence Eircom is, and will be, compliant and this in turn reduces the risks that fear of discriminatory behaviour will have a chilling effect on competitive investment.
 - d) Transparency remedies are also needed to ensure that access seekers have the information they need about the regulated wholesale products they purchase from Eircom.
182. Transparency obligations are, therefore, a pivotal component in the suite of remedies needed to secure effective downstream competition in markets where one of the players is the dominant provider of the key upstream inputs.

⁶² §8.441 of the ComReg Consultation.

⁶³ §§8.444 to 8.586 of the ComReg Consultation.

⁶⁴ §§8.444 to 8.455 of the ComReg Consultation.

183. Vodafone supports the transparency requirements proposed by ComReg, and further supports the view taken by ComReg that the transparency remedies need detailed and precise specification to ensure that they fully meet the needs of access seekers.

Transparency requirements concerning ARO

184. Vodafone supports ComReg’s proposal that Eircom should make an ARO publicly available, which provides access seekers with all the information needed about WLA products, services and facilities provided by Eircom. Without this, it will not be possible for access seekers to compete effectively in downstream markets, as they will not be able to make timely business decisions regarding use of these products.
185. Vodafone also fully agrees that the ARO should contain a specified minimum list of items as set out by ComReg.⁶⁵ Without this level of specification, the risk is the Eircom will seek to comply with its obligation by publishing an ARO which does not contain the items necessary to meet the purposes of the regulations.

Transparency requirement to publish a revised ARO within a specified period

186. Vodafone supports ComReg’s proposal that the updates required by changes in the WLA regulatory obligations resulting from this market review should be published within a specified period. However, we do not understand why it should take six months from final decision for these changes to be made, and urge ComReg to tighten its proposals in this area.
187. Vodafone also agrees that amendments relating to CEI – namely removal of restrictions on use of CEI for ‘fixed broadband’ and access to additional Ingress and Egress points – should be reflected in the ARO and published within a shorter timescale. However, these are extremely simple changes for Eircom to make and we see no reason for it to take Eircom three months to make these amendments. We therefore urge ComReg to tighten its proposals in this area.

Transparency requirements governing ARO change management

188. Eircom needs to improve its communication with other SPs in relation to updates to the ARO. Vodafone supports ComReg’s proposed obligations relating to ARO change management. Changes to product specifications have a real impact on Vodafone’s use of Eircom WLA services and provision of services to its own customers.
189. Having documentation in place that allows Vodafone to track changes made to the ARO over time is needed so Vodafone can adapt operations and assess the impact of changes that have been proposed or have been implemented.

Advance notification timeframes for ARO and price changes

190. The introduction of standardised and precisely specified advance notification requirements for ARO and for price changes is important for access seekers. Without this requirement, there is a risk that Eircom will use any ambiguity to delay notification and therefore hinder its downstream competitors from being able to adapt and respond accordingly.
191. Coupled with any weakness in non-discrimination obligations and supporting measures to give them effect, a further danger is that Eircom’s downstream operations could receive notice of changes, including price changes, in advance of access seekers. As we have argued elsewhere, therefore, a sufficiently strong functional separation model will be needed alongside non-discrimination and transparency obligations. Without this, it is all too easy for key pieces of information to ‘slip’ between

⁶⁵ §8.464 of the ComReg Consultation.

Eircom's upstream and downstream businesses in a way that advantages Eircom's retail operations and hinders its competitors. We therefore urge ComReg to consider this risk as part of its review of Eircom governance, and seek implementation of a model of functional separation that makes such an eventually less likely to occur and more likely to be detected when it does occur.

192. As regards to the specific advanced notification proposals,⁶⁶ Vodafone supports the specific and precise timeframes included within these proposals. We also support the proposal that ComReg reserve the right to extend these timeframes where it considers that proposed changes are likely to have a material impact on related markets.

Transparency requirements on wholesale billing

193. Vodafone supports ComReg's proposal to impose obligations to improve transparency in Eircom's billing of WLA charges.
194. This has been an area of frustration for Vodafone, as the quality of billing for regulated services, and the clarity and granularity of the information presented, has been insufficient to allow Vodafone to reconcile usage with charges and to do so in a proportionate manner. An inability to do so means it becomes difficult for Vodafone to reassure itself that bills are as they should be and that the quantum is not excessive given the usage that sits behind them.
195. A good test of whether existing arrangements are as they should is whether they would be observable in a market where there is choice of supply. In our view, such poor billing transparency would not be possible in a competitive market, as customers would reject such poor billing practices and would negotiate improvements or seek better service from alternative suppliers. It is a feature of markets with dominance that suppliers are not responsive to their customers (as they have nowhere else to turn to if they are unhappy) and all aspects of quality suffer.
196. Vodafone has a clear view of what is needed to bring billing transparency to the level that would make it adequate for meeting the reasonable needs of Eircom's WLA wholesale customers.
197. **Vodafone calls on ComReg to require Eircom to provide each access seeker with a table view of all the regulated products it provides, the account numbers for each, which invoice/account various products are invoiced against, where copies of invoices can be received, and where invoice backing data can be received.** Vodafone also requires that detailed information on billing process, formats, systems, detail be captured in all product descriptions as Vodafone is of the view, that in some instances, akin to our experience on SLAs, Access Seeker focussed billing requirements are not given adequate consideration at the product development stage and also tend to be considered in light of Eircom's billing system capabilities. In other words, what is needed is a very good overview of the totality of Eircom's regulated product sales to the access seeker. This should be updated and maintained by Eircom's open eir division.
198. As with other changes introduced as a result of the WLA/WCA market review, Eircom should not seek to give effect to these changes through a unilateral specification of the changes to be made and an announcement of their features once completed. So, for example, in the case of wholesale billing transparency, Vodafone believes that Eircom should communicate all changes to the access seeker well in advance and engage and agree with access seekers prior to deployment.

Transparency requirements regarding KPIs, SLAs and reporting

199. Vodafone is fully supporting of ComReg's proposed transparency requirements regarding KPIs, SLAs and reporting.

⁶⁶ §§8.482 to 8.483 of the ComReg Consultation.

200. SLA design has been a key failing in the current system and this has significantly inhibited the effectiveness of competition in the market. Improvements in SLA arrangements are key to improving competition and creating conditions that encourage investment in new networks and services by competitive carriers.
201. Transparency arrangements around performance by Eircom across the full range of metrics is a cornerstone of the effectiveness of the regime. It is vital that the level and type of data published, or shared with access seekers, is sufficient to allow effective comparison of the performance of service provided to Eircom's downstream operations with the performance of service provided to its competitors.
202. Vodafone has sought to analyse data published at present to determine if there is variation in performance levels, but we have not found the data sufficient for these purposes. **Vodafone therefore calls on ComReg to carry out an analysis of the data currently published by Eircom under the existing obligations with a view to re-specifying requirements to ensure that the data that is published under these transparency arrangements are sufficient to meet this key purpose.**
203. It is essential that all parties have full confidence in the metrics published by Eircom in compliance with this transparency obligation. Given this, Vodafone considers that there needs to be an additional requirement to ensure that all SLA, KPI and related performance metrics published by Eircom are fully audited by an independent expert third party who is able to certify their accuracy and veracity. Without this provision, the obligation will not give the required level of confidence that access seekers need if they are to be reassured that Eircom's downstream businesses are not receiving a level of service that is superior to that received by its competitors.

Transparency requirement for KPIs for CEI

204. Alongside VUA, Vodafone considers CEI to be a key input for those seeking to invest to provide higher speed broadband to Irish residential and business consumers. It is therefore vital that, as the product set for CEI is re-developed to make it fit-for-purpose, a full set of KPIs is available at re-launch. This must cover the full set of metrics that are relevant to monitor performance, and must allow for effective comparison of performance attained by Eircom and by its downstream competitors.
205. We therefore welcome ComReg's view that it is necessary to develop a set of KPIs with respect to CEI access, and signal our intention to support the development of KPIs for this product set in due course.

Transparency requirement with respect to network roll out and network development

206. Vodafone agrees that planned FTTH rollout information is also needed by access seekers.
207. Vodafone supports ComReg's proposal to continue existing transparency requirements with respect to FTTC rollout, and to introduce new transparency obligations with respect to FTTH.
208. ComReg considers that Eircom should provide the specified level of information within a six-month period in advance of roll-out for planning and interconnect and/or backhaul capacity. Vodafone agrees that this is an appropriate period.
209. Vodafone agrees with ComReg's view that more granular and accurate information is required for the purposes of marketing and selling of FTTH services if access seekers are to compete effectively in the downstream market for FTTH customers.
210. Vodafone strongly agrees that it is vital for access seekers to have sufficient and timely clarity on proposed roll out areas and the number of potential customers in each area. Only with this information

will Eircom's downstream FTTC competitors be in a position to plan and execute operational and sales activities.

211. Vodafone supports the phased timing for release of relevant information specified in ComReg's Consultation.⁶⁷ As ComReg has stated, this is essential to prevent Eircom's downstream businesses from gaining a first mover advantage through receipt of vital information in advance of its downstream competitors in relevant markets.

Proposed transparency requirement with respect to physical network planning information

212. Vodafone supports the introduction of a transparency requirement for new Eircom CEI deployments. Again, this is necessary to prevent Eircom from gaining a first mover advantage, and to allow its downstream competitors to plan their own network rollout and subsequent sales and marketing activities.

Transparency with respect to CEI engineering planning and design rules

213. Vodafone supports the proposed obligation on Eircom to make transparent the engineering and design rules that relate to the management of duct, chambers and pole space. We agree that this is needed so that access seekers can determine their own network build implementation.

Proposed transparency requirement with respect to product development

214. Vodafone has serious misgivings with respect to existing arrangements for product development.
215. It is hard for Vodafone to fully understand product development activity as discussed at industry fora. The engagement at the product forum and industry forums does provide overviews of the Product development process and details are set out on the openeir website however we remain concerned that we have limited transparency around prioritisation and development calls.
216. We support the moves towards greater transparency around the development of regulated wholesale products. We agree with ComReg that this is particularly important for the promotion of competition.
217. Vodafone therefore welcomes the highly specific requirements for product development transparency set out in ComReg's consultation.⁶⁸
218. **Vodafone further considers that Eircom's regulated wholesale product development needs to be tracked and enforced by ComReg. Only with ComReg's involvement do we see a prospect for a fair and transparent project development process in practice.**

Transparency requirement regarding trials

219. Trials are a key part of new product development. Therefore, it is vital that access seekers have the opportunity to participate in trials. To enable this to happen, access seekers need sufficient information on proposed trials, in a timely manner, so that they can make an informed decision over whether to participate in the proposed trial.
220. Vodafone therefore supports the criteria proposed by ComReg for the establishment of trials,⁶⁹ following a standard process before the trial can commence.
221. ComReg is not proposing that these criteria should constitute an obligation. Given Eircom's ability and incentive to use trials to favour its own downstream businesses, Vodafone considers that the criteria do need to be part of an obligation placed on Eircom with a threat of sanction for non-compliance.

⁶⁷ §§8.532 to 8.534 of the ComReg Consultation.

⁶⁸ §§8.564-8.566 of the ComReg Consultation.

⁶⁹ §8.570 of the ComReg Consultation.

222. Vodafone also agrees with the proposed obligation for the notification of trials, as specified by ComReg.⁷⁰

Transparency requirement to facilitate the legitimate sharing of confidential and/or commercial information through a non-disclosure agreement

223. Vodafone agrees with ComReg's proposal to ensure that obligations are in place to govern the necessary sharing of confidential information.

Proposed price control and cost accounting remedies

Cost orientation obligation

224. In the absence of relevant remedies in the WLA market, Eircom has the ability and incentive to disadvantage its rivals by charging wholesale prices that are above the efficient level of costs and/or engaging in a margin squeeze. On this basis, Vodafone agrees with the principle of imposing cost orientation remedies in the WLA Market. The key policy objectives of a well-designed cost-orientation remedy would be to:
- a) Prevent Eircom from setting excessive charges for WLA services, where it has SMP while providing incentives for it to increase its efficiency;
 - b) Ensure that prices are subject to appropriate controls whilst still encouraging Eircom to maintain service quality and innovation in WLA services;
 - c) Promote efficient and sustainable competition in the delivery of downstream retail services which rely on the relevant wholesale inputs in the WLA market;
 - d) Provide regulatory certainty for Eircom and its customers and to avoid undue disruption;
 - e) Encourage investment and innovation by all operators in the relevant markets; and
 - f) Ensure that the delivery of the regulated services is sustainable, in that the prevailing prices provide Eircom with the opportunity to recover all of its relevant costs (where efficiently incurred), including its cost of capital.
225. The current cost orientation obligations are imposed on LLU, SLU Line Share, CEI (duct and pole access), Dark Fibre, backhaul, unbundled access to the fibre loop, co-location, interconnection and ancillary services.⁷¹ These obligations were first specified in the 2010 WPNIA Decision and further amended in the 2013 NGA Decision and the 2016 Access Pricing Decision.⁷² Vodafone agrees with ComReg's proposal to continue to re-impose the current pricing obligations in the WLA market, subject to the below considerations.⁷³

⁷⁰ §8.573 of the ComReg Consultation.

⁷¹ §8.20 of the ComReg Consultation.

⁷² In the 2016 Access Pricing Decision ComReg, amongst other things, updated the existing copper access pricing model to include the additional services and costs involved with Dark Fibre and CEI (duct and poles). Furthermore, ComReg aligned its model with the proposals of the Commission's 2013 Non-Discrimination Recommendation where reusable assets (ducts and poles) are now valued using Eircom's top-down costing data, while non-reusable assets (cables) are valued using a bottom-up long run average incremental (BU-LRAIC+) methodology (§8.616 of the ComReg Consultation).

⁷³ § 8.617 of the ComReg Consultation.

226. We also support ComReg's proposal to extend the current cost orientation price control obligations to FTTC based VUA.⁷⁴ Such a price control obligation is now called for and will provide price certainty to all operators. Furthermore, it is now easier to forecast the demand and associated costs of these services.
227. More importantly, ComReg's own analysis shows that, based on recent price changes, Eircom's wholesale and retail prices are not effectively constrained in this market.⁷⁵ Eircom has increased its NGA wholesale prices twice since the launch of NGA services in 2013. In July 2015 Eircom increased the VUA monthly price by €2. Furthermore, from 1 September 2016 Eircom increased the rental price of for FTTC based VUA by €3.50 and the monthly rental price for FTTH based VUA by around €3.00. Similarly, Eircom also increased its retail broadband prices for NGA. The wholesale price increases have had the effect of significantly increasing our cost of delivering voice and broadband services to our customers – however, given ComReg's decision to reduce the pricing of WLR products,⁷⁶ Eircom's cost base for serving the same retail customers has not been affected.
228. These wholesale price increases are not supported by any evidence of increases in Eircom's cost base and are therefore a key example of Eircom's ability to 'squeeze' operators seeking to compete with Eircom based on alternative voice technologies. **Vodafone therefore urges ComReg to closely scrutinise Eircom's cost base** when further specifying the details of the cost orientation obligation for FTTC based VUA services in its Separate Pricing Consultation.
229. We agree with ComReg's proposal that the current cost-orientation obligations should continue to apply to current and next generation ancillary (migrations, fault repairs and connections)⁷⁷ and interconnection services (including WEILS).⁷⁸ These are important components in the WLA market which allow alternative operators to compete with Eircom by interconnecting to its network and if not subject to a price control obligation, would be at risk of excessive pricing.
230. Although ComReg does not propose to impose a cost orientation obligation on FTTH based Bitstream services,⁷⁹ we note that SPs such as Vodafone, who will be relying on these more in the future, might be at risk of excessive pricing by Eircom. Vodafone therefore **urges ComReg to monitor the market closely during the lifetime of this review and reconsider the need for a cost orientation obligation should the demand for FTTH based Bitstream services becomes more predictable**.

Margin squeeze obligation

231. A margin squeeze can occur where a dominant undertaking with SMP sets too high a wholesale price (where the relevant wholesale product is not subject to a cost orientation obligation) and/or where it sets its retail prices at a level which does not allow an SP to cover its (efficiently incurred) downstream costs (e.g. sales, marketing etc.). In the long-term, if an SP is not able to economically replicate dominant undertaking's retail, and/or other relevant downstream services, it may exit the WLA market (or potential entrants may be deterred from entering the WLA and/or other downstream markets).
232. Under ex-post competition law a dominant undertaking is prevented from engaging in margin squeeze. However, in circumstances where the regulator is concerned with the development of a competitive market, which would otherwise not develop, an ex-ante margin squeeze obligation is more appropriate as it enables *a*) all operators in the market to have clarity on practices which are not allowed and *b*) the

⁷⁴ § 8.627 of the ComReg Consultation.

⁷⁵ § 8.626 of the ComReg Consultation.

⁷⁶ ComReg decision, 16/39. Based on a new cost model, the price of the WLR product was decreased from €18.02 to €15.81 (e.g. by €2.11).

⁷⁷ § 8.629 of the ComReg Consultation.

⁷⁸ § 8.631 of the ComReg Consultation.

⁷⁹ § 8.624 of the ComReg Consultation.

regulator to intervene in a timely manner. With the above discussion in mind, Vodafone agrees with the principle of imposing a general margin squeeze obligation on Eircom who, as the dominant provider upstream, has the incentive and ability to engage in margin squeeze.

233. Currently, Eircom is subject to a margin squeeze obligation pursuant to the 2010 WPNIA Market Decision and 2013 NGA Decision.⁸⁰
234. Furthermore, in its consultation ComReg is proposing that Eircom shall not cause a margin squeeze:⁸¹
- a) Between the wholesale prices of WLA services in the WLA market and WCA services in the WCA Markets;
 - b) Between the wholesale prices of FTTH based VUA in the WLA market and FTTH based NGA Bitstream services in the WCA Markets;
 - c) Between the retail prices of broadband services (both on a standalone and in a bundle) and the relevant WLA services (in the WLA market in areas corresponding to the Urban WCA Market). This obligation would apply to all WLA services including CG and FTTx based services.
235. Vodafone will comment on the specific margin squeeze obligations proposed by ComReg, in the WLA Market, as part of its Separate Pricing Consultation. In order for Vodafone to provide constructive comments, **Vodafone calls on ComReg to set out clearly in its Separate Pricing Consultation a) the competition concerns the different margin squeeze tests are aiming to address and b) the reasons as to why the relevant (existing and/or proposed) cost orientation obligations would fail to provide adequate protection for the concerns identified.**
236. Vodafone also calls on ComReg to ensure that the overall proposed price control framework, including the specific cost orientation and margin squeeze obligations, is not overly complicated both to ensure adequate monitoring once implemented and to avoid opportunities for gaming by Eircom.

Cost accounting obligation

237. In order to monitor a dominant provider's compliance with its cost orientation and margin squeeze obligations, it is important that there is a clear and comprehensive understanding of its costs and how these are attributed to different parts of its activities. In order to accomplish this, an appropriate cost accounting system must capture all relevant financial, operational and other information necessary to prepare and present financial information. Moreover, cost accounting rules can relate to charge controls, the recovery of costs and cost orientation.
238. Such an obligation needs to also be forward looking. As new products and services are supplied the current financial reporting obligations on an incumbent will need to be amended to encompass these.
239. We therefore agree with ComReg's proposal that Eircom should continue to be subject to a cost accounting obligation.⁸² ComReg can only effectively monitor Eircom's compliance with its cost orientation and margin squeeze obligations, if it can assess in detail Eircom's costs associated with the provision of its regulated WLA services. This will ensure that Eircom continues to maintain appropriate cost accounting systems to justify its prices and costs of WLA services.

⁸⁰ §8.21 of the ComReg Consultation.

⁸¹ §8.679 of the ComReg Consultation.

⁸² §8.679 of the ComReg Consultation.

Proposed accounting separation remedies

240. In order to monitor a dominant provider's compliance with its non-discrimination obligations it is important that there is transparency between the financial performance of its regulated and unregulated activities. Amongst other things, the dominant undertaking needs to make transparent its wholesale prices and internal transfer prices, i.e., to demonstrate that it is not unduly discriminating against SPs. In practice, this means that it is obliged to produce financial statements that reflect the performance of markets as though they were separate businesses.
241. Appropriate accounting separation obligations may be imposed on the dominant provider in respect of the provision of network access, the use of the relevant network and the availability of relevant facilities.
242. We agree with ComReg's proposal that Eircom should be subject to accounting separation obligations.⁸³ This will ensure that ComReg is able to monitor whether Eircom has allocated costs correctly to the relevant WCA services and products.

Proposed requirement for a Statement of Compliance⁸⁴

243. ComReg is proposing that Eircom should be obliged to provide a Statement of Compliance (SoC) to ComReg with respect to all regulatory obligations imposed in the WLA market. It is also proposing that Eircom should be required to publish the SoC, subject to removal of confidential information, so that it can be scrutinised by access seekers. It is also looking to specify timelines for the preparation of the SoC, and levels of certification needed to ensure that the statements contained within the SoC can be relied upon.
244. Vodafone supports the obligation on Eircom to produce a SoC. Given the complexity of the regulations, and the difficulty in ensuring sufficient transparency in all areas to enable detection of possible breaches, an SoC can provide an additional layer of assurance in this challenging area.
245. However, no matter how comprehensive ComReg makes the obligation to produce a SoC, it will always be a system of self-certification imposed on an organisation that does not have the incentive to comply, and does not have the incentive to fully discover and reveal the extent of any non-compliance.
246. Vodafone is concerned that the level of self-certification may prove insufficient, and therefore considers that the final SoC should be signed off by the Eircom Chief Executive and its Board.
247. Of itself, the production of a SoC does not incentivise compliance. The limited reach of such a mechanism is clearly demonstrated by the history of Eircom's Styles report, which found multiple instances of non-compliance, and thus demonstrates that this system cannot be relied upon to prevent prohibited practices, even if it can assist in ex-post identification.
248. It is for this reason that the transparency obligations placed on Eircom should, wherever possible, provide sufficient information to allow access seekers to detect and report discriminatory or other non-compliant practices. We also reiterate our view that information relied on for this purpose as part of the transparency obligations needs to be audited by an independent third party.
249. Where the SoC finds issues, these then need to be pursued by ComReg through enforcement action that includes financial penalties where breaches are found. Only in this way can Eircom be incentivised to comply with the regulations.

⁸³ § 13.336 of the ComReg Consultation.

⁸⁴ §§8.686 to 8.725 of the ComReg Consultation.

250. Yet, this necessity itself reveals one of the limitations of the SoC approach: if the outcome of an SoC can be enforcement action (as must be the case if it is to be effective), then Eircom will be conflicted in the production of the report given the difficulties that arise where there is a possibility of self-incrimination.
251. Therefore, while Vodafone supports the obligation on Eircom to produce a SoC, given its ability to add an additional layer of assurance, **Vodafone urges ComReg to recognise the inherent limitations of this approach. ComReg must therefore continue to pursue with vigour the other activities that can support compliance and therefore good competitive and consumer outcomes, including:**
- a) Transparency obligations that enable access seekers to detect, as far as possible, breaches in regulations;
 - b) Where there are suspected infringements, the threat of vigorous enforcement action with penalties that would make non-compliance an unprofitable activity for Eircom;
 - c) For service delivery, an SLA regime that is designed to prevent evasion (through, for example, the invoking of 'storm mode') and with payments sufficient to incentivise investment in network and people to deliver a high-quality service to end users; and
 - d) For non-discrimination remedies, a form of functional separation that allows relations between the different parts of Eircom to be observed and any discriminatory practices to become harder to sustain.

WCA Markets

252. In this section, we comment on ComReg's assessment of competition in the WCA market along the three main dimensions of its analysis including market definition, SMP assessment and remedies.
253. We have instructed Compass Lexecon to assess the merits of ComReg's finding that there is a competitive Urban WCA Market in Ireland. Therefore, when replying to ComReg's specific question in relation to this market we refer to Compass Lexecon's expert report (where necessary and appropriate), rather than repeating its conclusions below.

Vodafone broadly agrees with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Markets

Question 8: Do you agree with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Market to the extent that it informs the analysis of the WCA Market? 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.

254. Vodafone broadly agrees with ComReg's preliminary conclusions on the assessment of the Modified Retail Broadband Markets, as used to inform the WCA Market analysis.⁸⁵
255. ComReg examined the Retail Broadband Market absent any wholesale regulation in Section 4 of its consultation and we have provided our views under Question 2 of this response. In Section 9, ComReg

⁸⁵ §9.31 of the ComReg Consultation.

examines the “Modified Retail Broadband Market”, in the hypothetical case of WLA remedies being in place (but not WCA remedies). This is to inform ComReg’s analysis of the WCA Market.⁸⁶

256. We agree that the Modified Retail Market includes the same products as the retail market set out in Section 4 of ComReg’s Consultation.⁸⁷ We agree that the product market should continue to include all fixed point asymmetric retail broadband products of any speed, whether provided over copper, FTTC, FTTH and CATV networks. These products have sufficiently similar characteristics for the purpose of market definition, and agree that there is likely to be a chain of substitution between them. We also agree that retail broadband products provided over 3G and 4G networks, satellite networks and FWA networks and leased lines are not effective substitutes and therefore do not form part of the Modified Retail Broadband Market.
257. We recognise that there is the potential for differences in the competitive intensity according to geography. ComReg has found that there is geographic variation in entry conditions, broadly tracking population density – Virgin Media’s network is mainly available in urban areas, while SIRO announced that its FTTH network roll-out will include 50 large towns.⁸⁸ ComReg has also found variations in operator market shares by geography.⁸⁹ However, ComReg has not identified any geographic variations in the pricing of the retail broadband services offered to end users.
258. Accordingly, ComReg states that although it recognises the possibility of sub-geographic markets (in the Modified Retail Broadband Market), given the lack of product or pricing variation, states that it leaves the question open.
259. Products derived from wholesale broadband networks (including voice, broadband and TV) are marketed and sold at a national level. National challengers to Eircom’s potential dominance for these products rely on being able to offer service throughout Ireland, typically at a price that can vary by product but otherwise does not vary by geography.
260. If regulation delivers a wholesale product set that is varied geographically, in a way that means major national SPs have gaps in their ability to replicate (technically and/or economically) Eircom’s product offers within some geographies, this could seriously undermine competition in the retail market and the investment and innovation that flow from it. Any consideration of geographic variations in the market definition, the SMP designation and the remedies to be implemented in the WCA market must take account of the need to ensure nationally focused competitors can, in principle, maintain a national footprint. We consider this further in our discussion of the WCA Markets.

Vodafone does not agree with ComReg’s preliminary conclusions on the product assessment for the WCA Markets

Question 9: Do you agree with ComReg’s preliminary conclusions on the product assessment for the WCA 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.

⁸⁶ §§9.1 and 9.2 of the ComReg Consultation.

⁸⁷ §§9.4 and 9.5 of the ComReg Consultation.

⁸⁸ §§9.10 to 9.21 of the ComReg Consultation.

⁸⁹ §§9.22 to 9.24 of the ComReg Consultation.

261. Vodafone agrees with Compass Lexecon’s conclusions on ComReg’s competitive assessment in the context of the product market definition.⁹⁰
262. Vodafone disagrees with ComReg’s preliminary conclusions on the product assessment for the WCA Markets. In particular, we are concerned that the evidence does not support the inclusion of SIRO, Virgin Media and Vodafone as providing an effective competitive constraint in the WCA Markets.⁹¹
- 263. Vodafone therefore calls on ComReg that SIRO (as a potential competitor) and Virgin Media/Vodafone (as indirect competitors) are given much less weight in the assessment of competitive constraints.**

Vodafone does not agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA Markets

Question 10: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the WCA 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.

264. Vodafone agrees with Compass Lexecon’s conclusions on ComReg’s competitive assessment in the context of the geographic market definition.⁹²
265. **Vodafone disagrees with ComReg’s preliminary conclusion that there are two distinct geographic WCA Markets: The Urban WCA Geographic Market (including 88 exchange areas) and the Regional WCA Geographic Market (including 1,129 exchange areas).**⁹³
266. We are concerned that ComReg has undertaken its analysis by assuming that the WCA Market is local in scope and then has proven this by applying its proposed criteria in a mechanistic way. In our view, ComReg has not undertaken the requisite analysis to show that there are two distinct geographic WCA Markets.
267. Based on its own experience, Vodafone believes the WCA Market to be national in scope. First, Eircom follows a national pricing approach – we have not come across any geographically differentiated pricing. Second, Vodafone faces considerable practical challenges in identifying an alternative supplier of WCA products which would allow it to compete with Eircom’s retail offers on a national basis.

Vodafone does not agree with the assessment of SMP in the Urban WCA Market as defined by ComReg

Question 11: Do you agree with ComReg’s assessment of SMP in the WCA 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.

268. Vodafone agrees with Compass Lexecon’s conclusions on ComReg’s competitive assessment in the context of the SMP analysis.⁹⁴

⁹⁰ §§ 2.1 to 2.38 of the Compass Lexecon expert report.

⁹¹ §§10.133 and 10.175 of the ComReg Consultation.

⁹² §§ 3.1 to 3.42 of the Compass Lexecon expert report.

⁹³ §§10.173, 10.176 of the ComReg Consultation.

269. Vodafone does not agree with the delineation between the Urban and Regional WCA Markets, and therefore does not agree with the assessment of SMP in the WCA Market, where ComReg preliminary conclusion is that Eircom has SMP in the Regional WCA Market only (as defined by ComReg).⁹⁵
270. **As such, Vodafone considers the WCA Market to be national in scope. We call on ComReg to designate Eircom as having SMP in this market, given its WCA product is not competitively constrained due to a lack of viable alternative scenarios.**

Vodafone agrees that the competition problems and the associated impacts on competition identified are those which could potentially arise in the Regional WCA Market

Question 12: Do you agree that the competition problems and the associated impacts on competition and consumers identified are those which could potentially arise in the Regional WCA Market (and related 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.

271. We have outlined the competition problems which are likely to arise in a market which is not competitive, and the likely impact of this on competition and consumers, in detail as part our response to the relevant question on the WLA Market.
272. The same considerations are equally relevant for the Regional WCA Market and we therefore refer ComReg to our answer to Question 6.

Vodafone agrees with ComReg's proposed remedies in the Regional WCA Market

Question 13: Do you agree with ComReg's proposed remedies in the Regional WCA 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.

273. Vodafone agrees with ComReg's proposed remedies in the Regional WCA Market. As with our response relating to the WLA Market (Question 7), there are several areas where there would be merit in tightening the proposed remedies.
274. Furthermore, as we have done elsewhere in this response, we believe ComReg's analysis that there is a separate Urban WCA Market with no finding of SMP is flawed. As a result, inappropriate deregulation of the area covered by the 88 exchanges identified as being part of the Urban WCA Market would seriously damage Vodafone's commercial position in the national market and our ability to compete and invest.
275. Our response to Question 13 of ComReg's consultation document therefore, while corresponding to Vodafone's views on the proposed remedies for the Regional WCA Market, would also constitute Vodafone's position on remedies that should be in place were ComReg to instead designate a single national WCA Market.
276. In our response to Question 7 on proposed WLA remedies, **[Confidential text removed]**

⁹⁴ §§ 4.1 to 4.13 of the Compass Lexecon expert report.

⁹⁵ §11.130 of the ComReg Consultation.

277. However, our ability to deliver to this vision, and play our part in a modern digital Ireland, depends entirely on the suite of access remedies implemented as a result of this market review. And they also depend on the supporting activity needed to ensure that Eircom adheres fully to its access obligations, and does so in a way that facilitates the ability of access seekers to invest and compete fairly.
278. This includes provisions for a sufficient separation between Eircom’s dominant upstream businesses and its downstream businesses operating in more competitive markets. It also means that ComReg will need to remain involved throughout some of the key negotiations that are to follow, such as for the development of fit-for-purpose SLAs that incentivise quality delivery by Eircom, and the development of a usable set of CEI products. Finally, it requires that Eircom know that there is a significant downside if it fails to have adequate compliance systems in place. And this in turn means that ComReg must be willing and able to investigate non-compliance and impose significant financial penalties where breaches are found.
279. In our response to Question 13, we outline our specific comments on ComReg’s proposed remedies under the following heading:
- a) Access;
 - b) Transparency;
 - c) Non-discrimination;
 - d) Price control;
 - e) Cost accounting and accounting separation; and
 - f) Statement of Compliance.
280. Where the issues raised are similar to those considered as part of the WLA remedies discussion, we refer to our response to Question 7.

Proposed access remedies⁹⁶

281. Vodafone agrees with the remedies proposed by ComReg.⁹⁷ Eircom is dominant in the WCA market and this means that a full set of access remedies is needed for challengers to gain access to their customers.
282. There are also other associated remedies required to ensure that the access granted is fit-for-purpose and able to support full and effective competition.
283. Vodafone remains concerned, however, that Eircom may still be able to distort competition in downstream markets where there are practices that are difficult to detect or where it can delay required improvements, such that irreparable damage is caused to those seeking to use WCA products to challenge the incumbent.

Requirement to meet reasonable requests for access

284. Vodafone agrees with a requirement to meet reasonable request for access to WCA products, services and associated facilities. Ex-ante obligations are required as a combination of dispute resolution and competition law would be ineffective in ensuring competitors can have the access they need in order to compete with Eircom in downstream markets.

⁹⁶ §§13.32 to 13.181 of the ComReg Consultation.

⁹⁷ §13.179 of the ComReg Consultation.

Requirement to provide access to specific WCA products

285. ComReg lists the specific WCA products to which it considers Eircom should be required to provide access.⁹⁸ The product set includes FTTH, FTTC and exchange launched product variants, as well as CG and NG Bitstream products offered on a standalone basis.
286. We agree with the specific WCA products which ComReg proposes Eircom must supply.
287. Vodafone relies on these products **[Confidential text removed]**.
288. We do not believe that there is a prospect of effective competition in these 88 exchanges and consider that Vodafone would be severely disadvantaged in the national retail broadband market as a result. We note that this would be a direct consequence of Eircom's dominance and the serious gap in regulation that would result if there is deregulation of the urban WCA market as defined by ComReg.⁹⁹
289. As we mention in our response to Question 7, **a partial mitigation of the damage done through patchy availability of competitive CGA WCA products would be for Eircom to be obliged to deliver a CGA variant of VUA, which would allow Vodafone to continue to serve its CGA customers in the event of de-regulation in the 88 exchanges in the Urban WCA market.**

Requirement to provide access to backhaul

290. Vodafone agrees with ComReg's analysis that backhaul services, and associated interconnection services, are required to transport end users' traffic to and from the point of handover with the access seeker. Vodafone therefore supports the inclusion of backhaul access obligations in the WCA market.

Requirement to provide access to migration services including Bitstream soft migrations

291. We set out in our answer to Question 7 – in paragraphs 85 to 92 – Vodafone's agreement that migrations are an essential component of a fit-for-purpose access obligation. As we explain in that section, without effective migrations it is simply not possible for challengers such as Vodafone to use Eircom's access products to compete for customers, to invest and maintain the customer base accordingly, or to meet customer demand for new and better products.
292. Vodafone also agrees with ComReg's proposal to introduce a 'Bitstream Soft Migration' facility, similar to the one developed for LLU Soft Migrations. It is hugely inefficient, and an artificial impediment to access seekers, if migration volumes are limited by the absence of this feature.

Requirement to provide access to interconnection services, flexible interconnect and co-location

293. We set out in our answer to Question 7 – in paragraphs 93 to 97 – Vodafone's view that interconnection services are an essential component of a fit-for-purpose access obligation. As with the WLA market, Vodafone supports the WCA obligation to provide interconnection services as proposed by ComReg.
294. We also agree that the full suite of proposed interconnection services is required to ensure there is sufficient flexibility to meet the varying needs of different access seekers that have followed different

⁹⁸ §13.50 of the ComReg Consultation.

⁹⁹ While Vodafone would, in theory, be able to purchase WCA products from BT Ireland in these exchanges, our strongly held view is that in a deregulated market, BT's WCA products would also not be competitively constrained in the absence of price regulation on Eircom's WCA products. We also observe that it would be far from costless for Vodafone to dual source from Eircom and BT Ireland, with significant development cost and increased complexity that would risk creating a poor end user experience. We discuss this in more detail in our answer to Question 7 above, in paragraphs 76 to 82 and in footnote 47.

investment approaches, or are at a different stage in their development through the ladder of investment.

295. Vodafone also supports the requirement to provide flexible interconnection, so that access seekers can choose a point in the network that is economically feasible and reduces unnecessary backhaul costs.
296. Vodafone agrees that access seekers that have unbundled an exchange for LLU or VUA should be able to reuse their existing co-location services and facilities.

Requirement for associated facilities

297. We set out in our answer to Question 7 – in paragraphs 100 to 102 – Vodafone’s view that both multicast and CoS are required as part of the access service. We agree that the requirement is the same for those making use of regulated WCA products as it is for those purchasing regulated WLA inputs.

Requirement to negotiate in good faith

298. We set out in our answer to Question 7 – in paragraphs 117 to 118 – Vodafone’s support for a requirement to negotiate in good faith. The requirement needs to apply both to regulated WCA products and to regulated WLA products.
299. The reasoning is the same for both markets. Where access obligations are in place, it places a requirement on Eircom to supply the products needed by access so they can compete fairly in downstream markets. However, there is a history of protracted negotiations in which little progress is made and significant delays occur, which mean the purpose of the original access obligation is not realised.
300. Vodafone urges ComReg to enforce this obligation vigorously as it is pivotal to achieving the outcomes that the access remedies are intended to deliver. We also request– for particularly complex or contentious negotiations – that ComReg stays close to the negotiations so it can guide discussion and be better prepared to intervene should the negotiations not succeed, or should they lead to delays that are not acceptable.

Requirement not to withdraw access to facilities already granted

301. Vodafone supports the proposed requirement on Eircom not to withdraw access to facilities already granted, and the associated measures needed to give full effect to this requirement.

Requirement to grant open access to technical interfaces, protocols and other key technologies

302. Vodafone supports the proposed requirement to grant open access to technological interfaces, protocols and other key technologies.

Requirement to provide access to Operational Support Systems or similar software systems necessary to ensure fair competition in the provision of services

303. Vodafone supports the proposed requirement to provide access to OSS or similar software systems necessary to ensure fair competition in the provision of services.
304. Access seekers cannot compete with Eircom’s downstream businesses unless they have effective and efficient means to access the OSS. A lack of reasonable access is a mechanism by which Eircom can use its upstream dominance to distort downstream competition. It is therefore essential that OSS access is fit-for-purpose and high quality, and that access seekers have the same access as is used by Eircom’s downstream businesses.

Requirements governing fairness, reasonableness and timeliness of access

305. Vodafone supports the proposed requirement governing the fairness, reasonableness and timeliness of access.
306. In our response to Question 7 – in paragraphs 123 to 145 – we set out our view (i) that a well-functioning and effective SLA regime is key to effective competition and good consumer outcomes; and (ii) that the SLA regime in Ireland has failed.
307. The SLA regime needs to be agreed in a timely fashion and be in place at product commencement. There cannot be a situation where a key access product is being procured by access seekers where it is not accompanied by an agreed and effective set of SLAs. The consequence will necessarily be a substandard service that adversely impacts access seekers and end users, and thereby damages competition.
308. And the SLA regime – to be effective – must be designed so that (i) it always incentivises Eircom to invest in a quality of service that meets the needs of access seekers and end users; and (ii) allows access seekers to compensate their retail customers for failures and recover these and all other associated costs.
309. Vodafone reiterates its support for ComReg’s enhanced approach and the proposed new condition. As discussed in detail in our response to Question 7, this approach is clearly necessary given the significant failings to date.
310. However, we also wish to emphasise that, given the significant challenge of the task ahead, the introduction of enhanced remedies will not, of itself, be sufficient. As we discuss in our response to Question 7 – in paragraphs 141 to 145 – ComReg will need to demonstrate enhanced leadership during the negotiations, with improved oversight and a willingness to intervene formally should sufficient and timely progress not be made.
311. The success of negotiations will depend on a credible threat of enforcement action by ComReg as a response to any failure by Eircom to deliver effective SLAs within the specified time period.
312. Given the complexity of this area, the incentives on Eircom for delay, and the importance for competition and consumers, we call on ComReg to prioritise this area during the negotiation and implementation phases. ComReg will need to stay very close to industry discussions. And it will need to stand ready to guide and intervene as necessary.
313. Only if ComReg shows a willingness to move swiftly to enforcement action where progress is not made, will there be any prospect of Ireland seeing an SLA regime that is fit for the needs of a modern competitive digital infrastructure.

Requirement for timeliness of product development

314. ComReg indicates that its proposed timelines for WCA product development¹⁰⁰ are the same as the proposed WLA remedies.¹⁰¹
315. Vodafone supports the requirements proposed by ComReg and explains its position in detail in response to Question 7, in paragraphs 146 to 151.

¹⁰⁰ §13.172 of the ComReg Consultation.

¹⁰¹ §§8.354 to 8.374 of the ComReg Consultation.

316. However, as with improvements needed to the SLA regime, we do not consider that the adoption of the specified requirements for product development will of themselves be sufficient to deliver the necessary improvement.
317. Vodafone would therefore ask that, in addition to the proposed remedies, ComReg engage in direct oversight of the product development process.
318. This would serve two purposes: (i) ComReg’s presence would help guide the discussion where obstacles emerge; and (ii) where the issue ends in formal referral to the regulator, ComReg will be in a position to act to resolve in a timelier fashion owing to its direct familiarity with the issue and a stronger directly observed evidence base.
319. We believe that ComReg’s presence, and willingness to act, are required if Eircom is to deliver the changes needed in a timely fashion.

Withdrawal of access obligations imposed in the 2013 NGA Decision

320. ComReg proposes the de-regulation of two existing obligations: an in-services access obligation and an obligation to notify ComReg in advance of potential co-investment arrangements relating NGA WCA products.
321. The proposed de-regulation is due to ComReg’s view that existing general powers are sufficient to deal with the concerns that originally gave rise to the obligations.
322. Vodafone does not object to ComReg’s proposal.

Proposed non-discrimination remedies¹⁰²

323. Vodafone has set out its views on the need for non-discrimination remedies in detail in its response to Question 7 – paragraphs 155 to 179.
324. As indicated in our response to Question 7, Vodafone does not have confidence that the regime to date has been effective in preventing discriminatory practices by Eircom. Our own analysis, and evidence from the Styles report, demonstrate that behavioural remedies alone cannot deliver a regime that prevents Eircom from favouring its own downstream businesses.

Specification of the non-discrimination standards with respect to the provision of WCA

325. ComReg sets out in detail its proposals for dealing with the challenge of moving the WCA CGA customer base to an EoI standard given that many CGA customers are currently served by legacy Eircom IT systems that are not capable of serving customers via EoI.¹⁰³
326. We set out in our response to Question 7 that EoI is a pre-requisite to the success of measures intended to secure non-discrimination. We also argue that even EoI, on its own, will be insufficient. Separation of Eircom’s upstream and downstream businesses will also be needed.
327. Given this, it is a concern that under the remedies proposed by ComReg, there will be customers that continue to be served using the weaker EoO standard.
328. Nevertheless, Vodafone has considered the measures that ComReg has proposed to recognise the cost of bringing all WCA CGA customers to the EoI standard in a shorter timeframe than is proposed.

¹⁰² §§13.182 to 13.238 of the ComReg Consultation.

¹⁰³ §§13.186 to 13.234 of the ComReg Consultation.

329. The proposal that all NGA WCA products, services and facilities are to be provided to the EoI standard in all cases is welcome. Nevertheless, we note that for this measure to succeed in its intent, it will also be necessary to resolve the Eircom governance challenge and that this requires an enhanced level of separation between Eircom’s upstream and downstream businesses.
330. ComReg is proposing that all CGA WCA products, services and facilities be supplied on an EoI basis by 1 November 2018 unless otherwise agreed by ComReg. Vodafone welcomes this requirement, but we are disappointed by the extended timeframe.
331. Given the increased threat of discriminatory practices while there is any element of EoO, we do not think it is acceptable that ComReg leaves open the possibility of a further extension. If it will take until 1 November 2018 for Eircom to migrate its entire CGA WCA product set, then it needs to be on the basis of certainty of this outcome.
332. The obligation must require full migration of all customers to the new (EoI-ready) IT system by 1 November 2018, with no possibility of extension. If Eircom fails to achieve this migration, it will be in breach of its regulatory obligations and will need to face the consequences. Only if the arrangement is set up in this way will Eircom have sufficient incentive to deliver to the specified timeframe.
333. ComReg proposes a series of interim measures to mitigate the risks arising from the continued provision of service on an EoO basis for a portion of the CGA WCA customer base until 1 November 2018. These include ensuring that new CGA WCA customers are placed directly onto the new IT systems that support EoI, and that service assurance will be provided on an EoI basis for all CGA WCA customers within 6 months of the final WCA market review decision publication (though again, we object to the inclusion of an ‘unless otherwise agreed with ComReg’ exception to the obligation).
- 334. These are sensible mitigations, but are a poor substitute for a system where all customers, and all aspects of service, are provided on an EoI basis. Vodafone therefore repeats its call for ComReg to introduce a firm deadline of 1 November 2018 for completion of migration of all customers to the EoI standard, with no possibility being left open of a further extension. This is essential if the correct expectations are to be set.**

Proposed transparency remedies¹⁰⁴

335. In our response to Question 7 of ComReg’s consultation, we set out in detail our view that transparency remedies are key to the effective functioning of a market where a vertically integrated provider is dominant in the provision of services relied upon by its downstream competitors.
336. In its consultation, ComReg lists the specific remedies proposed for the WCA market.¹⁰⁵ It then explains the justification for each of these remedies by reference to the relevant discussion in the WLA discussion of remedies contained in Section 8 of the ComReg consultation document.¹⁰⁶
337. Vodafone would therefore point to paragraphs 180 to 223 of our response to Question 7 of ComReg’s consultation. This summarises our position with respect to each of the specific transparency proposals.

¹⁰⁴ §§13.239 to 12.257 of the ComReg Consultation.

¹⁰⁵ §§13.253 and 13.255 of the ComReg Consultation.

¹⁰⁶ §13.254 of the ComReg Consultation.

Proposed price control and cost accounting remedies

Cost orientation obligation

338. As discussed in detail in response to Question 7, in the absence of remedies in the relevant market where it has been designated as having SMP, Eircom would have the ability and incentive to disadvantage its rivals by charging wholesale prices that are above the efficient level of costs and/or engaging in margin squeeze.
339. **Notwithstanding its concerns about the deregulation of the Urban WCA Market, Vodafone agrees with the general principle of imposing price control and cost accounting remedies on Eircom in the Regional WCA Market.**
340. As summarised by ComReg, Eircom’s CG WCA Services (access, ancillary services and interconnection services) are currently subject to various separate cost orientation obligations, namely:¹⁰⁷
- a) A price floor obligation to ensure Eircom does not set CG Bitstream prices at a level which discourages investment in LLU.
 - b) A national and a sub-national cost orientation obligation for Outside the LEA.
 - c) Furthermore, ComReg has also set the pricing methodology and maximum prices for Stand Alone Broadband (SABB) Outside the LEA (now referred to as Regional Area 2).
341. Furthermore, ComReg proposes to modify some of the above-mentioned price control obligations in its consultation.¹⁰⁸
342. Vodafone will provide detailed comments on the cost orientation obligations in the context of ComReg’s Separate Pricing Consultation which, we hope, will include ComReg’s detailed assessment in support of its latest proposals. However, we would like to make some high-level observations.
343. As part of its 2013 Bundles Decision, ComReg defined two separate geographic WCA Markets with varying prospective competitive conditions (namely the LEA¹⁰⁹ and outside the LEA) which it subjected to different pricing remedies. ComReg now proposes to carry this distinction into the Regional WCA Market, however has not provided any justification for its proposed approach.¹¹⁰ As part of its Separate Pricing Consultation, Vodafone would expect ComReg to justify why this distinction is still relevant, particularly in light of the issues that Vodafone has raised in relation to ComReg’s proposed geographic market definition.
344. We agree, in principle, with ComReg’s proposal to extend the price control obligation to FTTC based Bitstream services (access, ancillary services and interconnection services) in the Regional WCA Market.¹¹¹ The demand for FTTC based Bitstream services is now more predictable, making it easier to forecast volumes and associated cost levels. More importantly, it will provide price certainty to operators like Vodafone who rely on these inputs and ensure that they are not at the mercy of Eircom’s unilateral price increases (as we have discussed in paragraph 28 Eircom increased NGA wholesale prices twice since their launch in 2013). Such a price control obligations will also offer the correct ‘buy/build’ signals.
345. Furthermore, **we call on ComReg to remain vigilant in relation to the following concerns and consider these further in its Separate Pricing Consultation:**

¹⁰⁷ §13.19 to 13.22 of the ComReg Consultation.

¹⁰⁸ §13.362 of the ComReg Consultation.

¹⁰⁹ Larger Exchange Area.

¹¹⁰ §13.262 of the ComReg Consultation.

¹¹¹ §13.306, 13.362 of the ComReg Consultation.

- a) Although ComReg does not propose to impose a cost orientation obligation on FTTH based Bitstream services,¹¹² we note that SPs such as Vodafone, who will be relying on these more in the future, might be at risk of excessive pricing by Eircom. We therefore urge ComReg to monitor the market closely during the lifetime of this review and reconsider the need for a cost orientation obligation should the demand for FTTH based Bitstream services becomes more predictable.
- b) Although the cost orientation obligation on CG WCA services mitigates the risk of cross-subsidy between the Regional and Urban WCA Markets, it does not remove the risk of Eircom allocating (and therefore recovering) more of its fixed and common costs through the regulated Regional WCA market. ComReg needs to closely scrutinise Eircom's cost allocation between the Regional and Urban WCA Markets in its Separate Pricing Consultation.

Margin squeeze obligation

346. We agree with ComReg's view that a general margin squeeze obligation continues to be appropriate in the Regional WCA Market.¹¹³ For a more detailed discussion of our views on this obligation, we refer ComReg to our response to Question 7 in relation to the WLA Market.
347. Currently, in the WCA Market, Eircom is subject to obligations not to cause:¹¹⁴
 - a) A retail margin squeeze between the price for retail CG broadband and the price for wholesale CG Bitstream services in both the LEA and outside the LEA (referred to as Regional Area 1 and Regional Area 2 in ComReg's Consultation).¹¹⁵
 - b) A wholesale margin squeeze between the price of End-to-End CG Bitstream and the price of the associated WBA regulated components.¹¹⁶
 - c) A wholesale margin squeeze between price of End-to-End NG Bitstream and the price for NGA Bitstream.¹¹⁷ This test ensures that the price of end-to-end NG Bitstream is greater than the price of NGA Bitstream and therefore the investment case for LLU/VUA is not undermined.
 - d) A retail margin squeeze between the retail price of the NGA retail product (s) and the price for NGA Bitstream.¹¹⁸
348. Furthermore, ComReg proposes to modify some of the above-mentioned margin squeeze obligations in its consultation.¹¹⁹
349. Although Vodafone agrees with the principle of imposing a general margin squeeze obligation on Eircom in this market, we will provide further detailed comments on ComReg's specific proposals in the context of its Separate Pricing Consultation.

Cost accounting obligation

350. We agree with ComReg's proposal that Eircom should be subject to a cost accounting obligation in the Regional WCA Market.¹²⁰ ComReg can only effectively monitor Eircom's compliance with its cost

¹¹² §13.312 of the ComReg Consultation.

¹¹³ §13.319 of the ComReg Consultation.

¹¹⁴ §13.362 of the ComReg Consultation.

¹¹⁵ §13.321 and 13.322 of the ComReg consultation. Details of this margin squeeze test are set out in Chapter 7 of ComReg's 2014 WBA Pricing Decision (D11/14).

¹¹⁶ §13.329 of the ComReg Consultation. The specific margin squeeze test is set out in ComReg's 2012 WBA Price Floors Decision (D06/12).

¹¹⁷ §13.336 of the ComReg Consultation and as further set out in ComReg's 2013 NGA Decision (D03/13).

¹¹⁸ § 13.334 of the ComReg Consultation and as further set out in ComReg's 2013 NGA Decision (D03/13).

¹¹⁹ §13.362 of the ComReg Consultation.

orientation obligation, if it can assess in detail Eircom's costs associated with the provision of its regulated WCA services. This will ensure that Eircom continues to maintain appropriate cost accounting systems to justify its prices and costs of WCA services.

351. Furthermore, we also agree with ComReg's proposal, that Eircom should be required to provide revenue and cost data for the Urban WCA Market.¹²¹ This will ensure that ComReg is able to monitor Eircom's compliance with its various margin squeeze obligations.
352. For a more detailed discussion, we also refer ComReg to our response to Question 7 in relation to the WLA Market.

Proposed accounting separation remedies

353. We agree with ComReg's proposal that Eircom should be subject to accounting separation obligations in the Regional WCA Market.¹²² This will ensure that ComReg is able to monitor whether Eircom has allocated costs correctly to the relevant WCA services and products.
354. For a more detailed discussion, we also refer ComReg to our response to Question 7 in relation to the WLA Market.

Proposed requirement to provide Statements of Compliance¹²³

355. ComReg is proposing that Eircom should be obliged to provide a Statement of Compliance (SoC) to ComReg with respect to all WCA regulatory obligations.
356. ComReg is proposing identical SoC obligations for WCA as it is for the WLA market.¹²⁴
357. Vodafone supports the obligation on Eircom to produce a SoC in the WCA Markets. Given the complexity of the regulations, and the difficulty in ensuring sufficient transparency in all areas to enable detection of possible breaches, an SoC can provide an additional layer of assurance in this challenging area.
358. However, there are limitations to how much we can rely on a SoC, as ultimately it is a system of self-certification issued by an organisation that does not have full incentives either to comply, or to report publicly on instances of non-compliance. We therefore consider that there are some enhancements that sit alongside a SoC requirement that would help make it more effective.
359. We refer ComReg to our detailed response to Question 7, in paragraphs 243 to 251, for a full description of our position.

Vodafone does not agree with the proposal for a six-month sunset period

Question 14: Do you agree with the above proposals to maintain requirements upon Eircom to continue to provide existing access at prevailing prices during a six month sunset period? Please

¹²⁰ §13.355 of the ComReg Consultation.

¹²¹ §13.357 of the ComReg Consultation.

¹²² §13.336 of the ComReg Consultation.

¹²³ §§13.367 to 13.376 of the ComReg Consultation.

¹²⁴ §§13.368 to 13.374 of the ComReg Consultation.

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.

360. **Vodafone disagrees with ComReg’s preliminary proposal for a six-month sunset period, coupled with the fact that Eircom would not be obliged to meet new requests for WCA inputs on a regulated basis.**¹²⁵
361. As discussed in detail above, we do not agree with ComReg’s assessment of competitive constraints in the Urban WCA Market and its proposal to deregulate it. Vodafone is very concerned about access seekers’ ability to serve the market as this will leave significant gaps in availability of access products needed to serve customers in these exchange areas. ComReg is proposing to remove the regulatory backstop when competitive supply is insufficient.
362. Vodafone does not believe a six-month sunset period would be sufficient **[Confidential text removed]**:
- a) **[Confidential text removed]**
 - b) **[Confidential text removed]**
 - c) **[Confidential text removed]**
 - d) **[Confidential text removed]**
 - e) **[Confidential text removed]**
363. **Vodafone therefore calls on ComReg to implement a transition period of 12 months from the date of ComReg’s final Decision.** In addition, ComReg should get a definitive statement and commitment on open eir’s system and field force capabilities/limitations per product and how they can be ‘flexed’ to meet a ‘bow wave’ of orders seeking to move way from open eir. ComReg would need to model a worst-case migration scenario and open eir’s commitment to support. ComReg should also bear in mind that Access Seekers will most likely be procuring WCA products from providers that purchase WLA from open eir.
364. Furthermore, we also disagree with the proposal that Eircom should not be obliged to meet new requests for WCA inputs during the sunset (or transitional) period. **[Confidential text removed]**
365. **Vodafone therefore calls on ComReg to require Eircom to meet new requests for a WCA inputs on a regulated basis during the sunset (transitional) period.**

Regulatory Impact Assessment

Question 15: 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.

366. Vodafone agrees with the Regulatory Impact Assessment (RIA) in the round. It captures the benefits and risks of different options for remedies where there is SMP, and concludes correctly that it is justifiable to maintain Access, Transparency, Non-Discrimination, Price Control and Cost Accounting and Accounting Separation obligations in both the WLA and Regional WCA Markets (Referred to as

¹²⁵ §§14.8 and 14.9 of the ComReg Consultation.

Option 4 by ComReg).¹²⁶ We note that no one of these obligations would be sufficient to address all of the competition issues identified by ComReg – they are all required and are complementary to each other.

367. Furthermore, and as we have discussed elsewhere in our response, there are certain remedies that need refining and improving. Introducing these improvements will greatly increase the effectiveness of the proposed remedies.
368. **Vodafone disagrees with ComReg’s preliminary conclusion that no undertaking has SMP in the Urban WCA Market** (and that the RIA has not been extended to consider relevant regulatory obligation in respect of this market).¹²⁷ We stress the negative impact that will result from the incorrect market definition proposed for the Urban WCA Market. In particular, where there is deregulation of WCA in particular Exchange Areas where ComReg has incorrectly concluded that Eircom’s WCA product will be constrained by competition, there will be severe consequences. In the presence of SMP, and absent any regulatory obligations, Eircom has the ability and incentive to engage in exploitative and/or exclusionary behaviour. The Urban WCA Market is likely not to function effectively, to the detriment of Irish consumers and businesses.

¹²⁶ §§15.57 and 15.94 of the ComReg Consultation.

¹²⁷ §15.100 of the ComReg Consultation.

A report prepared for Vodafone Ireland

Assessment of ComReg's finding of a competitive Urban WCA Market in consultation 16/96

30 January 2017

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Glossary

Term	Definition
Alternative Network Operators	Operators that have networks that exist independently of WLA and WCA regulation. ComReg includes Virgin and SIRO in this category
CATV	Cable Access Television Network
CBP	Countervailing Buyer Power
CGA	Current Generation Access, i.e. copper-based access
CLT	Critical Loss Test
Commission	The European Commission
CPE	Customer Premise Equipment
ESB	Electricity Supply Board, an Irish energy company
FTTx	Fibre to the Cabinet (FTTC) or Fibre to the Home (FTTH)
HM	Hypothetical Monopolist
LLU	Local Loop Unbundling
NGA	Next Generation Access, i.e. fibre based access
Primary Operator	ComReg considers Eircom, BT Ireland, SIRO, Vodafone, and Virgin Primary Operators due to their potential to exert an effective competitive constraint
SMP	Significant Market Power
SP	Service Provider
SSNIP	Small but Significant Non-transitory Increase in Price
UPC	UPC Ireland, rebranded to Virgin Media
VUA	Virtual Unbundled Access
VULA	Virtual Unbundled Local Access
Virgin	Virgin Media
WCA	Wholesale Central Access, i.e. wholesale access
WLA	Wholesale Local Access, i.e. unbundled access

Section 1

Background and introduction

Introduction

- 1.1 On 11 November 2016 ComReg issued its Consultation and Draft Decision (Reference: ComReg 16/96) on Wholesale Local Access (WLA) provided at a Fixed Location and Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products (the ComReg Consultation). ComReg's preliminary conclusion is that:
- a. *"Eircom has SMP in the WLA Market"*.¹ The WLA market is national.²
 - b. *"No SP has SMP in the Urban WCA Market"*.³ The proposed Urban WCA market includes 88 exchange areas for which ComReg finds that *"conditions of competition are appreciably different"* to a Regional WCA Market including Eircom's other 1,129 exchange areas.⁴ The 88 exchange areas cover 37% of premises⁵ and 47% of total broadband subscriptions.⁶ ComReg distinguishes the proposed Urban WCA market from the proposed Regional WCA Market through the application of five cumulative criteria.⁷ ComReg explains that *"by the nature of its construct, the Urban WCA Market is an area where Eircom faces greater competition"*.⁸

¹ ComReg Consultation, ¶1.12.a.

² ComReg Consultation, ¶1.34.

³ ComReg Consultation, ¶1.12.b.

⁴ ComReg Consultation, ¶A5.56 and Table 86.

⁵ ComReg Consultation, Table 25: 772,254 premises within the 88 exchange areas and 1,308,798 premises within the remaining exchange areas.

⁶ ComReg Consultation, Table 24.

⁷ ComReg Consultation, ¶1.51.

⁸ ComReg Consultation, ¶11.115.

c. “Eircom has SMP in the Regional WCA Market”.⁹ The Regional WCA Market includes exchange areas that do not meet ComReg’s abovementioned five cumulative criteria.

1.2 We have been instructed by Vodafone to assess the merits of ComReg’s finding that there is a competitive Urban WCA Market in Ireland. In practical terms, ComReg identifies exchange areas as part of the proposed Urban WCA Market if ComReg considers that there is sufficient competition in these exchange areas such that no operator has SMP.

1.3 ComReg assesses the degree of competitive pressure in three partially overlapping steps:

a. ComReg first identifies the relevant product market considering demand substitution, supply substitution, and indirect constraints. ComReg’s view of the strength of the associated constraints informs ComReg’s subsequent assessment of the geographic market definition and SMP. We consider ComReg’s competitive assessment in the context of the product market definition in Section 2;

b. ComReg then groups exchange areas that meet five cumulative criteria into an Urban WCA Market and other exchange areas into a Regional WCA Market. ComReg explains that “*by the nature of its construct, the Urban WCA Market is an area where Eircom faces greater competition*”.¹⁰ ComReg’s geographic market assessment thereby to a large extent overlaps with ComReg’s SMP assessment. We assess ComReg’s approach to classifying exchange areas as Urban or Regional in Section 3; and

c. ComReg finally assesses SMP taking into account factors already reflected in the five criteria used to define separate Urban and Regional WCA Markets as well as past pricing behaviour and countervailing buyer power. We assess ComReg’s SMP designation in Section 4.

Summary conclusions

1.4 In relation to the product market definition, we consider ComReg’s proposal to include SIRO based on supply substitution and Virgin Media (“Virgin”) and Vodafone as indirect constraints unsupported by the necessary analyses, contradicted by facts and conclusions otherwise relied upon by ComReg, and therefore likely overestimates the associated competitive pressure.

⁹ ComReg Consultation, ¶1.12.c.

¹⁰ ComReg Consultation, ¶11.115.

- 1.5 In relation to ComReg's geographic market assessment, we consider that ComReg's proposed five criteria for a number of reasons are likely to overestimate the degree of competition in the Urban WCA exchange areas such that even if the five criteria are satisfied this may not be sufficient to imply a competitive market.
- 1.6 In relation to ComReg's final SMP assessment, we consider that this is substantially impacted by the issues we identify in the context of ComReg's proposed product market definition and geographic market assessment criteria. Moreover, we consider that ComReg's assessment of past pricing conduct excludes important evidence that ComReg relies upon in other contexts within the consultation and which contradicts ComReg's conclusion on pricing behaviour in its proposed Urban WCA Market.
- 1.7 We therefore consider that ComReg's analysis overstates the competitiveness of the Urban WCA Market and that ComReg has not demonstrated that the Urban WCA Market is competitive. We note that some of the key facts that ComReg relies upon to find that Eircom has SMP in the proposed Regional WCA Market also apply to the proposed Urban WCA Market. This suggests that the proposed Urban WCA Market may not be competitive.

Statement of truth

- 1.8 We have prepared this report on the basis that our duty is to help on matters within our expertise. We are independent from the parties and their legal advisors. The assumptions upon which our opinions are based are not, in our opinion, unreasonable or unlikely assumptions.
- 1.9 We confirm that we have made clear which facts and matters referred to in this report are within our own knowledge and which are not. Those that are within our own knowledge we confirm to be true. The opinions we have expressed represent our true and complete professional opinions on the matters to which they refer.

Section 2

ComReg's competitive assessment in the context of the product market definition

Introduction

- 2.1 In its assessment of the relevant WCA product market, ComReg considers whether a given product acts as a constraint within that product's geographic footprint¹¹ on a forward looking basis.¹² ComReg does not consider whether the incremental product's footprint is sufficient to constrain a hypothetical monopolist across the entirety of that monopolist's geographic footprint. This aspect is instead captured in the assessment of whether competition varies across exchange areas to such an extent as to justify finding separate geographic markets (which we discuss in Section 3).
- 2.2 We agree that ComReg's approach may be appropriate as it includes products which may exercise a competitive constraint regionally even if these products are not offered across a sufficient footprint to constrain prices nationally. This allows for the possibility that broadband retailers take a regional approach to acquiring WCA. However, we note that ComReg in the context of WLA considers the use of multiple suppliers to achieve the necessary coverage "*unlikely to be a realistic or suitable option due to the transaction costs*".¹³ This must be taken into account when assessing whether products with a limited geographic footprint can

¹¹ ComReg Consultation, ¶10.54: "*within their overlapping coverage areas such [competitive] constraints would be likely to [be] more effective*".

¹² ComReg Consultation, ¶10.11.

¹³ ComReg Consultation, ¶6.99.

be expected to result in competitive conditions that are “*appreciably different*” to what is observed outside of their footprint.¹⁴

2.3 ComReg defines the relevant product market as including:¹⁵

- a. “*Wholesale Bitstream WCA based products provided over copper and FTTx networks, including wholesale Bitstream products provided using upstream WLA inputs*”. ComReg includes copper-based products as the focal product and FTTx based products by reference to chain substitution;¹⁶
- b. “*Self-supply of WCA based Bitstream by Eircom and BT Ireland*”;
- c. “*Hypothetical WCA based Bitstream products that may be offered by SIRO*”;
- d. “*Self-supply of CATV retail broadband products offered by Virgin Media in areas where its network is present*”; and
- e. “*Self-supply of retail broadband products offered by SPs using WLA upstream inputs and having a wide spread coverage (such as Vodafone)*”.

2.4 These market components fall into three categories: Demand substitution (2.3a and 2.3b), supply substitution (2.3c), and indirect constraints (2.3d and 2.3e). We discuss these in turn below.

Demand substitution

2.5 Eircom and BT Ireland are included in the market as the only current suppliers of WCA. BT Ireland does so based on WLA and WCA products acquired from Eircom.¹⁷

2.6 ComReg identifies copper-based WCA Bitstream products as the focal product for the WCA market. This is because WCA Bitstream products “*remain the most widely used and most widely available products in the WCA market*” (notwithstanding declining use).¹⁸ Copper-

¹⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/03), ¶8.

¹⁵ ComReg Consultation, ¶10.133.

¹⁶ ComReg Consultation, ¶10.17 and ¶10.38.

¹⁷ ComReg Consultation, ¶6.34. See also ComReg Consultation, ¶11.13.

¹⁸ ComReg Consultation, ¶10.17.

based broadband is available at 96% of premises in Ireland¹⁹ and 40%²⁰ of retail connections are based on copper. ComReg's proposal is also consistent with the European Commission's (the "Commission") assessment that *"it is expected that copper-based technologies will continue to play an important role in providing access to high-speed broadband services thereby extending the lifetime of copper access networks"*.²¹ We agree that copper-based broadband represents a reasonable focal product.

2.7 ComReg considers that *"FTTx based Bitstream services are likely to be an effective substitute for copper network based Bitstream services in areas where a FTTx network has been rolled out"*.²² This reflects *"the inherent advanced capabilities of fibre products and the quality of service vis-à-vis Bitstream provided over a copper network"* which is likely to *"manifest itself in retail demand by consumers for high speed broadband products"*.²³ ComReg argues that substitution between copper and FTTx based Bitstream services is likely to be one-way due to higher download speeds available from FTTx networks.²⁴ Eircom's FTTx network passes 1.6 million (80%) of Ireland's 2 million premises²⁵ and 31% of retail connections are based on fibre.²⁶ ComReg's proposal is also consistent with the Commission's assessment that *"It remains likely that there is a chain of substitution between copper DSL-based bitstream services and fibre-based bitstream services provided over FTTH and FTTC/VDSL networks in the near- to medium-term future"*.²⁷ We agree that it is reasonable to include FTTx in the product market.

2.8 Only Eircom and BT Ireland currently supply WCA to third parties.^{28,29} Both operators also supply broadband at retail level.³⁰ Both operators can therefore be considered as self-

¹⁹ ComReg Consultation, ¶9.13.

²⁰ ComReg Consultation, Table 2: 505,639 copper DSL users, 370,575 cable broadband users, 392,868 VDLS (i.e. fibre) users, and 4,564 GPON users imply a copper DSL market share of 40%. This calculation excludes 392,764 mobile broadband, 42,083 FWA, and 5,523 satellite users as ComReg exclude these from the relevant market.

²¹ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 41.

²² ComReg Consultation, ¶10.38.

²³ ComReg Consultation, ¶10.26.

²⁴ ComReg Consultation, ¶10.37.

²⁵ ComReg Consultation, ¶1.22.

²⁶ See FN20 above.

²⁷ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 46.

²⁸ ComReg Consultation, ¶11.11.

supplying WCA.³¹ ComReg includes both internal and external sales in its assessment of market shares at the WCA level.³² This is consistent with the Commission's guidance and we consider this uncontroversial for operators included on the basis of demand substitution.³³

Supply substitution

2.9 ComReg includes SIRO in the relevant market on the basis that SIRO is a potential supplier of WCA access based on its WLA offering.³⁴

2.10 SIRO is a joint venture between ESB³⁵ and Vodafone Ireland (50:50) offering fibre to the home on a wholesale basis in the WLA market. SIRO does not offer services at retail level.³⁶ SIRO's current national market share is less than 1%,³⁷ its network coverage is less than 1%,³⁸ and it is present in less than 10 exchange areas.³⁹ SIRO is expected to expand its footprint to 200,000 premises by the end of 2017⁴⁰ and potentially 500,000 customers when

²⁹ ComReg does not discuss whether switching costs or any practical barriers to switching may impact the effective degree of competition between Eircom and BT Ireland. ComReg also does not discuss whether buyers of WCA could rationally use multiple suppliers. The effect of these factors is not clear.

³⁰ In the case of BT Ireland, this includes only business users downstream as BT Ireland is not present in the residential market (ComReg Consultation, ¶11.13).

³¹ ComReg Consultation, ¶10.12 and ¶10.24.

³² ComReg Consultation, ¶10.165.

³³ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 18: "*Where there is no merchant market and where there is consumer harm at retail level, it is justifiable to construct a notional market when potential demand exists. Here the implicit self-supply of this input by the incumbent to itself should be taken into account*"; and "*In cases where there is likely demand substitution, i.e. where wholesale customers are interested in procuring from alternative operators, it may be justified to take the self-supply concerned into consideration for the sake of market delineation*".

³⁴ ComReg Consultation, ¶10.73.

³⁵ ESB is an Irish energy company. It is majority owned by the government.

³⁶ ComReg Consultation, ¶3.45.

³⁷ ComReg Consultation, FN842.

³⁸ ComReg Consultation, FN844.

³⁹ ComReg Consultation, FN845.

⁴⁰ ComReg Consultation, FN389.

its current roll-out plans are completed.⁴¹ This corresponds to 25% of the 2 million premises in Ireland.⁴²

2.11 ComReg's proposal to include SIRO in the relevant product market reflects the following reasoning:

- a. Whereas "*SIRO does not offer WCA products over its FTTH network*",⁴³ ComReg takes the view that "*It is technically feasible for SIRO to offer WCA based products on its network [...] within a relatively short timeframe*";⁴⁴
- b. However, such a WCA offering "*may not impose a sufficiently effective constraint on Eircom in the WCA market over the medium term given SIRO's current and expected geographic availability. In this respect, Access Seekers currently purchasing Bitstream services from Eircom or BT Ireland would not be in a position to readily switch all their services to an alternative WCA product provided over the SIRO network or to cease their purchase of WCA from Eircom or BT Ireland*";⁴⁵ and
- c. "*Given the current and expected coverage of the SIRO network, it is somewhat questionable whether there would be sufficient substitution to SIRO's hypothetical WCA based products to constrain a SSNIP by a HM supplier of services with near national coverage. However, within their overlapping coverage areas such constraints would be likely to [be] more effective. On this basis, ComReg's preliminary view is that hypothetical WCA products offered by SIRO should be included in the WCA product market*".⁴⁶

2.12 SIRO's ability to act as a supply side substitute based on its WLA product reflects ComReg's preliminary conclusion that SIRO should be considered part of the WLA market.⁴⁷ ComReg argues in that context:

- a. "*Given SIRO's rollout to date and limited network availability, ComReg is of the preliminary view that SIRO is unlikely to impose an effective constraint on Eircom in the WLA market over the short term*";⁴⁸

⁴¹ ComReg Consultation, ¶1.27 and ¶3.45.

⁴² ComReg Consultation, ¶1.23.

⁴³ ComReg Consultation, ¶10.28.

⁴⁴ ComReg Consultation, ¶10.54. See also ¶10.28 and ¶11.16.

⁴⁵ ComReg Consultation, ¶10.39.

⁴⁶ ComReg Consultation, ¶10.54.

⁴⁷ ComReg Consultation, ¶10.54.

- b. *“the significant investments required to move to an alternative network (moving backhaul, new CPE and interconnection etc.) may make such a switch unviable for Access Seekers who have to date already invested in WLA products over Eircom’s network”*;⁴⁹ and
- c. *“notwithstanding the above concerns, on a forward looking basis, ComReg intends to include SIRO’s VULA products within the WLA product market”*.⁵⁰

2.13 Whilst including SIRO in the WLA market, ComReg concluded that *“while SIRO has entered the WLA market, its network is and is likely to remain of a limited size and scale to not effectively constrain Eircom’s behaviour in the WLA Market within the period of this market review”*.⁵¹

2.14 ComReg’s concerns in relation to SIRO’s footprint and certain switching costs⁵² in the context of WLA are also applicable to WCA. Moreover, SIRO is only a potential supplier of WCA whereas it is an actual supplier of WLA. ComReg does not explain why the reasoning for finding that SIRO is an insufficient constraint in the context of WLA therefore does not also apply to WCA. Rather, ComReg argues against including Virgin as a supply side constraint in the context of WCA due to Virgin’s limited footprint⁵³ (which far exceeds SIRO’s prospective footprint) and switching costs.⁵⁴

2.15 ComReg performs its analysis on a forward-looking basis *“in that ComReg has also taken into consideration the planned network presence and rollout plans of various SPs”*.⁵⁵ ComReg explains that *“it is important to consider how market shares might evolve over the*

⁴⁸ ComReg Consultation, ¶5.52.

⁴⁹ ComReg Consultation, ¶5.52.

⁵⁰ ComReg Consultation, ¶5.54.

⁵¹ ComReg Consultation, ¶6.86. Similar point made in ¶6.122.

⁵² ComReg Consultation, FN767: *“Access Seekers switching services from Eircom (or BT Ireland) to SIRO would likely incur significant switching costs, including costs associated with new backhaul, new CPE and marketing costs”*. The need to incur CPE and marketing costs as an access seeker switches to another platform like SIRO would make these costs higher than the switching costs associated with a simpler switch such as from Eircom to BT Ireland, which are on the same network.

⁵³ ComReg Consultation, ¶10.48: Virgin *“may not provide the level of coverage demanded by Access Seekers, who require a national presence to serve their retail customers”*.

⁵⁴ ComReg Consultation, ¶10.46: *“it is likely that significant costs could be incurred in switching WCA to a hypothetical WCA product provided over a CATV network”*.

⁵⁵ ComReg Consultation, ¶10.153. See also ¶A5.76.

period of the market review and whether any observed variations in current or historic market shares are likely to increase, decrease or remain relatively stable. In this regard, ComReg must consider whether each Primary Operator's market share within an Exchange Area might change sufficiently over the review period, such that it could acquire or lose the ability to act as a sufficient constraint on another Primary Operator".⁵⁶ It is not clear how ComReg in practice has done this and what weight ComReg places on existing versus potential network footprint or on network expansions anticipated for immediate versus medium term delivery.⁵⁷ It is therefore not clear to what extent ComReg relies on SIRO network expansions that may only occur towards the end of the review period and therefore may not provide any clear immediate constraints.

- 2.16 In summary, ComReg first de-emphasises concerns relating to very limited network footprint and potentially significant switching costs to include SIRO in the WLA market despite finding that SIRO *"is unlikely to impose an effective constraint on Eircom"*.⁵⁸ ComReg then emphasises the technical feasibility of a SIRO WCA offering based on this WLA presence to include SIRO in the WCA market despite finding that *"Even if SIRO were [sic] to offer a WCA market product, ComReg is of the preliminary view that SIRO may not impose a sufficiently effective constraint on Eircom in the WCA market over the medium term"*.⁵⁹ On ComReg's assessment, the proposal to include SIRO in the market hence likely overestimates the competitive pressure potentially attributable to SIRO. ComReg explains that SIRO's planned roll-out *"is predominately located within the Urban WCA Market"*.⁶⁰ However, given SIRO's very limited network footprint and market share, it is not clear whether this has any meaningful impact on ComReg's subsequent assessment of competition in the WCA market, as discussed in Section 3 below.

⁵⁶ ComReg Consultation, ¶A5.73.

⁵⁷ Under the heading "Exceptional Additions" ComReg explains that *"in order to ensure the boundary of a geographic market remains sufficiently stable over time, ComReg proposes to include a number [of] Exchange Areas that fail to meet one of the cumulative criteria set out above, but where the competitive conditions appear to be such that the Exchange Area could reasonably and foreseeably be expected to meet the outstanding criteria during the lifetime of the market review"* (ComReg Consultation, ¶A5.79). ComReg does not explicitly state whether this is its method for accounting for prospective growth.

⁵⁸ ComReg Consultation, ¶5.52.

⁵⁹ ComReg Consultation, ¶10.39.

⁶⁰ ComReg Consultation, ¶11.64.

Indirect competition

- 2.17 Virgin and Vodafone are included in the market exclusively on the basis that they can be considered internal users of WCA; that is, as self-supplying WCA.
- 2.18 ComReg acknowledges that Virgin and Vodafone are neither actual nor potential suppliers of WCA. Specifically, ComReg finds that Virgin Media “does not currently offer WLA or WCA products”,⁶¹ “has not expressed any interest in providing wholesale products (WLA or WCA)”,⁶² and that “it [is] unlikely that Virgin Media would enter the merchant WCA Markets on any significant scale, if at all, over the period of this market review”.⁶³ ComReg further considers that any wholesale offering from Virgin would be limited by switching costs⁶⁴ and by Virgin’s limited footprint.⁶⁵ Similarly, ComReg states that “Vodafone has not indicated to ComReg that it has any plans to use Eircom’s VUA products to supply WCA based wholesale services”.⁶⁶
- 2.19 Both operators are hence only included in the WCA market by virtue of the indirect constraint that their retail offerings may impose on WCA suppliers.⁶⁷ In the case of Virgin, ComReg considers that there is “likely to be a chain of substitution between broadband products provided over copper, FTTC, FTTH and CATV networks” though the “availability of FTTC, FTTH and CATV broadband products may limit the ability of customers to switch between platforms”.⁶⁸ Whereas Virgin’s network has a smaller coverage than that of Eircom,⁶⁹ ComReg concludes that “the indirect constraints from Virgin Media’s retail CATV network in

⁶¹ ComReg Consultation, ¶10.43.

⁶² ComReg Consultation, ¶10.44.

⁶³ ComReg Consultation, ¶11.89.

⁶⁴ ComReg Consultation, ¶10.46: “it is likely that significant costs could be incurred in switching WCA to a hypothetical WCA product provided over a CATV network”. As discussed in FN52, the need to incur CPE and marketing costs as an access seeker switches to another platform like Virgin would make these costs higher than the switching costs associated with a simpler switch such as from Eircom to BT Ireland, which are on the same network.

⁶⁵ ComReg Consultation, ¶10.48: Virgin “may not provide the level of coverage demanded by Access Seekers, who require a national presence to serve their retail customers”.

⁶⁶ ComReg Consultation, ¶10.24.

⁶⁷ ComReg Consultation, ¶10.126 and ¶10.127.

⁶⁸ ComReg Consultation, ¶9.4.

⁶⁹ Virgin network passes 38% (ComReg Consultation, ¶1.23) whereas Eircom’s network is broadband-enabled for 96% (¶9.13) of Ireland’s 2 million premises.

urban areas (based on its retail self-supply) are sufficiently strong, in the areas where the Virgin Media network is present, to warrant inclusion in the WCA Market⁷⁰.

- 2.20 ComReg relies on the Commission's recommendation that *"If there is competitive pressure stemming from alternative platforms at retail level, such platforms should be included in the WCA market if the following conditions are met"*:⁷¹
- a. *"access seekers would be forced to pass a hypothetical wholesale price increase onto their consumers"*;
 - b. *"there would be sufficient demand substitution at the retail level based on indirect constraints such as to render the wholesale price increase unprofitable"*; and
 - c. *"the customers of the access seekers would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices"*.
- 2.21 ComReg does not perform a complete quantitative analysis across these points and concludes that the basis for including Virgin in the WCA market due to indirect constraints is *"finely balanced"*.⁷²
- 2.22 We agree that these criteria are relevant. However, we do not consider that ComReg has demonstrated that the criteria are satisfied in the present case. We assess this in more detail below for each condition.

Condition (1) Whether WCA price increases would be passed through

- 2.23 ComReg explains that *"While it is uncertain whether the entire WCA price increase will be passed through to the price of retail services or other associated prices (or indeed if it is passed through at all), ComReg makes the assumption that it is passed through in full for the purpose of market definition, since this will prevent any underestimation of any indirect retail constraints on the WLA Market arising from the pass-through of a WLA price increase into retail prices"*.⁷³ ComReg hence assumes rather than establishes that WCA price increases would be passed through into retail prices. ComReg acknowledges that it *"may not be the*

⁷⁰ ComReg Consultation, ¶10.127, emphasis added.

⁷¹ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), pages 46 and 47.

⁷² ComReg Consultation, ¶10.107.

⁷³ ComReg Consultation, ¶10.89. We assume that the references to WLA in this quote should have been to WCA.

case” that operators would pass through wholesale price increases in full.⁷⁴ When making a similar assumption for WLA, ComReg describes this as a “*prudent approach*”.⁷⁵

2.24 It is true that ComReg’s approach by design avoids underestimating the indirect competitive impact.⁷⁶ The risk is however that it overestimates the impact. We find that the full pass-through assumption is likely to be inappropriate for a number of reasons:

- a. ComReg explains its full pass-through assumption in context of WLA as consistent with “*Assuming that all other elements of the downstream retail service were provided at a competitive price level, an increase in the price of WLA may translate into a retail price increase given that the SP would otherwise be operating its service at a loss over the long-term*”.⁷⁷ However, this does not take into account that entrants may use WCA to compete head-to-head with existing operators using WLA or proprietary infrastructure until these entrants gain sufficient scale to unbundle with WLA or build their own networks (i.e. climb the “ladder of investment”).⁷⁸ A specific user cohort can therefore be supplied based on different technologies with different associated costs. Indeed, operators rely on WLA, WCA, combinations of WLA and WCA,⁷⁹ cable, and FTTH to compete at retail level. It is therefore not clear that there is a uniform cost level to which competition will drive down prices or that operators failing to pass through wholesale cost increases for one of several upstream products would become loss-making.
- b. Operators do not set localised prices depending on whether an exchange area is served based on WLA or WCA.⁸⁰ An operator may rely predominantly on WLA and only use

⁷⁴ ComReg Consultation, ¶10.96.

⁷⁵ ComReg Consultation, ¶5.134.

⁷⁶ This is because a higher pass-through puts WCA buyers at a greater competitive disadvantage at retail level *vis-à-vis* competitors who do not use WCA. A high pass-through therefore increases the effect that retail competition may have on WCA based retailers’ volumes and therefore demand for WCA.

⁷⁷ ComReg Consultation, ¶5.108.

⁷⁸ ComReg Consultation, ¶8.133.

⁷⁹ ComReg does not explicitly consider this option. The ComReg Consultation provides the following explanation: “*WCA purchasers: these operators purchase wholesale inputs in the WCA Market and use them to provide products in the retail markets. These operators typically have limited network infrastructure of their own and depend on services provided by Independent providers and WLA purchasers to provide retail services to End Users. Examples include British Sky Broadcasting Limited (‘Sky’)*” (ComReg Consultation, ¶3.11.c).

⁸⁰ ComReg Consultation, ¶ 9.25: “*All SPs indicated in their responses that they did not differentiate the prices of their retail broadband services on a geographic basis, this despite some operators using multiple platforms in offering such services*”. ¶4.291: “*Despite the geographic variation in network*

WCA in exchange areas in which volumes do not justify using WLA,⁸¹ as we understand is the case for Vodafone. Under national pricing, an increase in WCA prices should at most be passed on into retail prices in proportion to the share of the operator's user base served using WCA.⁸² However, the incentive for an operator to do so will depend on any impact this will have on its competitiveness across its entire retail offering. ComReg does not assess this. However, ComReg recognises that *"any wholesale price increase will nonetheless be diluted once it is translated into a retail price increase. This is because the wholesale service costs are just one input to the overall retail price"*.⁸³ The smaller an operator's reliance on WCA, the greater this dilution should be.

- c. An operator may use broadband to win or retain users of other services, as we understand may be the case for Sky. ComReg finds that bundles are increasingly prevalent.⁸⁴ In the context of WLA, ComReg acknowledges that *"it is not possible to be definitive about the retail price associated with the WLA-related element of the bundle"*.⁸⁵ Nonetheless, ComReg assumes *"no cross-subsidisation from other services sold within bundles"*.⁸⁶ This is also a questionable assumption in light of ComReg's conclusion that *"a sufficient number of customers could (and would) unpick a bundle containing broadband and TV services if there were to be a hypothetical price increase in the cost*

coverage, ComReg has no evidence of differing competitive constraints on retail broadband pricing". Similar point made in ¶4.291, ¶9.25 and ¶10.172. ¶4.294: "the lack of differentiated pricing and limited differences in demand characteristics across regions suggests the retail broadband market is likely to be national, absent regulation in the WLA and WCA Markets".

⁸¹ As ComReg explains, *"investments by new entrants are gradual while their subscriber base rises and they will require several complimentary services from incumbents until their subscriber bases grows significantly"* (ComReg Consultation, FN595) and *"low premises density in these areas often means that it is not economically viable or profitable either to offer broadband services either via WLA inputs or via an alternative network infrastructure"* (ComReg Consultation, ¶10.162).

⁸² We understand from Vodafone that past upstream price increases have affected both WLA and WCA concurrently and that these have been passed through into retail prices. However, this is different from a hypothetical increase in WCA prices alone with WLA prices unaffected. It is therefore not clear that pass-through would be possible in such situations.

⁸³ ComReg Consultation, ¶10.79.

⁸⁴ ComReg Consultation, ¶3.36: *"ComReg has identified a strong tendency for broadband services and telephone services to be purchased from a single retail SP. In addition, broadband and telephone services are often bundled with television services at the retail level"*; ¶3.38: *"By Q1 2016, there were an estimated 1.82 million fixed market retail subscriptions, of which 38.7% were single play, 35.8% were double play, 25.4% were triple play and quadruple play"*.

⁸⁵ ComReg Consultation, ¶5.113.

⁸⁶ ComReg Consultation, FN410.

of the bundle”.⁸⁷ An operator would hence only pass on a WCA price increase into the bundle if the associated price increase would more than compensate for the loss of income across all services in the bundle. ComReg does not assess this.

- d. Broadband retailers incur up-front costs for customer acquisition. These costs are then typically recovered over the duration of the customer relationship. For existing users, customer acquisition costs are sunk. It may therefore remain economically rational to keep supplying existing users on an exchange even if WCA prices increase to a level that makes it unprofitable to acquire new users. This may allow a WCA supplier to extract profitability from the existing customer base whilst only losing incremental margins from foreclosed new users.⁸⁸ ComReg does not assess this.
- e. ComReg relies on past national wholesale price increases as evidence that Eircom does not consider its wholesale prices constrained by indirect competition to propose stricter, cost orientation-based, regulation for Regional WCA.⁸⁹ ComReg also considers these price increases as *“evidence that Eircom’s prices are not currently sufficiently constrained at a retail or wholesale level, in the presence of regulation”*.⁹⁰ In the context of WLA, ComReg concludes that there is *“no firm behavioural evidence to suggest that Eircom is facing effective pricing constraints in the provision of WLA”*,⁹¹ and that *“Eircom likely has incentives to exploit its WLA customers in this manner as it competes with these SPs in downstream retail and/or wholesale markets”*.⁹² ComReg does not explain why these concerns do not apply equally to the proposed Urban WCA Market. We see no reason why they would not.

2.25 In summary, ComReg’s assumption that WCA price increases would be passed on in full into retail prices is unsubstantiated and does not take into account the differentiated cost structure and product offering of Eircom’s retail rivals. Cross-subsidies to WCA based broadband users from WLA based users, from other components of a bundle, or from existing users to new users, may enable and incentivise operators to absorb WCA price increases. Indeed, ComReg acknowledges in the context of WLA that Eircom could distort competition by *“Setting higher prices for WLA products to negate rivals’ competitive*

⁸⁷ ComReg Consultation, ¶4.271.

⁸⁸ In the context of the WLA Market, ComReg recognises that *“even in the case of competitive retail markets, there may not be an immediate pass through of an increase in the price of a wholesale input if fixed sunk investments are non-trivial”* (ComReg Consultation, ¶5.108).

⁸⁹ ComReg Consultation, ¶13.306.b.

⁹⁰ ComReg Consultation, ¶13.306.b. See also ¶5.169.

⁹¹ ComReg Consultation, ¶6.124.

⁹² ComReg Consultation, ¶7.12.

advantages".⁹³ We agree that this is a risk. Indeed, ComReg's conclusion that Eircom is subject to a meaningful indirect constraint is contradicted by ComReg's proposed assessment of Eircom's past conduct. ComReg has not addressed this risk in its assessment of indirect WCA constraints. Assuming full pass-through is hence not inherently prudent as it risks failing to identify SMP.

Condition (2) Whether there is sufficient demand substitution at the retail level

- 2.26 ComReg assesses whether "*there would be sufficient demand substitution at the retail level based on indirect constraints such as to render the wholesale price increase unprofitable*" by reference to a critical loss test (CLT).⁹⁴ ComReg compares the result of its CLT to an estimate of user sensitivity to price changes based on market research. ComReg cautions that the CLT "*is by no means conclusive, and is considered by ComReg alongside other information referred to throughout the document*".⁹⁵
- 2.27 Although ComReg does determine the magnitude of a 5-10% SSNIP at WCA level,⁹⁶ ComReg's analysis addresses whether a retailer could profitably increase retail prices by 5-10% holding wholesale prices as a given.⁹⁷ ComReg's analysis does not assess the impact of a 5-10% wholesale price increase. ComReg has therefore not undertaken the test required by the Commission. As retail prices are higher than the prices for the underlying wholesale products, ComReg's analysis overestimates the magnitude of the relevant price increase that retailers would implement if passing through a 5-10% wholesale SSNIP.
- 2.28 ComReg's research suggests that 20% of residential customers buying broadband on a standalone basis would switch to CATV based broadband (like Virgin) in response to a €2 price increase.⁹⁸ For residential buyers of bundles, ComReg find that the percentage is

⁹³ ComReg Consultation, ¶7.42, second bullet.

⁹⁴ ComReg explains that its CLT provides "*an estimate of the percentage of customers that would have to divert away from the focal product in response to a SSNIP (in this case the pass-through of a wholesale SSNIP) to make the increase in the price of the focal product unprofitable*" (ComReg Consultation ¶10.92).

⁹⁵ ComReg Consultation, ¶10.93.

⁹⁶ ComReg Consultation, Table 21, "Wholesale Price Increase €".

⁹⁷ ComReg summarises the results of its critical loss analysis in ¶10.94 and ¶10.95 which in turn refer back to Tables 94, 95, 96, and 97 in Appendix 7.

⁹⁸ ComReg Consultation, ¶10.104. ComReg explains that "*€2 was considered to be a small but significant price increase for respondents [to the WLA/WCA Market Research] to consider*" (ComReg Consultation, FN130). ComReg does not appear to have considered other values for the SSNIP.

14%.⁹⁹ It is outside the scope of this analysis to audit ComReg's derivation of these percentages. However, with the exception of a single scenario,¹⁰⁰ the relevant wholesale price increases identified by ComReg are significantly less than €2.¹⁰¹ ComReg's reliance on consumer responsiveness to a retail €2 price increase is therefore likely to exaggerate the indirect competitive constraint at WCA level.

- 2.29 In relation to WLA based suppliers (like Vodafone), ComReg considers that *"it is likely that a number of End Users would switch to its WLA based retail services in response to a SSNIP in WCA prices (as Vodafone's WLA based services would remain unaffected by such a SSNIP on WCA)"*.¹⁰² The factual basis for this finding is not clear. Nonetheless, ComReg proposes to *"include the self-supply of Vodafone's WLA based broadband services within the WCA market"*.¹⁰³
- 2.30 ComReg would need to assess the implications of a SSNIP at WCA level, not at retail level. ComReg has therefore not performed the required test. Given that this is the case, we have not considered the robustness of the data inputs used in ComReg's analysis at this point.

Condition (3) Whether Eircom would expect to recapture users from foreclosed WCA buyers

- 2.31 Higher WCA prices may depress WCA volumes,¹⁰⁴ as discussed in the context of the first two conditions above. The associated loss of income would undermine Eircom's incentive to impose such price increases (assuming that the above conditions are met). However, Eircom's retail business may win some of the users switching away from the operators affected by higher WCA prices. For retail competition to constrain Eircom's conduct at WCA level, the effect of such incremental retail margins must therefore not be so strong as to

⁹⁹ ComReg Consultation, ¶10.104.

¹⁰⁰ ComReg finds that a 10% increase in FTTx network NGA bitstream prices would equal €2.30, excluding VAT (ComReg Consultation, Table 21). If passed into retail prices, the increase would be €2.83, applying a 23% standard VAT rate ($€2.30 * (1+23\%) = €2.83$).

¹⁰¹ These price increases fall in a range between €0.27 and €1.15 excluding VAT. Applying a 23% standard VAT rate, this would correspond to at most a €1.41 retail price increase assuming full pass-through.

¹⁰² ComReg Consultation, ¶10.113.

¹⁰³ ComReg Consultation, ¶10.115.

¹⁰⁴ We understand that users have a *"right to withdraw without penalty"* from their contracts in response to price increases (S.I. No. 337/2011 - European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, Regulation 14(4b)).

more than offset the effect of lower wholesale volumes, as recognised by ComReg.¹⁰⁵ This is what this final condition assesses.

2.32 ComReg argues that *“it is likely that a HM vertically-integrated supplier would hold its retail prices constant in the face of a SSNIP of WCA, so as to attract [as] many retail customers as possible away from other SPs that purchase WCA inputs”*¹⁰⁶ and concludes that *“retail customers affected by the pass-through of a SSNIP in WCA (i.e. retail customers of Access Seekers who purchase WCA from the vertically-integrated supplier) are also likely to switch to retail products offered by Eircom’s retail arm”*.¹⁰⁷ This suggests that the requirement that *“the customers of the access seekers would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist”* may not be met.¹⁰⁸

2.33 ComReg considers that *“Virgin Media does not likely face an incentive to [supply wholesale], given that it would lead to increased competition in areas where it provides retail services”*.¹⁰⁹ It is exactly in these geographic areas that ComReg suggests to deregulate WCA. However, ComReg does not explain why Eircom would not have a similar incentive to withhold WCA supply when targeting the same users. It may be the case that Virgin’s and Eircom’s incentives are different due to differences in retail market shares and thereby their expected ability to recapture downstream users following foreclosure of WCA buyers. However, ComReg does not appear to have assessed this.

2.34 ComReg hence does not assess whether customers would *“switch to a significant extent to the retail arm of the integrated hypothetical monopolist”* such that it may become profitable for Eircom to impose higher WCA prices in the absence of regulation.¹¹⁰ ComReg has therefore not assessed whether the third of the requirements set out by the Commission is satisfied.

2.35 In summary, the three criteria set out by the Commission address whether there is an incentive to foreclose at wholesale level considering:

- a. the extent to which a WCA price increase would be passed on into retail prices;

¹⁰⁵ ComReg Consultation, ¶10.120.

¹⁰⁶ ComReg Consultation, ¶10.121.

¹⁰⁷ ComReg Consultation, ¶10.124.

¹⁰⁸ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), pages 46 and 47.

¹⁰⁹ ComReg Consultation, ¶5.65.

¹¹⁰ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 47.

- b. the extent to which such a retail price increase would induce users to switch to another platform (and thereby reduce WCA volumes); and
- c. whether Eircom's expected recapture of any of these users at retail level would result in margins that more than compensate for the wholesale margins lost from the lower wholesale volumes.

2.36 ComReg has not performed this analysis. We have provided a number of reasons why the Commission's criteria may not be satisfied. This is corroborated by ComReg's findings that Eircom could distort competition by "*Setting higher prices for WLA products to negate rivals' competitive advantages*"¹¹¹ and that past price increases are "*evidence that Eircom's prices are not currently sufficiently constrained at a retail or wholesale level, in the presence of regulation*".¹¹²

2.37 ComReg does not discuss the sensitivity of its finding of a competitive Urban WCA Market to its proposed inclusion of Virgin and Vodafone as indirect constraints. However, we note that Virgin appears to represent the difference between the proposed Regional and Urban WCA markets.¹¹³ This suggests that ComReg's proposal to include indirect constraints from Virgin may significantly impact ComReg's preliminary findings.

Conclusion

2.38 We consider ComReg's proposed inclusion of Eircom and BT Ireland into the relevant WCA product market consistent with the Commission's guidance and economically justifiable. However, we consider that ComReg's proposal to include SIRO into the relevant WCA product market likely overestimates the competitive pressure potentially attributable to SIRO. Likewise, we consider ComReg's proposal to include Virgin and Vodafone as indirect constraints unsupported by the necessary analysis, contradicted by facts and conclusions otherwise relied upon by ComReg, and therefore also likely overestimates the associated competitive pressure.

¹¹¹ ComReg Consultation, ¶7.42, second bullet.

¹¹² ComReg Consultation, ¶13.306.b. See also ¶5.169.

¹¹³ ComReg Consultation, ¶10.177.

Section 3

ComReg's competitive assessment in the context of the geographic market definition

Introduction

- 3.1 ComReg identifies exchange areas as the appropriate geographical unit within which to assess the intensity of competition.¹¹⁴ ComReg considers that this balances the need for the geographical unit to be “*small enough to avoid significant variations in competitive conditions within each chosen unit but also large enough to avoid a resource intensive and burdensome micro-analysis that could lead to an unwarranted fragmentation of a market(s)*”.¹¹⁵
- 3.2 ComReg considers that “*only those SP having a reasonably sized market share are capable of potentially exerting an effective competitive constraint on other competitors*”.¹¹⁶ ComReg therefore includes only what ComReg defines as “Primary Operators” in its assessment of the intensity of competition. This assessment is performed on a forward looking basis.¹¹⁷
- 3.3 ComReg identifies five operators as meeting the Primary Operator requirements. This includes Eircom and BT Ireland as direct competitors, SIRO as a supply side competitor, and Vodafone and Virgin Media as indirect constraints. This conclusion mirrors ComReg's assessment of the relevant product market, as discussed in Section 2 above. ComReg's assessment also considers Alternative Network Operators (that is, operators that have

¹¹⁴ ComReg Consultation, ¶10.150. An exchange area includes users connected to a specific Eircom exchange. Some or all of these users may also be within the footprint of other networks.

¹¹⁵ ComReg Consultation, ¶A5.36.

¹¹⁶ ComReg Consultation, ¶10.153.

¹¹⁷ ComReg Consultation, ¶10.153.

networks existing independently of WLA and WCA regulation) as a distinct subset of the Primary Operators. Virgin and SIRO are in this category.¹¹⁸

3.4 To test whether there are sub-national markets for WCA, ComReg seeks to ascertain “*whether the conditions of competition are sufficiently different between certain Exchange areas such that separate geographic markets can be distinguished*”.¹¹⁹ As a matter of principle, we agree that this is an appropriate approach.

3.5 In practical terms, ComReg considers that an Urban WCA Market is distinguished by meeting five criteria cumulatively. These criteria appear to have been developed by ComReg for the present purposes. ComReg explains that by “*the nature of its construct, the Urban WCA Market is an area where Eircom faces greater competition*”.¹²⁰

3.6 ComReg’s five criteria for classifying an exchange area as Urban are:¹²¹

- a. “**Criteria 1:** *An Exchange Area in which at least three Primary Operators would be capable, within a sufficiently short period, of providing either broadband services at the retail level to End Users, WCA or WLA in the Exchange Area, absent regulation in the WCA Market*”;
- b. “**Criteria 2:** *An Exchange Area in which Eircom would provide broadband services at the retail level to less than 50% of End Users within that particular Exchange Area, absent regulation in the WCA Market*”;
- c. “**Criteria 3:** *An Exchange Area where one or all of the Primary Operators providing retail broadband services to End Users using inputs from the WLA Market provide a total greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA market*”;
- d. “**Criteria 4A:** *An Exchange Area in which each Alternative Network Operator has the network coverage to, within a sufficiently short period, provide retail broadband services to End Users to more than 30% of the premises in that particular Exchange Area (or currently provides greater than 30% of End Users with retail broadband services), absent regulation in the WCA market*”;

¹¹⁸ ComReg Consultation, FN831.

¹¹⁹ ComReg Consultation, ¶10.156.

¹²⁰ ComReg Consultation, ¶11.115.

¹²¹ ComReg Consultation, ¶A5.85.

- e. **“Criteria 4B:** *An Exchange Area in which each Alternative Network Operator providing retail telecommunication services to End Users provides greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA Market*”; and
- f. **“Criteria 5:** *Exceptionally, on a case-by-case basis, where an Exchange Area:*
 - i. *(a) fails no more than one of criteria set out from (2) to (4) above and fails the criterion by a small margin (i.e. less than 10% percent of the percentage specified); OR*
 - ii. *fails no more than one of criteria set out from (2) to (4) above and where an Alternative Network Operator provides telecommunication services either at the wholesale level or at the retail level which equates to more than 60% of End Users within that particular Exchange Area; that Exchange Area will be deemed to have satisfied the relevant criterion*”.

3.7 All of these criteria assume absence of WCA regulation. ComReg explains that this is consistent with the so-called Modified Greenfield Approach as defined by the Commission.¹²² The Commission explains that Modified Greenfield Approach “requires the [National Regulatory Authorities] to assess whether markets are effectively competitive from a forward-looking perspective in the absence of regulation”.¹²³

3.8 Below we discuss our interpretation of each of these criteria and assess their appropriateness.

Assessment of ComReg’s Criterion 1

3.9 ComReg’s proposed Criterion 1 is that “at least three Primary Operators would be capable, within a sufficiently short period, of providing either broadband services at the retail level to End Users, WCA or WLA in the Exchange Area, absent regulation in the WCA Market”.¹²⁴

3.10 We understand this to mean that any combination of “at least three Primary Operators” may satisfy this requirement. The reference to “would be capable, within a sufficiently short period” suggests that the requirement includes a degree of forward-looking assessment.

¹²² ComReg Consultation, ¶1.19.

¹²³ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 8.

¹²⁴ ComReg Consultation, ¶10.157.i.

- 3.11 We understand that ComReg's first proposed criterion does not distinguish between Primary Operators that:
- a. represent demand substitution, supply substitution, or an indirect constraint;
 - b. would be present for one or both of CGA and NGA; and
 - c. are mutually independent or have shared ownership.
- 3.12 We discuss these points below.

ComReg's proposal to treat all Primary Operators as equivalent

- 3.13 We consider that ComReg has not adequately justified its proposal to treat Primary Operators which represent demand substitution, supply substitution, or an indirect constraint as equivalent. As the Commission explains:
- a. *"From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions"*;¹²⁵
 - b. *"The competitive constraints arising from supply side substitutability [...] and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis"*;¹²⁶
 - c. *"Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy"*;¹²⁷ and
 - d. indirect constraints *"should be deemed to be strong enough so that the platform concerned is included in the market"*¹²⁸ only if the three conditions discussed in Section 2 are satisfied.¹²⁹

¹²⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/03), ¶13.

¹²⁶ Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/03), ¶14.

¹²⁷ Commission Notice on the definition of relevant market for the purposes of Community competition law, (97/C 372/03), ¶20.

3.14 It is clear from the Commission's guidance that existing, potential, and indirect competitors cannot *a priori* be considered equivalent. This is also reflected in ComReg's own assessment that "*SIRO may not impose a sufficiently effective constraint on Eircom in the WCA market over the medium term*",¹³⁰ and that "*it is finely balanced as to whether retail services provided over a CATV network could exert a sufficiently immediate and effective indirect constraint in the WCA market such that they warrant inclusion in the WCA market*".¹³¹ As discussed above,¹³² it is also not clear that the criteria for including Virgin and Vodafone in the market by virtue of indirect competition have been met. On this basis, we consider that ComReg's application of this criterion likely overestimates the strength of competition.

ComReg's proposal equates unbundling of NGA or CGA to unbundling of NGA and CGA

3.15 On a given exchange, operators may supply NGA based on WLA but CGA based on WCA. For example, we understand that this is the case for Vodafone. ComReg's first criterion only appears to assess whether unbundling has taken place for either CGA or NGA rather than for both.

3.16 ComReg's approach hence appears to assume that the presence of, for example, Vodafone as an unbundler of NGA on an exchange will act as a constraint on Eircom in its supply of CGA based WCA to Vodafone on the same exchange. The reason for this cannot be that Vodafone may start to self-supply CGA based on WLA as this would put WLA and WCA in the same market.¹³³ Rather, ComReg's analysis seems to rely on a chain of reasoning whereby:

- a. NGA retail prices constrain CGA retail prices through chain substitution; and
- b. CGA retail prices constrain CGA based WCA prices through indirect competition.

3.17 ComReg does not discuss this so it is not clear whether this in fact is ComReg's reasoning.

¹²⁸ Commission Explanatory Note to the 2014 Recommendation (SWD(2014) 298), page 47.

¹²⁹ See ¶2.17 to ¶2.37 above.

¹³⁰ ComReg Consultation, ¶10.39.

¹³¹ ComReg Consultation, ¶10.107.

¹³² See ¶2.17 to ¶2.37 above.

¹³³ ComReg Consultation, ¶10.70: ComReg proposes to "*exclude supply-side substitution by WLA purchasers*" from the WCA market.

- 3.18 ComReg assesses whether NGA retail prices constrain CGA retail prices through chain substitution in the context of the product market definition.¹³⁴ This assessment was based on the likely degree of substitution between CGA and NGA in response to a price increase by a hypothetical CGA retail monopolist. However, as recognised by ComReg,¹³⁵ Eircom may not increase its own retail CGA retail prices in response to higher WCA prices once these are unconstrained by regulation. Moreover, as also recognised by ComReg,¹³⁶ there is no reason to believe that WLA or CATV based CGA retailers would increase their prices.¹³⁷ A price increase by a hypothetical WCA monopolist at wholesale level is therefore not equivalent to a price increase by a hypothetical retail CGA monopolist at retail level.
- 3.19 A finding of chain substitution between retail CGA and retail NGA therefore does not imply that a CGA based WCA monopolist would not be able to profitably increase its prices. ComReg does not address this. On this basis, we consider that ComReg’s application of this criterion likely overestimates the strength of competition.

Ownership of Primary Operators

- 3.20 ComReg identifies both Vodafone and SIRO as primary operators. Vodafone owns 50% of SIRO.¹³⁸ Two of the three required Primary Operators needed to find a competitive market could therefore be related. ComReg does not consider what, if any, effect this may have. ComReg’s application of this criterion may therefore overestimate the strength of competition.

Assessment of ComReg’s Criterion 2

- 3.21 ComReg’s proposed Criterion 2 is that “*Eircom would provide broadband services at the retail level to less than 50% of End Users within that particular Exchange Area, absent regulation in the WCA Market*”.¹³⁹

¹³⁴ See ¶2.7 above.

¹³⁵ ComReg Consultation, ¶10.121: “*it is likely that a HM vertically-integrated supplier would hold its retail prices constant in the face of a SSNIP of WCA, so as to attract many retail customers as possible away from other SPs that purchase WCA inputs*”.

¹³⁶ ComReg Consultation, ¶10.123.

¹³⁷ See also our discussion of pass-through in the presence of different cost structures in ¶2.24a above.

¹³⁸ ComReg Consultation, ¶5.48: “*SIRO currently supplies VULA to Vodafone, a parent company in the 50:50 Joint Venture (‘JV’), which owns SIRO*”.

¹³⁹ ComReg Consultation, ¶10.157.ii.

- 3.22 ComReg explains that market shares are calculated assuming that “*subscribers of Eircom’s wholesale purchasers revert to being Eircom customers, absent regulation in the WCA Market. This assumes Eircom will withdraw its wholesale supply of WCA*”.¹⁴⁰ We understand this to imply that third party retail volumes based on Eircom’s WCA product are added to Eircom’s retail volumes for the purpose of calculating market shares. This may overstate Eircom’s market share under the assumed withdrawal of WCA supply as other operators unaffected by this withdrawal also may win a share of the affected users.
- 3.23 The basis for ComReg’s requirement that Eircom’s market share be less than 50% is not clear. In particular, as discussed above,¹⁴¹ ComReg has not undertaken a full analysis of the market share split needed to imply sufficient indirect competition. It is therefore not clear whether the market share threshold proposed by ComReg is appropriate.

Assessment of ComReg’s Criterion 3

- 3.24 ComReg’s proposed Criterion 3 is that “*one or all of the Primary Operators providing retail broadband services to End Users using inputs from the WLA Market provide a total greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA market*”.¹⁴²
- 3.25 We understand this to mean that the individual market shares amongst WLA based operators do not matter as long as their total is at least 10%. The reference to “*one*” in “*one or all*” seems redundant as the criterion will always be satisfied for all if it is satisfied for one operator.
- 3.26 ComReg argues that “*for a Primary Operator to act as an effective constraint on another operator (and contribute to differing competitive conditions) it must have a minimum presence in an area, such that potential subscribers view it as a sufficiently viable alternative supplier in any switching decision*”.¹⁴³ However, Criterion 3 seems to suggest that one WLA based Primary Operator could have a very low market share as long as another WLA based Primary Operator has a sufficiently high market share. ComReg’s reasoning for Criterion 3 is therefore not clear.

¹⁴⁰ ComReg Consultation, note under Table 23.

¹⁴¹ See ¶2.17 to ¶2.37 above.

¹⁴² ComReg Consultation, ¶10.157.iii.

¹⁴³ ComReg Consultation, ¶A5.71.

- 3.27 The basis for the market share threshold in the proposed Criterion 3 is also not clear. In particular, as discussed above,¹⁴⁴ ComReg has not undertaken a full analysis of the market share split needed to imply sufficient indirect competition. It is therefore not clear whether the market share threshold proposed by ComReg is appropriate.

Assessment of ComReg’s Criterion 4A

- 3.28 ComReg’s proposed Criterion 4A is that “*each Alternative Network Operator has the network coverage to, within a sufficiently short period, provide retail broadband services to End Users to more than 30% of the premises in that particular Exchange Area (or currently provides greater than 30% of End Users with retail broadband services), absent regulation in the WCA market*”.¹⁴⁵
- 3.29 We understand the proposed market share criterion to apply to “*each*” Alternative Network Operator present in a given exchange area. Counterintuitively, this suggests that an exchange area found to be sufficiently competitive to be included in the proposed Urban WCA Market when one Alternative Network Operator is present, in theory, may not be considered sufficiently competitive if an additional Alternative Network Operator were to enter. An increase in already adequate competition would hence result in failure of this criterion. In practical terms, we understand that this may not be an issue as SIRO is not expected to establish infrastructure in the areas covered by Virgin.¹⁴⁶ Nonetheless, the rationale for applying the market share threshold to “*each*” operator is not clear.
- 3.30 The criterion requires that Alternative Network Operators have network coverage of at least 30% of premises in a particular exchange area or supply at least 30% of users based on a combination of own and other infrastructure. ComReg explains that the optionality in the mix between own and other infrastructure “*is to allow for the scenario where a network operator has a lower network coverage, but a high share of the total market within the Exchange Area*”.¹⁴⁷ An Alternative Network Operator may therefore meet this criterion even if its network coverage is very low as long as the operator has a sufficiently high retail market share based on some other type of access (potentially supplied by Eircom), or *vice versa*.

¹⁴⁴ See ¶2.17 to ¶2.37 above.

¹⁴⁵ ComReg Consultation, ¶10.157.iv.

¹⁴⁶ Case M.7307 – Electricity Supply Board/Vodafone Ireland/JV Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/20041, ¶54: “*The overlap between the FTTB network of the JV and the cable network of UPC is likely to be limited. This is because the Parties decided not to include areas covered by the UPC cable network*”.

¹⁴⁷ ComReg Consultation, FN1222.

This requirement thereby equates (potentially unused) own network coverage to a market share based on third party access through another operator's network. The rationale for this is not clear.

- 3.31 ComReg does not explain the basis for this 30% threshold or whether two Alternative Network Operators would be allowed to have overlapping networks. We agree that less than full network coverage may be enough for an Alternative Network Operator to be competitive in an exchange area. However, it is not clear why ComReg suggests that as little as 30% may be sufficient. ComReg considers that Virgin's coverage of 45% of households and 38% of premises¹⁴⁸ would be inadequate for an access seeker in the context of WLA.¹⁴⁹ In a similar analysis in the UK in 2014, Ofcom applied a 65% network overlap requirement in its assessment of when to include Virgin as present in an exchange area.¹⁵⁰ This suggests that ComReg's proposed 30% threshold is low and that ComReg's proposed approach therefore likely overestimates the degree of competition in Urban WCA exchange areas.
- 3.32 The basis for the market share threshold in the proposed Criterion 4A is therefore not clear. Furthermore, as discussed above,¹⁵¹ ComReg has not undertaken a full analysis of the market share split needed to imply sufficient indirect competition. It is therefore not clear whether the network coverage/market share threshold proposed by ComReg is appropriate.

Assessment of ComReg's Criterion 4B

- 3.33 ComReg's proposed Criterion 4B is that "*each Alternative Network Operator providing retail telecommunication services to End Users provides greater than 10% of End Users within that particular Exchange Area, absent regulation in the WCA Market*".¹⁵²
- 3.34 We understand this to mean that each and every Alternative Network Operator present in an exchange area must have a market share of at least 10%.

¹⁴⁸ ComReg Consultation, ¶1.23.

¹⁴⁹ ComReg Consultation, ¶10.48: "*Virgin Media's network coverage extends to approximately 45% of households in the State, predominately in urban areas. This may not provide the level of coverage demanded by Access Seekers, who require a national presence to serve their retail customers*".

¹⁵⁰ Ofcom, Review of the wholesale broadband access markets, Statement, 26 June 2014, ¶4.73.

¹⁵¹ See ¶2.17 to ¶2.37 above.

¹⁵² ComReg Consultation, ¶10.157.v.

- 3.35 The rationale for requiring that each and every Alternative Network Operator must have a market share of 10% under Criterion 4B is not clear, particularly given that WLA based operators are only required to have a 10% market share in aggregate under Criterion 3.
- 3.36 The basis for the market share threshold in the proposed Criterion 4B is again not clear. In particular, as discussed above,¹⁵³ ComReg has not undertaken the full analysis of the market share split needed to imply sufficient indirect competition. It is therefore not clear whether the market share threshold proposed by ComReg is appropriate.

Assessment of ComReg's Criterion 5

- 3.37 ComReg's proposed Criterion 5 is that "*Exceptionally, on a case-by-case basis, where an Exchange Area:*
- a. *(a) fails no more than one of criteria set out from (2) to (4) above and fails the criterion by a small margin (i.e. less than 10% percent of the percentage specified); OR*
 - b. *fails no more than one of criteria set out from (2) to (4) above and where an Alternative Network Operator provides telecommunication services either at the wholesale level or at the retail level which equates to more than 60% of End Users within that particular Exchange Area; that Exchange Area will be deemed to have satisfied the relevant criterion*".¹⁵⁴
- 3.38 ComReg explains that these exceptions are intended "*to ensure the boundary of a geographic market remains sufficiently stable over time*".¹⁵⁵
- 3.39 In relation to the first of these proposed exceptions, ComReg explains that it in practical terms means that "*For example, the requirement for Eircom's market share to be less than 50% (Criteria 2) could be altered to 55% under Criteria 5 (i.e. 110% of the requirement set out in Criteria 2)*".¹⁵⁶ Allowing such a margin of flexibility seems consistent with ComReg's intended stability of market boundaries.¹⁵⁷ ComReg does not discuss the extent to which this exception to Criteria 2 to 4 impacts its findings. Considering this and the abovementioned

¹⁵³ See ¶2.17 to ¶2.37 above.

¹⁵⁴ ComReg Consultation, ¶10.157.vi.

¹⁵⁵ ComReg Consultation, ¶A5.79.

¹⁵⁶ ComReg Consultation, FN832.

¹⁵⁷ ComReg Consultation, ¶A5.79.

ambiguity associated with Criteria 2 to 4, we cannot assess whether this part of ComReg's Criterion 5 is appropriate.

- 3.40 The second of ComReg's proposed exceptions allows one of Criteria 2 to 4 to be failed as long as an Alternative Network Operator has market share of at least 60%. The link to ComReg's intended stability of market boundaries is not clear.¹⁵⁸ The only Alternative Network Operators that ComReg proposes to include in its analysis are Virgin and SIRO. Of these, the proposed exception appears most relevant to Virgin given SIRO's modest current user volumes. This exception therefore assumes that the relative strength of Virgin can compensate for the weakness of other operators (e.g. failing Criterion 3 that WLA based competitors must have at least a 10% market share absent WCA regulation). The rationale for this is not clear. For example, it may be exactly when Virgin has a strong presence that other operators may find it least attractive to unbundle and therefore depend most directly on WCA.¹⁵⁹
- 3.41 The second exception proposed within ComReg's Criterion 5 may therefore be problematic as it may facilitate removing regulation exactly when regulation may be needed. This may again overestimate the degree of competition in the Urban WCA exchange areas.

Conclusion

- 3.42 ComReg explains that "*by the nature of its construct, the Urban WCA Market is an area where Eircom faces greater competition*".¹⁶⁰ This construct is implemented through ComReg's five proposed criteria. As explained above, we consider that these criteria for a number of reasons are likely to overestimate the degree of competition in the Urban WCA exchange areas.

¹⁵⁸ ComReg Consultation, ¶A5.79.

¹⁵⁹ Virgin has 370,575 CATV based broadband subscribers within the 784,400 premises covered by its network (ComReg Consultation, ¶4.118 and ¶4.119). The corresponding 47% penetration rate suggests an even higher market share ($370,575/784,400 = 47.2\%$).

¹⁶⁰ ComReg Consultation, ¶11.115.

Section 4

ComReg's competitive assessment in the context of the SMP analysis

Introduction

- 4.1 ComReg finds that Eircom has SMP in the proposed Regional WCA Market for the following reasons:
- a. **Existing competition:** *“Eircom’s persistently high market shares, the lack of an effective pricing constraint and the absence of clear evidence of competition constraining Eircom’s pricing behaviour is suggestive of Eircom enjoying a position of SMP”;*¹⁶¹
 - b. **Potential competition:** *“it is unlikely that Eircom would be sufficiently constrained by potential competition”;*¹⁶² and
 - c. **Countervailing buyer power:** *“it is unlikely that Eircom would be sufficiently constrained in the Regional WCA Market by CBP”.*¹⁶³
- 4.2 ComReg finds that no operator has SMP in the proposed Urban WCA Market for the following reasons:
- a. **Existing competition:** *“Eircom faces significant constraints from existing competition and indirect constraints which can prevent Eircom from behaving independently of its competitors, customers and consumers. On the basis of the above analysis it is suggestive that no SP has a position of SMP in the Urban WCA Market”;*¹⁶⁴

¹⁶¹ ComReg Consultation, ¶11.41.

¹⁶² ComReg Consultation, ¶11.95.

¹⁶³ ComReg Consultation, ¶11.122.

¹⁶⁴ ComReg Consultation, ¶11.42.

- b. **Potential Competition:** “potential competition from SIRO would, in combination with existing competition, be likely to further constrain Eircom’s ability to behave, to an appreciable extent, independently of competitors, customers and consumers”;¹⁶⁵ and
- c. **Countervailing buyer power:** “While Eircom may face stronger constraints from CBP with respect to its supply in the Urban WCA Market, ComReg does not consider that they would be sufficient, in and of themselves, to act as an effective competitive constraint”.¹⁶⁶

4.3 ComReg’s SMP findings for the proposed Regional WCA Market follow from the market definition approach whereby potentially competitive areas are assigned to the proposed Urban WCA Market. Our concern is that the ComReg approach to the geographic market definition overestimates this competitive pressure. ComReg’s finding of lack of competition in the Regional WCA Market therefore appears robust.

4.4 ComReg’s finding of no SMP in the Urban WCA Market again follows from ComReg’s proposed market definition. This finding is therefore vulnerable to the issues identified in Section 2 and Section 3 above. We discuss these in more detail below under the same headings as those used by ComReg.

Existing competition

4.5 Eircom and BT Ireland:¹⁶⁷ we understand that it is correct that “Eircom and BT Ireland are the current sole merchant market providers of WCA”.¹⁶⁸ We therefore agree with ComReg’s assessment that BT Ireland “plays an important part in facilitating entry to retail markets and in providing a degree of competitive constraint upon Eircom in the WCA Markets”,¹⁶⁹ as discussed above.¹⁷⁰

4.6 Market shares:¹⁷¹ ComReg considers that “Eircom’s market share in the Urban WCA Market is substantially different to that in the Regional WCA Market. On the basis of the market share figures presented above, ComReg’s preliminary view, therefore, is that Eircom’s

¹⁶⁵ ComReg Consultation, ¶11.97.

¹⁶⁶ ComReg Consultation, ¶11.123.

¹⁶⁷ ComReg Consultation, ¶11.11 to ¶11.16.

¹⁶⁸ ComReg Consultation, ¶11.11.

¹⁶⁹ ComReg Consultation, ¶11.15.

¹⁷⁰ See ¶2.5 to ¶2.8 above.

¹⁷¹ ComReg Consultation, ¶11.17 to ¶11.28.

market share in the Urban WCA Market is suggestive (but not determinative in itself) that it faces constraints in the Urban WCA Market which may limit its ability to behave, to an appreciable extent, independently of competitors, customers and consumers".¹⁷² We note that these market shares treat indirect competition and supply substitution on par with direct competition. We do not consider that this is justified, as discussed above.¹⁷³

4.7 Indirect constraints:¹⁷⁴ ComReg finds that "*Eircom faces an indirect constraint in the provision of WCA from Virgin Media in the Urban WCA Market. The Virgin Media network has a significant network coverage in the Urban WCA Market and a sizeable retail market share suggesting that customers can and do switch to such services. The same can be said of Vodafone on a forward looking basis*".¹⁷⁵ However, ComReg has not assessed retailers' incentive and ability to pass through WCA price increases,¹⁷⁶ whether, assuming pass-through, retail market competition is sufficient to constrain Eircom's conduct upstream at the WCA level,¹⁷⁷ or the impact that any recapture by Eircom of users foreclosed through WCA pricing may have on Eircom's incentive to foreclose.¹⁷⁸ We therefore do not consider that ComReg has demonstrated the presence of sufficient indirect constraints.

4.8 Pricing behaviour:¹⁷⁹ The section on pricing behaviour in the ComReg Consultation does not assess past pricing behaviour. ComReg concludes that Eircom "*would not likely be in a position to profitably raise prices above the competitive level*".¹⁸⁰ As explained above,¹⁸¹ we consider that ComReg has not justified this.

4.9 ComReg quotes past price increases as "*evidence that Eircom's prices are not currently sufficiently constrained at a retail or wholesale level, in the presence of regulation*" as an argument for a cost orientation remedy in the proposed Regional WCA Market.¹⁸² These

¹⁷² ComReg Consultation, ¶11.27.

¹⁷³ See ¶3.13 to ¶3.14 above.

¹⁷⁴ ComReg Consultation, ¶11.29 to ¶11.35.

¹⁷⁵ ComReg Consultation, ¶11.34.

¹⁷⁶ See ¶2.23 to ¶2.25 above.

¹⁷⁷ See ¶2.26 to ¶2.30 above.

¹⁷⁸ See ¶2.31 to ¶2.34 above.

¹⁷⁹ ComReg Consultation, ¶11.36 to ¶11.40.

¹⁸⁰ ComReg Consultation, ¶11.40.

¹⁸¹ See discussion of indirect competition in ¶2.17 to ¶2.37.

¹⁸² ComReg Consultation, ¶13.306.b.

price changes also applied to the proposed Urban WCA Market. ComReg states in the context of WLA that “*the fact that the only circumstances within which LLU prices have dropped has been based on regulatory intervention, may be suggestive of a lack of outside effective competitive constraints on Eircom’s price setting behaviour*”.¹⁸³ We understand that the same applies to WCA. ComReg’s assessment of past pricing behaviour in other contexts therefore contradicts ComReg’s conclusion on pricing behaviour in its proposed Urban WCA Market. We also understand that Virgin has implemented a number of price increases over the course of the past year.¹⁸⁴ ComReg does not discuss whether this is consistent with ComReg’s proposed finding that Virgin provides meaningful indirect competitive pressure on Eircom’s WCA prices.

Potential competition

- 4.10 ComReg concludes that “*absent regulation in the Urban WCA Market, potential competition from SIRO would, in combination with existing competition, be likely to further constrain Eircom’s ability to behave, to an appreciable extent, independently of competitors, customers and consumers*”.¹⁸⁵ As discussed above,¹⁸⁶ we consider that ComReg’s proposal to include SIRO in the market likely overestimates the competitive pressure potentially attributable to SIRO.

Countervailing buyer power

- 4.11 ComReg concludes that “*While Eircom may face stronger constraints from CBP with respect to its supply in the Urban WCA Market, ComReg does not consider that they would be sufficient, in and of themselves, to act as an effective competitive constraint*”.¹⁸⁷ ComReg explains that countervailing buyer power derives from, *inter alia*, “*credible alternative sources of supply*” and the ability of buyers to “*switch to other suppliers at little cost to themselves, or to self-supply the relevant product relatively quickly and without incurring substantial sunk*

¹⁸³ ComReg Consultation, ¶6.38.

¹⁸⁴ The Irish Times, 11 November 2016, Virgin Media Ireland prices will increase from January: “*Virgin broadband bundle subscribers previously saw their bills increase by €5 in March, meaning their bills will have increased by €9 a month when the new prices kick in from January*”. We recognise that the latest of these price increases may have been announced too late to be reflected in the ComReg Consultation.

¹⁸⁵ ComReg Consultation, ¶11.97.

¹⁸⁶ See ¶2.9 to ¶2.16 above.

¹⁸⁷ ComReg Consultation, ¶11.123.

costs".¹⁸⁸ As discussed above, we consider that ComReg's analysis in a number of places overestimates the degree of competition faced by Eircom. This corroborates that Eircom is unlikely to face meaningful countervailing buyer power.

Conclusion

- 4.12 ComReg's SMP analysis substantially follows from its market analysis discussed in Section 2 and Section 3 above. As discussed in these two sections, we consider that ComReg's analysis likely overestimates the competitive pressure faced by Eircom.
- 4.13 In addition to the points that flow from the market analysis, ComReg considers past pricing conduct as part of its assessment of existing competition and countervailing buyer power. We consider that ComReg's assessment of past pricing conduct excludes important evidence that ComReg relies upon in other contexts within the consultation and which contradict ComReg's finding of no SMP in the proposed Urban WCA Market.¹⁸⁹ In relation to countervailing buyer power, we agree that this is unlikely to represent a meaningful constraint on Eircom.¹⁹⁰

¹⁸⁸ ComReg Consultation, ¶11.100.

¹⁸⁹ See ¶4.8 to ¶4.9 above.

¹⁹⁰ See ¶4.11 above.