eircom Ltd.

Response to ComReg Consultation and Draft Decision 10/81

Market Review:

Wholesale Broadband Access

(Market 5)

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Executive Summary

1. This consultation is of critical importance to Irish consumers and the Irish economy and the outcome will have a profound impact on the development of the broadband market and the electronic communications sector more generally over the next three or four years.

2. The choice of broadband suppliers available to Irish consumers has expanded dramatically since ComReg last conducted a review of the WBA market. There are a variety of physical networks wholly independent of eircom's, including UPC's cable television network, four mobile networks and many Fixed Wireless Access (FWA) networks. Digital Subscriber Line (DSL) solutions utilising eircom's wholesale services are provided by several Other Authorised Operators (OAOs) and there is growing utilisation of LLU. According to the ComReg Quarterly Report for the period until end of June 2010, more than 67% of retail broadband customers were being served by companies other than eircom. eircom's share of the market will be a challenge to sustain in the face of the decline over recent years and the continuing number of new entrants to the market.

3. Broadband in Ireland has continued to grow rapidly. Over the past twelve months according to ComReg's Quarterly Report, broadband growth has been driven largely by the offerings of mobile network operators (increased by 40%) and cable operators (increased by 39%), which are providing real and intensifying competition to fixed broadband solutions.

4. eircom welcomes the timing of this market review, which takes place in an environment of robust growth and increasing competition in both upstream and downstream broadband markets. It is disappointing however that it fails to take account of the impact of other broadband platforms in the market. While the wholesale market definition proposed may have been relevant several years ago, it does not recognise the realities of the market today.

5. eircom maintains that the proposed definition of the market is incorrect as it fails to recognise the reality of infrastructure-based competition in the current market place, and the fact that cable, mobile and FWA are effective substitutes for DSL copper in the retail Broadband market. In addition, the impact of self-supply (FWA and Cable) has not been taken into account. eircom contends that a full and thorough analysis of inter-modal competition and potential self-supply by competing broadband suppliers at the wholesale level, including foreseeable developments in the period up to the next review, is absent and needs to be done.

6. The proposed analysis does not recognise the existence of sub-geographic markets. The proposed market definition is national in scope, despite the fact that there are significantly different competitive conditions in operation in rural and urban segments of the market. In that regard, an ability to de-average prices on a sub geographic market basis as was recently introduced for eircom's Ethernet product portfolio would be a very welcome competitive development.

7. Without prejudice to eircom's view that the proposed Market Definition is incorrect, eircom has a number of concerns with the proposed remedies in the Consultation Paper which appear to becoming more onerous despite the

reductions in eircom's market share. In particular eircom notes the proposals to extend notification periods to ComReg for amendments to the BARO and to have longer publication periods which we consider to be a step in the wrong direction. eircom cautions against applying blanket remedies and believes for example that existing notification and publications periods should be maintained with case by case extensions for significant product changes. eircom is also of the view that price control remedies should only be implemented in those areas where there is no inter platform competition.

8. Finally, eircom would point to recent developments in other markets most notably:

a) The Austrian market where the Austrian Regulator has included mobile and fixed broadband services in the same market
b) The UK market where Ofcom concluded that cable and LLU broadband provide sufficient indirect constraint on the incumbent Bitstream prices to justify defining sub national markets

EIRCOM RESPONSES TO COMREG QUESTIONS

1. **Do respondents have any general comments in relation to this Consultation Paper? If so, please explain your views, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.**

eircom welcomes the review of the market for wholesale broadband access. As explained in further detail in response to the specific questions raised by ComReg, eircom however does not believe that the conclusions reached by ComReg in relation to the definition of the relevant markets and its assessment of eircom's market power in the WBA market are correct and reflect the realities of competition in broadband access markets in 2010. There are three general comments that eircom would like to make:

First, the Greenfield approach, which requires that competition on the market being reviewed, and on the markets downstream of that market, be analysed absent regulation, does not appear to have been applied consistently throughout the consultation document. For instance, the analysis does not include an assessment of what eircom's pricing behaviour at the retail and wholesale levels would be absent the current retail-minus price control for Bitstream.

Second, the analysis conducted by ComReg does not appear to be forward-looking. At the very least, eircom would submit that too much emphasis is being placed on the past circumstances of the markets rather than, as a forward looking approach would require, on the evolution of the markets which can be expected in the light of current trends. eircom in this regard believes that the market for wholesale broadband access clearly tends towards competition in urban areas and that this should be reflected in the remedies imposed on eircom. Indeed, in many respects, ComReg's conclusion that having regard to the progress of cable-based broadband, it should monitor developments over the period of the review would have been appropriate two or three years ago. In the meantime, however, the market has progressed to an extent such that it must be recognized in the way ComReg proposes to regulate the market.

Finally, while eircom welcomes the timeframe of two to three years proposed by ComReg for its review of the market, eircom also notes that this does not accord with the timeframe that ComReg in practice has followed for the purpose of conducting market reviews (for instance, the previous market review for broadband access was initiated six years ago). In these circumstances, eircom believes that it is appropriate that ComReg uses a longer timeframe, of maybe three to four years, in assessing how the markets will evolve and/or includes in any decision that it adopts imposing obligations on eircom a provision for the expiry of the decision after the decision has been in force for three, possibly four, years rather than it being in place indefinitely until the next Market Review is completed.

I. THE RETAIL MARKET

A. INTRODUCTION

Pursuant to Regulation 26 of the Framework Regulations, ComReg must take utmost account of the Recommendation of the European Commission on relevant product and service markets in defining the scope of the relevant markets which it proposes to regulate. The purpose of the Commission's Recommendation is to provide the conditions for harmonisation of electronic communications markets in the European Union by identifying, in particular, relevant markets susceptible to *ex ante* regulation on the basis of general characteristics which appear to be present in a majority of the Member States. The Recommendation creates a presumption that the "three criteria test" for regulatory intervention has been met and it is correct, as ComReg says (¶ 4.3), that ComReg is not obliged "per se" to conclude on a precise definition of the retail market prior to defining and regulating the market for wholesale broadband access.

However, Ireland is not a "typical" Member State insofar as the competitive dynamics of the broadband sector are concerned. ComReg acknowledges in the Consultation Document that the broadband market has changed very significantly since the last market review in 2004 and that not only has broadband access become the most common means of accessing the Internet, as opposed to narrowband access, but significant competitive forces have emerged, in particular, cable TV networks and mobile broadband. The inclusion by the European Commission of a wholesale broadband access market essentially limited to the DSL platform reflects the situation in the majority of Member States where retail competition is driven by WBA and LLU/LS operators on the DSL platform. In Ireland, in addition to DSL-based operators, mobile operators and the cable operator are influencing to a very significant extent market dynamics. In this regard, it is essential that ComReg assesses in detail the broadband market forces in Ireland. The European Commission has emphasized the need for NRAs when examining a market listed in the Recommendation to bear in mind that:

> "a key aim of the regulatory framework is to enhance user and consumer benefits in terms of choice, price and quality by promoting and ensuring effective competition. It is only where consumer harm could be expected in the absence of regulatory intervention that a market should be susceptible to ex ante regulation."

This means that regulatory intervention at the wholesale level must be justified by the state of competition at the retail level. As ComReg explains (¶ 4.127), "*the objective is to determine to what extent [] wholesale regulation is needed to facilitate effective retail competition and choice for end-users*". It is very regrettable in this context that while ComReg undertakes to define the scope of the retail market, ComReg does not assess how competitive the market is and, in accordance with the Greenfield approach, does not consider the relevance of WBA regulation in the presence of WPNIA regulation and healthy infrastructure-based competition from cable and mobile networks.

B. PRODUCT MARKET

Q.2 Do respondents agree with ComReg's preliminary conclusions on the retail 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 position.

ComReg's preliminary conclusion is that DSL, cable modem and FWA services belong in the same relevant retail market. eircom agrees with that conclusion. However, ComReg further concludes that, "*the degree of substitutability between DSL broadband and mobile broadband would not be sufficient to prevent a HM of DSL-based broadband from imposing a successful SSNIP*" (¶ 4.109). ComReg has therefore decided to include Mobile broadband services in a distinct retail market. eircom believes that this conclusion fails to reflect the actual realities in Ireland.

eircom does not agree with ComReg's analysis of the substitutability between fixed and mobile broadband, for the following reasons:

- Ireland has the sixth highest penetration of mobile broadband across EU member states at 10.6%, well above the EU average of 6.1%.[1] The same paper acknowledges that in some member states mobile broadband is considered a substitute product for basic broadband speed services. We would agree with the EU's perspective on the matter. There are currently over 508k customers in Ireland today with a Mobile Broadband service. It is by far the largest growth platform, growing by 143k (40%) subs in the 12 months to June 2010, nearly twice that of the entire Fixed broadband market that grew by 75k (8%) in the same period. Therefore as at June 2010 there are more people subscribing to Mobile Broadband than subscribing to an eircom Retail broadband service. The huge success of Mobile Broadband in the Irish market is evidence that consumers are comfortable using it as a form of broadband.

- In relation to the functional differences, Mobile Broadband is being offered in Ireland with download speeds of up to 14.4MB over HSPA, and recently the launch of a HSPA+ Mobile Broadband modem by Vodafone sees speeds of 21.6MB being advertised[2]. These speeds are likely to increase given the migration of HSPA to HSPA+ to LTE over the coming years. By way of example, Deutsche Telekom have launched their LTE Mobile broadband service and are advertising speeds of up to 50MB. Vodafone's recent interim results and strategy update outlined that the average speed of Mobile broadband across the Vodafone group in Europe was 3.2M[3]. ComReg's June 2010 Irish Communications Market report outlines that 79.3% of all broadband subscriptions are now in the 2M-9.99M category. Therefore with the majority of broadband connections being between 2M – 9.99M and Mobile broadband also falling into this speed category, the only logical conclusion that can be reached is that in terms of speed mobile broadband is an effective substitute to Fixed broadband products.

- In functional terms Mobile broadband offerings have also been enhanced with the introduction of products such as 'Broadband in a Box' and other 'MiFi'

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[1] *: 'Broadband access in the EU: situation at 1 July 2010' published 21st November 2010*
[2] http://www.vodafone.ie/df/mobilebroadband/devices/devices_detail.jsp
[3] http://www.vodafone.com/content/dam/vodafone/investors/financial_results_feeds/half_year_30september2010/p_halfyear2010.pdf

devices that enable multiple users of a single mobile broadband connection throughout a household. Therefore, these devices have now eroded the previous functional difference that Fixed broadband could deliver over Mobile broadband, i.e. wireless broadband throughout the home / office. In addition to equivalent physical connection capabilities, access to products and services is also on a par across both DSL and Mobile Broadband, in terms of access to e-Mail services, Web browsing, social networking, on-line purchases, gaming, searching, streaming video/audio (VoIP), peer-to-peer etc.

- There is little or no difference in download volume limits for the majority of broadband users. 'Post Pay' Mobile Broadband products offer usage allowances from 10GB to 15GB per month, in line with eircom's entry level NGB offering. The evidence is also that the monthly usage of mobile broadband users is becoming aligned with that of entry-level broadband users.

- Contrary to what ComReg suggests at ¶ 4.87, "*the fact that mobile broadband access remains a shared resource, even under an LTE scenario, could still imply capacity limitations in the face of such factors as spectrum constraints and significant increase in network usage"* is not a relevant consideration and is incapable of justifying its finding that fixed and mobile broadband accesses are functionally different. DSL networks also face capacity and speed limitations and their performance is affected by increased network usage. In addition, ComReg's suggestion that mobile and fixed broadband networks "may" evolve in such ways such that differences in functionalities (if there were any) would persist is not borne out by recent trends and the anticipated evolution of both types of networks. The opposite could be argued; that Mobile broadband networks could leapfrog DSL technology in terms of the speeds and coverage that they will be able to offer over the term of the ComReg review period.

- eircom has evidence to suggest that at least one quarter of mobile broadband connections results in the cancellation of another broadband option. Therefore, mobile broadband can and does cause a substitutional impact on Fixed broadband offerings. ComReg's recent ICT survey of July 2010 also indicates a similar percentage of users where mobile broadband causes substitution away from fixed broadband. Therefore, it is incorrect to state that mobile broadband is not an effective substitute when the market and reality show that there is a significant element of substitution from fixed broadband to mobile broadband. The ComReg ICT report also states that of the 190 Mobile Broadband users surveyed only 20 are using the Mobile Broadband service in conjunction with another type of Internet connection.[4] Therefore 170 (89%) other users deem Mobile Broadband sufficiently capable of delivering a broadband experience to them; these users therefore deem the service as a substitute or credible alternative to Fixed broadband.

- eircom does not believe that the statement from Mr. Paul Donovan, CEO of eircom, quoted by ComReg at ¶ 4.102 can be interpreted in any way contrary to the above. This statement if anything makes it clear that mobile broadband is competing head-on with fixed broadband and that mobile broadband is an effective substitute to DSL-based broadband, indeed, that it is a natural choice.

[4] Slide 41 Comreg Consumer ICT Survey Q2 2010

- We note that "3" Mobile were awarded, by the Department of Communications, Energy and Natural Resources, the National Broadband Scheme for Ireland in December 2008 on the basis of using Mobile Broadband as a lead offering. This clearly accepts that Mobile Broadband constitutes a DSL substitute for customers outside the reach of DSL enabled exchanges.

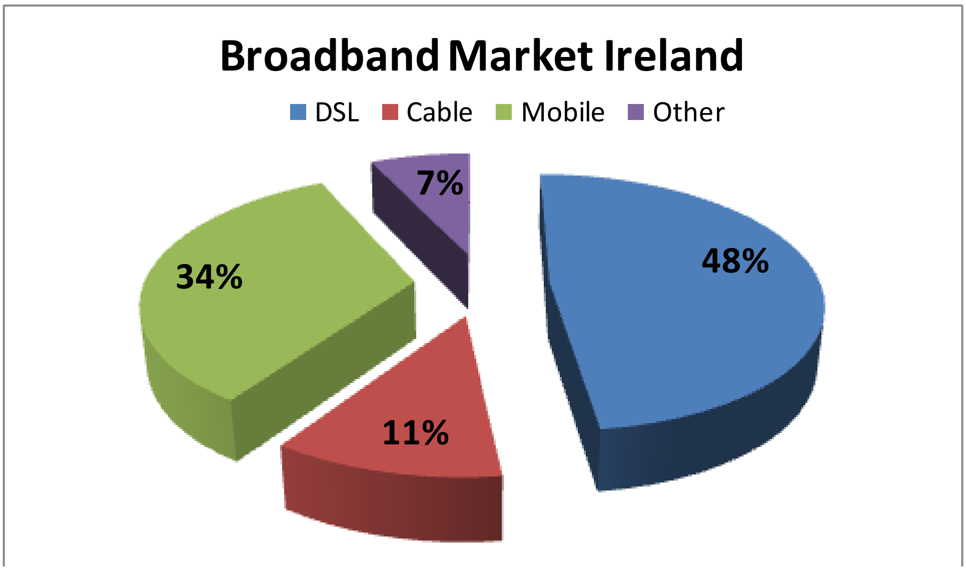
Today, over 508,000 customers in Ireland rely on a mobile service for broadband access. Mobile broadband is the platform growing the fastest (it added 143,000 (40%) subscribers in the 12 months to June 2010, nearly twice that of the entire Fixed broadband market that grew by 75,000 (8%) in the same period.) Currently, more people choose to subscribe to Mobile Broadband rather than to eircom Retail's broadband service and a significant decrease in DSL growth can be attributed to Mobile Broadband, denoting that Mobile Broadband is acting as a direct substitute for the Retail DSL product, rather than acting as a complementary offering.

It is worth noting that the European Commission has also acknowledged that Mobile Broadband can be considered to be a substitute for basic broadband services, depending on local market circumstances.

ComReg suggests that the diversification of some mobile operators into the provision of DSL broadband suggests that the mobile operators do not consider mobile broadband to be a close substitute for DSL. eircom, as a fixed and mobile operator, does not agree that this is the case. Mobile operators have diversified into fixed broadband for a number of reasons. Initially, this diversification occurred at a time mobile broadband was not developed as a product, and/or had poor coverage. Diversification is also a form of hedge given the uncertainty surrounding what form convergence will take. In any case, market positioning and marketing by mobile operators makes clear the view that mobile broadband does compete for fixed customers. Furthermore, mobile operators here and across Europe are entering the Fixed market in order to sell more mobile voice services to consumers, offering discounts on Fixed products to existing Mobile voice customers.

In summary, ComReg states that "*Retail mobile broadband is not considered an effective substitute for retail broadband offered over DSL, due primarily to functional differences, differences in pricing, and in customer usage."* We contend, based on the factual information supplied above, that mobile broadband is a comparable and effective substitute to fixed broadband given that it is causing substitution in the fixed broadband market; functional differences have been eroded; it can offer equivalent speeds; and customer usage patterns are becoming aligned with entry-level fixed offerings.

Including Mobile broadband in the context of the Broadband market would show the following market shares by technology:



To maintain that Mobile Broadband should be excluded from the Retail Broadband market in Ireland, lacks credibility and fails to recognise the current and ongoing realities of the Irish marketplace. Mobile broadband today is a comparable and effective substitute for Fixed Broadband and during the course of ComReg's 'timeframe' for this review Mobile Broadband will continue to increase speeds, quality of service and subscribers. To consider that a Mobile broadband service that provides an average speed of 3.2M is not comparable, or can act as a substitute to, a DSL entry level offerings of 1M does not stand up to any logical analysis.

C. THE GEOGRAPHIC MARKET

Q.3	**Do respondents agree with ComReg's preliminary conclusions on the geographic scope of the retail broadband 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 position.**

The geographic dimension of the market is of particular importance in relation to broadband access in Ireland as competition has evolved very differently in recent years along a rural/urban divide. As ComReg is aware, Ireland's demographic and topological profile is significantly different to most European countries with a high rural population (40%) and a low population density (60 per km2). As a result, the conditions faced by infrastructure providers vary significantly across the country. In this context, urban areas have witnessed the development of broadband access over cable and, more and more, over Line Share and LLU, while rural areas have not received much attention from the same operators. While ComReg acknowledges (¶ 4.165) the "*growing presence of cable-based broadband at the retail level in urban areas*", ComReg's conclusion that "*the conditions of competition in the retail broadband market are sufficiently homogeneous to suggest a national market"* (¶ 4.164) does not acknowledge the extraordinary developments in competition for retail broadband access in urban areas. eircom therefore disagrees with ComReg's assessment of the homogeneity of competitive conditions throughout Ireland.

eircom submits that each of the criteria examined by ComReg at ¶¶ 4.131for the purpose of its assessment clearly indicates that the conditions for competition in the market for broadband access are not homogeneous.

Entry conditions, distribution and evolution of market shares

- In September 2010, UPC had a total TV footprint of 876,300 homes passed, with a broadband footprint of 648,700, stretching well beyond just Dublin City and surroundings.[5] On the basis of a number of households of 1,599,500, this represents 40% of Irish households. As also recognised by ComReg, UPC's retail subscriber growth has been steadily increasing reaching a national market share of 17% (¶ 4.138). In urban areas, including Dublin, cable has witnessed growth at a rate significantly above the national average. We estimate that in areas where UPC operate their share of fixed broadband access is now over 35%. ✂ UPC has been increasing its broadband footprint by 80,000 customers per annum and has the capability to extend this reach to an estimated 50% of all Irish households.

- While ComReg focuses on the relatively stable market shares of LLU-based operators, the fact of the matter is that their market shares are expected to significantly increase on a forward-looking basis, having regard to the extraordinary low price at which such operators can now buy Line Share access from eircom. It is very important to note in this context that as recognised by ComReg, the Line Share roll-out footprint significantly overlaps with cable such that retail competition for broadband access in those areas will during the lifetime of the review period be driven by Line Share operators and UPC, in addition to the mobile operators, but not by Bitstream operators. This contrasts with the rural areas which ComReg has deemed to be uneconomic in terms of LLU roll-out and which have not been reached by cable. In these areas, competition will be driven mainly by mobile operators and Bitstream operators.

Pricing patterns

eircom also disagrees with ComReg's analysis of the pricing patterns in broadband access. While it is correct that eircom has not to date differentiated its price according to region, it is the case that competitive conditions from a consumer perspective (price, choice) differ significantly between areas where other platforms, in particular cable, are available and areas where they are not, even if the incumbent operator follows a national uniform price policy.[6]

In this regard, ComReg has not taken into account the impact of eircom's current retail-minus pricing obligations on the wholesale broadband access market. The fact that under current regulation, a retail price applicable only in parts of the country (e.g., in urban areas) would lead to a Bitstream price applicable on a national basis acts to prevent eircom from differentiating prices on a geographical basis. No conclusion accordingly can be drawn from eircom's uniform pricing policy as such.

In this context, it is not the case, that eircom's NGB offer is "*driven primarily by technical consideration, i.e., those exchanges where NGB will be*

5 http://www.lgi.com/PDF/UPC-Holding-BV-Q3-FINAL2.pdf.

6 See Cave, Stumpf and Valettit (p. 30)

available" (¶ 4.159). Far from being driven by "technical considerations", eircom's development of its NGB offer seeks directly to address the nature and capabilities of competing platforms' offers, in particular, cable. Indeed, there is no technical reason for determining the characteristics chosen for eircom's NGB offer. eircom could have chosen - at much lower costs - to replicate the characteristics of the current bitstream products offered on the ATM/TDM core. Then, the NGB offer would have had the same port speeds and the same contended backhaul as the current range of ADSL services. In actual fact, eircom's NGB offer seeks to respond to the technical characteristics of the offers of competitors using unbundled loops, hybrid fibre coax cable networks, WiMax wireless distribution and 3G mobile broadband infrastructures. It is retail competition in urban areas which led to the decision to offer services at the maximum port speed available - 8 Mbps for the ADSL port and 24 Mbps for the ADSL2+ port – and "uncongested" backhaul where the Gigabit Ethernet connectivity offered by the NGN core at each edge node connected allows. What ComReg refers to as "technical considerations" is actually the deployment by eircom of substantial additional network resources to meet platform competition in urban areas by offering a large step improvement in value propositions.

Geographic differences in other supply and demand characteristics

As explained above, eircom's introduction of NGB in urban areas (where cable is present and LS operators are deploying their networks) demonstrates that eircom provides different types of products in different geographic areas. In view of this new product launch, ComReg's statement (at ¶ 4.161) that "*no operators have indicated … that they offer retail products with different functionalities or types of products in different geographic areas*" seems to be inaccurate and also overlooks the fact that UPC is only present in urban areas.

eircom also disagrees with the suggestion that some operators "*use different Internet platforms in a complementary way to serve their customers typically for network availability reasons"* thereby concluding that *"differences in functionality stem from technical constraints … rather than a direct response to differences in consumer demand/localised pressures in those areas"* (¶ 4.162. In an industry such as telecommunications, "localised pressures" frequently reflect differences in supply and demand conditions. In particular, eircom submits that the structure and level of costs in urban and rural areas determine very different entry conditions as the unit costs achievable according to platform in a geographic region will affect the characteristics of supply of broadband services in that geography.

Insofar as the DSL platform is concerned, the cost models devised by ComReg in relation to DSL (for building a DSL capability to deliver Bitstream port services in Ireland) and to eircom's NGN core network (as the basis for setting prices for Wholesale Next Generation Ethernet services) show significantly larger network unit costs for delivering service to provincial areas of Ireland than for urban areas. In the case of Ethernet, ComReg has acknowledged this situation and agreed to geographically de-averaged prices for wholesale Ethernet traffic conveyance. The regulated prices charged by eircom at the wholesale level for Ethernet conveyance from provincial areas are between 2 and 3 times those charged for conveying the same traffic across the same network elements in urban areas.

In relation to cable networks, the economics of cable television networks are such that the unit costs per house served of building and operating the cable network exceed the revenue available per household outside Irish cities and large provincial towns.

FWA unit costs, which depend on the number of customers that can be covered from a single transmitter, is similarly very sensitive to population density. For this reason the main provider of fixed wireless broadband services in Ireland uses eircom's Bitstream offering to provide service in provincial areas where their self-provided consumer broadband service could not yield sufficiently low unit costs to be profitable. In urban areas this provider offers a very competitively price highly contended service based on serving a high number of customers from a single transmitter using a channel dedicated to a lower quality consumer offering. In contrast the same provider limits their offering in provincial towns to a higher quality (higher priced) service primarily aimed at business users – reflecting the higher unit cost arising from providing coverage over a similar area but to fewer customers.

For these reasons, contrary to ComReg's conclusion at ¶ 4.164, eircom is clearly of the view that structural and behavioural trends indicate that the geographic market for retail broadband is no longer national but divided in urban and rural areas. ComReg argues ¶ 4.148 that "*based on the DSL market share evolution and distribution observed in the Dublin area since Q1 2007, it cannot be unambiguously inferred that eircom's market share is set for a rapid decline from its current levels".* In eircom's view, in arriving at this conclusion, ComReg has not considered the role that cable plays within urban areas and the role of line share operators in dramatically increasing the level of retail competition.

D. COMPETITION AT THE RETAIL LEVEL

While ComReg has defined the retail market, it has not assessed the level of competition at the retail level. In eircom's view this is regrettable in view of the fact that competition at the wholesale level is directly influenced by competition at the retail level. Any analysis of the level of competition at the wholesale level will therefore be incomplete unless competition at the retail level has also been determined. This is particularly regrettable as in eircom's view such an assessment would show that in Ireland, increased retail competition is driven by cable and mobile broadband.

While DSL remains the predominant means of retail broadband access in Ireland at about 730,000 subscriptions, mobile broadband access with over 508,000 subscribers and a growth rate of 41% over the past 12 months is experiencing and will continue to experience much larger growth versus Fixed Broadband and in particular DSL.

In rural areas, it is clear that as additions of DSL-enabled exchanges decrease, mobile broadband is becoming a significant competitive force, enhanced by the designation of mobile broadband as the mechanism by which the National Broadband Scheme is delivered.

DSL is also facing very strong competition in urban areas from Cable broadband. ✂

Mobile and Cable have become the preferred Broadband subscription choice in Ireland today and, in Ireland, competition in broadband access at the retail level benefits from the presence of alternative infrastructure operators. Based on ComReg's own market figures in the 12 months to June 2010, Mobile and Cable combined to capture 88% of all new additions to the broadband market in Ireland. While it may be true that DSL remains the principal means of access throughout Ireland, the figures put forward by ComReg strongly suggest that this will not remain so over the lifetime of the (forward-looking) review period, and that this would be especially pronounced in urban areas, calling into question the relevance of WBA regulation, if not at all, at least in urban areas.

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II. THE PROPOSED REGULATION OF THE MARKET FOR WHOLESALE BROADBAND ACCESS

eircom does not agree with ComReg's assessment of the scope of the market for wholesale broadband access and ComReg's resulting finding of market power which takes no account of the diverging conditions for competition throughout Ireland.

A. SCOPE OF THE MARKET

Q4 Do respondents agree with ComReg's preliminary conclusions on the definition of the WBA product 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 position.

eircom fundamentally disagrees with ComReg's proposed definition of the market for wholesale broadband access. ComReg's approach does not take into account the circumstances which are specific to the Irish market and cannot, by any measure, be considered to be consistent with the requirements of the regulatory framework.

WPNIA and WBA

For reasons previously explained to ComReg, including in the context of ComReg's market analysis of the WPNIA market, eircom does not accept ComReg's contention (¶ 5.3) that WPNIA and WBA are not in the same market. There is indeed evidence that Line Share and Bitstream in Ireland are substitutable for each other. It is very regrettable in this respect that ComReg did not conduct the two market reviews at the same time in accordance with the Commission's guidelines. eircom believes that there is very little justification in the light of the structure of the retail market to introduce regulation on the DSL platform at both physical and non-physical levels.

ComReg's approach to eircom's pricing of Bitstream also suggests that any change to the price of Bitstream will result in operators choosing WBA over WPNIA which does not appear to be consistent with the existence of two separate markets.

Approach to defining the WBA market

On the basis that the predominant means of retail broadband access in Ireland would be "*currently*" based on DSL, and that wholesale demand is ultimately derived from the demand for access at the retail level (¶ 5.13), ComReg assumes as its starting point a hypothetical monopolist supplier of DSL-based WBA services with extensive or ubiquitous infrastructure. Under the pretext of technology-neutrality, ComReg then includes WBA products based on current generation infrastructure as well as next generation infrastructure "*when it becomes available*" (¶ 5.14). For the reasons explained in response to Questions 2 and 3, eircom does not believe that it can be said that DSL is in Ireland the predominant means of accessing broadband. Trends over the recent years show that it is fast diminishing to the profit of broadband access over cable TV networks in urban areas and generally, including in rural areas, to mobile broadband access. The relevance in an Irish context of mobile broadband access, and mobile technologies, is clearly evident from the choice of a mobile operator as the provider under the National Broadband Scheme. Indeed, mobile technologies have a more extensive reach than eircom's DSL network. ComReg's premise for the assessment of the wholesale broadband access market is accordingly incorrect. eircom's further submissions below are without prejudice to this position.

Direct constraints

eircom believes that ComReg's assessment of the direct constraints exercised by WPNIA-based operators (¶¶ 5.28-5.33) is wrong in a number of respects:

- ComReg does not use a forward-looking approach as it is required to do. Its assessment of WPNIA evolution back to Q2 2008 fails to take into account major changes in that market, including in particular the very significant change in price of Line Share imposed by ComReg. This means that operators can now acquire Line Share services from eircom virtually for free. eircom further believes that it is entirely inappropriate to rely (at fn 213 (p. 81)) on the "*potential delays*" which may arise in "*unbundling exchanges and implementing relevant backhaul"* in seeking (oddly) to minimise the impact of the Line Share pricing decision. eircom does not accept that any such "potential" delays could be so overwhelming as to annihilate the constraints exercised by WPNIA operators. (This approach is all the more unacceptable in view of the actual timeframe for market reviews in Ireland.)

- ComReg's assessment of the constraints exercised by WPNIA operators is also at odds with the approach which ComReg has proposed in its recent WBA Price Control consultation. In particular, ComReg has proposed to impose on eircom a price ceiling which is calculated by reference to the costs faced by a LS operator in Ireland.

- In view of the BT/Vodafone deal, it is simply not realistic to say that "*wholesale customers may not find it viable to purchase wholesale services from a number of different suppliers".* Vodafone clearly shows that this is not the case.

- It is also difficult to understand why ComReg seeks to conduct an analysis and draws conclusions on the basis of an assessment which excludes the most likely DSL-based operator to provide significant direct competition to eircom at the wholesale level. In this regard, ComReg's statement (¶ 5.40) that "*it remains to be seen whether BT's anticipated coverage would provide sufficient ubiquity for further wholesale access seekers to switch a sufficient portion of their wholesale broadband purchases to BT, in the absence of an accompanying retail customer transfer"* fails to recognise that after the first year of exclusivity, BT's infrastructure will be there for other operators to avail of if they so wish. BT's services are considered sufficiently ubiquitous for Vodafone, now the main DSL-based OAO broadband provider to enter into a seven year deal. However, according to ComReg, none of Vodafone's competitors will switch from their current bitstream provider to BT in the event of a price increase. ComReg's assessment is in sharp contrast with that of the Competition Authority who, in approving the BT/Vodafone transaction, found that "*the expansion of BT's Ireland wholesale broadband business will effectively deliver a platform in Ireland which will compete against the copper wire network of eircom and the cable network of UPC Broadband ("UPC")".*[7]

For these reasons, eircom does not agree with ComReg's conclusions at ¶¶ 5.46-5.47. WPNIA operators are in the position to offer an effective WBA product and should accordingly be included in the market. eircom further believes that contrary to ComReg's suggestion, the inclusion of WPNIA's operators' services in the market will

[7] Decision of the Competition Authority, ref, at ¶ 38.

have a material impact on SMP assessment and/or remedies if appropriate account is taken of geographic variations in market conditions.

Direct constraints over alternative platforms

In terms of ComReg's analysis of the direct constraints exercised by alternative platforms, eircom notes as follows:

- The European Commission's Decision in the Wanadoo/Telefonica Decision does not support ComReg's findings that the provision of broadband access over cable TV does not fall within the same market as access over DSL-based networks. In particular, there are significant differences between the situation of cable networks in Spain and in Ireland:

    - The Commission found that in Spain "[e]*ven locally, cable networks would not constitute an alternative since their coverage is lower than Telefónica's even in regions like Madrid or Cataluña*". This is clearly not the case of UPC in Ireland whose network covers most of the Dublin area.

    - The Commission also found that the cable networks were fragmented and non-overlapping which means that alternative operators would need to contract with several cable operators to serve about 40% of the population. By contrast, in Ireland, only one cable operator covers 40% and more of the population.

- The relevance of nation-wide coverage of DSL-based network as opposed to cable TV network is only relevant in circumstances where the geographic scope of the market is national. For the reasons explained in response to Question 5, eircom is of the view that the geographic scope of the wholesale broadband access market is no longer national. This is all the more the case that now, as ComReg recognises, various technical solutions can be implemented that enable cable operators to provide a cable-based WBA service.

- The same remarks apply in relation to FTTx networks whose coverage reflect the supply conditions favourable to the development of alternative networks including cable and LLU-based networks.

- The evidence available in Ireland demonstrates that the concept of the "ladder of investment" has had, and has, no relevance. As eircom has highlighted previously to ComReg, the concept of a 'ladder of investment' or stepping stone was originally set out in a number of policy papers in Europe[8] but does not have a rigorous theoretical underpinning in economics literature. Some of the early proponents of the approach, including Martin Cave, have now revised their views.[9] Empirically speaking, the 'ladder of investment' concept is also at odds with experience in markets where no 'ladder' is required for entry to occur provided provision is made for access to non-replicable facilities. More important, in Ireland, all operators bar one have moved to unbundling before taking bitstream services.

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[8] Martin Cave and Ingo Vogelsang. November/December 2003. "How access pricing and entry interact". Telecommunications Policy, Volume 27(10-11), pp. 717-727.

[9] Martin Cave. December 2004. "Making the ladder of investment operational". Paper presented to the European Commission.

- eircom is of the firm view that the award of the National Broadband Scheme to a mobile operator which will deliver mobile-based solution for the provision of broadband access strongly suggests that mobile and fixed broadband access are substitutable. The fact that the NBS operator must develop a wholesale offer provides a readily available alternative were a hypothetical monopolist to increase its prices. In this regard, if ComReg considers that any further substitutability analysis is required, then it must conduct it. ComReg's reference to "demand and supply side factors" is difficult to comprehend in circumstances where ComReg claims that the market has a national coverage. In addition, in the face of 3's obligation to provide a wholesale offer in NBS areas, it does not appear to be credible for ComReg to suggest that "*it is not likely that a mobile operator would be capable of switching to third-party supply of WBA quickly or on a sufficient scale…".*

In the light of these issues, eircom does not believe that the evidence relied upon by ComReg shows that alternative infrastructure operators would not exercise a direct constraint on a DSL-based hypothetical monopolist.

Indirect constraints

Regardless of whether or not ComReg considers that access products based on alternative infrastructure in the market would exercise a direct constraint on a DSL-based hypothetical monopolist, eircom submits that these networks' self-supply, in particular cable, must be included in the market in view of the very strong and real constraints exercised at the retail level. eircom, in this regard, is aware that there is long standing confusion and difference of opinion among NRAs and the Commission regarding the appropriate time during which indirect constraints should be considered – whether that be at the market definition stage or the SMP assessment stage. While eircom supports ComReg's apparent position that indirect constraints should be examined in the context of market definition, eircom entirely disagrees with ComReg's conclusions.

As ComReg recalls, six years ago, during its first round review of the WBA market, ComReg found that a cable network's self supply should be included in the market for WBA because of the indirect constraints exercised on a hypothetical monopolist through competition at the retail level. ComReg said as follows:

> "ComReg concluded that the market for wholesale broadband access should include the provision of bitstream services through self-supply and supply to third parties; and the self-supply by cable operators and Fixed Wireless Access ('FWA') operators. ComReg considers that t<u>he indirect pricing constraint exercised by cable and FWA based services at the retail level has a sufficiently significant impact at the wholesale level</u> to justify its inclusion in the wholesale broadband access market." (emphasis added)

This was on the basis that "*an increase in the price of bitstream access is highly likely to induce demand-side substitution at the retail level. Such an increase will probably lead to ADSL operators that buy bitstream from eircom increasing their retail ADSL prices, thereby providing technically-able cable operators with the opportunity to increase their share of the retail market (assuming that they do not merely follow the retail ADSL price increase). Such cable operators would be effectively increasing their self-supplied wholesale broadband access. ComReg concludes that the indirect pricing constraint exercised by cable based services at the retail level has a sufficiently significant impact at the wholesale level to justify its inclusion in the wholesale broadband access market*."

It is very difficult to understand how, six years later, following a sustained period of unprecedented growth in the market share of UPC, ComReg can conclude that "*indirect retail constraints from suppliers of broadband services via purchased WPNIA inputs or over alternative cable, FWA or FTTx networks are not of sufficient strength to be included in the relevant WBA market"* (¶ 5.122). This cannot be objectively justified and such a change in position is simply unsustainable, particularly as ComReg does not provide any evidence or valid reason to support its conclusion.

In this regard, ComReg's reference to the criteria developed by the European Commission are not credible. On the face of recent evidence, eircom does not believe that it is correct to say that pass-through of a wholesale price rise to retail prices could be less than complete or that the dilution of the wholesale increase at the retail level would be such as to exclude a retail constraint. This is not the case and eircom does not believe that it would be in the position to increase its retail prices by any measure without losing further market share to UPC: in other words, that even a "diluted" increase at retail level would result in losses of such scale as to make any wholesale increase unprofitable. Furthermore, it is not credible for ComReg, following sustained subscriber losses by eircom to UPC, to suggest that switching cost may be such as to prevent the exercise of an indirect constraint at the WBA level.

In this regard, eircom's experience is consistent with the analysis by Ofcom of the indirect constraints exercised by cable networks.

In its 2007 WBA Market Review, Ofcom concluded that the indirect constraints from cable based services would be sufficient to render a price rise at the wholesale level unprofitable such that the market should be broadened to include cable services.[10] Ofcom carried out comprehensive consumer research to support its conclusions demonstrating the degree of switching that would take place following a small but significant non transitory increase in wholesale ADSL products. The analysis showed that "*a 10% increase of the wholesale element [of ADSL-based product] would translate into an 8.5% increase at the retail level…. and that such a price increase would lead to approximately 19% of end-users switching from ADSL based to cable-based broadband internet access at the retail level.*" Ofcom's view was that this price increase would lead to a sufficient number of customers switching to cable-based broadband internet access to render the price increase unprofitable.

Most recently, in its 2010 Review Ofcom reinforced this position and relied upon its earlier research to reach the same conclusion with respect to market definition and market power assessment.[11] Ofcom's analysis and eircom's own experience of loss of customers to UPC in urban areas contradict ComReg's position with respect to cable's inclusion in the WBA product market. In its final statement, published on 3 December 2010, Ofcom found as follows:

> *Although broadband access products based on cable technology may not currently be available at the wholesale level, competition from the retail packages offered by cable operators can still constrain the ability of an operator selling wholesale services to price above the competitive level. It will do so provided the indirect constraint from switching at the retail level is sufficiently strong.* <u>*This is likely because if a wholesale provider were to*</u>

[10] Ofcom Review of the Wholesale Broadband Access Market – Identification of relevant market, assessment of market power and proposed remedies. 2006/2007 P. 43

[11] Ofcom Review of the Wholesale Broadband Access Markets, 3 December 2010.

introduce a price increase, we believe it is reasonable to assume that this increase would ultimately be passed on to the end consumer at the retail level (as it would be if downstream markets were competitive such that providers could not price above the competitive level.) *In such a situation the end consumer could avoid the price increase by switching to broadband access products based on cable technology. Similarly retail level switching to LLU operators will also have a constraining effect on WBA charges, whether or not LLU operators supply a WBA product to third parties.*[12] (emphasis added)

In terms of the pass-through, Ofcom noted further that:

> *"the assumption of a very high pass through is reasonable, based on two distinct reasons. Firstly, all of the available evidence suggests that cable is a strong competitor at the retail level and indeed may now be stringer than at the time of previous market reviews. Secondly, we believe that competition at the retail level is sufficiently strong that retailers using WBA would be unlikely to be able to absorb any significant increase in wholesale costs in the medium term…*
>
> *…there is some evidence that retail broadband prices closely reflect costs and therefore that it is reasonable to expect changes in wholesale prices to be passed on, for example from geographic variations in prices… Our own analysis of costs and prices also suggests that any increase in wholesale costs could not be easily absorbed and would therefore be passed in to customers.*
>
> *Furthermore, we also note that, under the logic of the HMT, the price of the wholesale broadband access input would be passed on in full. This is because the product in question must be assumed to be supplied at the competitive price prior to the hypothetical increase and, in this case, we would expect the retail level of the supply chain to be competitive. Our view is that there are no significant barriers to entry at the retail level and hence, there is no SMP at the retail level as the bottlenecks in the supply chain relate to upstream inputs. In this context, we would expect to see full pass through of a wholesale price increase. We further note that, absent regulation, wholesale supply might in some circumstances be priced on a "retail minus" basis (that is the price is set equal to the retail price minus downstream costs of supply) since this compensates the incumbent for the full cost to it of wholesale supply including any loss of retail profit. In this hypothetical scenario there is an automatic link between the wholesale price and the incumbency's own retail price, which will help WBA purchasers pass on any increase in wholesale prices".*[13] (emphasis added)

While eircom recognises that Ofcom's analysis has been carried out in respect of the UK market, the conclusions that are drawn are directly applicable to the Irish market where cable based broadband is available in the majority of urban areas and consumers view DSL and cable based products as direct substitutes. Moreover, it is worth pointing out that the Commission guidelines on market analysis set out that "*any experience gained by NRAs, NCAs and the Commission through the application of competition rules to the telecommunication sector clearly will be of particular relevance in applying Article 15 [The Market Definition Procedure] of the Framework*

[12] idem, p. 20.
[13] Ibid. p. 24.

Directive".[14] In this context, "*any information gathered, any findings made and any studies or reports commissioned or relied upon by NRAs (or NCAs) in the exercise of their tasks, in relation to the conditions of competition in the telecommunications market should serve as a starting point for the purposes of applying Article 15…and carrying out a prospective market analysis*."

eircom also notes that ComReg's approach is inconsistent with its findings in relation to its proposed WBA price control. If eircom were to implement a Bitstream price increase of 10% from €10 per month to €11 per month for an entry level consumer broadband service, the current price control (published as ComReg 10/25) would require that that the retail price increase by €1.24 (or €1.50 including VAT) per month. The financial model that informs the retail minus control of eircom bitstream prices has been constructed by ComReg to reflect the cost of an entrant using Bitstream services as an essential input to compete in the retail Broadband market. This increased margin required under the Bitstream price control must represent ComReg's considered view of the retailing costs of selling broadband in Ireland as established in the Bitstream price control. However, ComReg's analysis in Doc. 10/81 suggests that not even 100% of the Bitstream price increase would flow through to the retail level.

Finally, ComReg is mistaken in considering that the impact of competition at the retail level is limited at the wholesale level by "*the more limited/dispersed availability of alternative platforms".* UPC's cable network is concentrated in the key urban areas. Over the lifetime of the review, BT will have expanded its LLU footprint so as to be able to serve 40% of the broadband addressable market. This is not limited coverage and supports the finding that sub-geographic markets should be defined to allow for consideration of the competitive effects at play in the WBA market.

B. THE GEOGRAPHIC DIMENSION

Q5	**Do respondents agree with ComReg's preliminary conclusion that the geographic scope of the WBA market is national? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in which your comments refer, along with all relevant factual evidence supporting your position.**

eircom does not agree with ComReg's preliminary conclusion that the geographic scope of the market is national. As explained in response to Question 3, there is clear evidence at the level of the retail market from the distribution of market shares and its evolution over the last two years, the retail product strategies and the significantly differentiated entry conditions between urban and rural areas that the conditions of competition throughout Ireland are not sufficiently homogeneous to consider that the market is national. This is the case at both retail and wholesale levels. Unfortunately, ComReg's exclusion of cable self-supply within the scope of the wholesale market leads to significant distortion of the assessment of the geographic market. Contrary to what ComReg appears to suggest at ¶ 5.131, the very effective competitive pressure exercised by the cable operator in particular is fatally excluded from ComReg's analysis of the wholesale market. This is compounded by ComReg's use of market shares assessed on a national basis which

[14] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Article 2, 3.5

fail to give the extent of the differences in competition conditions faced by eircom in urban and rural areas.

In this context, there are a number of statements from ComReg which require to be addressed specifically:

- ComReg's statement at ¶ 5.149 that "*notwithstanding this regulatory obligation [*of retail-minus pricing*], there is no obvious impediment to Eircom de-averaging its retail or wholesale prices in discrete geographic areas, subject to no margin/price squeeze concerns arising"* is clearly incorrect on a number of counts. First, on the basis of ComReg's finding in 2005 that the WBA market was national, eircom's access obligation and pricing obligation also applies nationally. In this regard, eircom does not believe that ComReg can reasonably suggest that eircom could have introduced geographically limited Bitstream products, that is, Bitstream products which although technically available from everywhere would be made available only in certain exchanges or at different prices in different exchanges, for instance according to an urban/rural divide. In addition, in circumstances where under current regulation, eircom is subject to a price control obligation designed to prevent margin squeezes between the retail and wholesale (Bitstream) level, and no others, ComReg's reference to an additional obligation demonstrates that there has been a very obvious impediment to eircom introducing de-averaged pricing at the wholesale level. eircom finally notes that ComReg's approach to LLU pricing is irreconcilable with its suggestion that a regulatory obligation in relation to pricing on a national market does not prevent an operator from introducing nationally de-averaged pricing on that market.

  eircom also notes the comments of the ERG that although it might be correct in some cases that a national uniform price of the incumbent implies a national market, "*there may be cases where, from a consumer perspective, significant differences exist between "competitive" and "non-competitive" areas despite a national uniform price of the incumbent operator*".[15] eircom is of the firm view that this is the case in Ireland. The ERG notes further that "*the national uniform price is (ceteris paribus) not a useful indicator for a national market if it is imposed as the result of an SMP finding".*

- As explained previously, the fact that eircom's retail broadband competitors have not differentiated their prices on the basis of geography cannot, contrary to ComReg's suggestion at ¶ 4.150, be conclusive where these operators are not present in the entirety of the Irish territory but concentrated in very urban areas.

- eircom does not believe that there is any valid reason for ComReg to doubt that operators can successfully migrate customer bases from WBA to Line Share.

For the purpose of assessing the scope of the geographic market, that is, identifying any areas where the conditions for competition are not the same, eircom has mapped out the areas where eircom faces competition from the cable network operator and those areas which are highly likely to be unbundled in the next two to three years. ✂

[15] ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies), October 2008, p. 14.

The analysis shows that today there is significant overlap in areas where Cable and LLU is available and that over the lifetime of this review the overlap will increase and the areas in which only eircom WBA is available will shrink significantly.

In two years' time, eircom's forecasts[16] suggest that the geographic overlap between fixed broadband providers will have significantly increased

✂

In this context, there can be no doubt that the conditions for competition in the market for wholesale broadband access are not homogenous in Ireland. eircom submits that two, possibly three areas, should be identified, as follows:

- an urban area, characterised by the presence of a cable TV network and/or where exchanges have been, or will be, unbundled during the course of the review (although this urban market could possibly be further divided between areas with a cable presence and areas without a cable presence, eircom notes ComReg's comments at ¶ 5.151 that "*the retail presence of broadband-enabled cable networks is growing in urban centres and provisioning of WBA services based on purchased WPNIA-inputs is also likely to be developed primarily in urban (and suburban residential) centres*; and

- a rural area.

On the basis of the above, including responses to Questions 2 and 3, eircom submits that the differences in the competitive conditions between rural and urban areas are sufficiently strong and stable to justify a definition of separate geographic markets for wholesale broadband access in Ireland.

eircom would also like to draw ComReg's attention to economists' findings that one or two competitors are sufficient to constrain the behaviour of a dominant firm. Bresnahan and Reiss thus found that "*most of the increase in competition comes with the entry of the second and third firm".*[17]

If ComReg continued to propose a definition of the market on a national basis, on the basis, as suggested at ¶ 5.155 that "*it does not appear possible to draw stable sub-national market boundaries on the basis of wholesale constraints from WPNIA purchasers",* then it is absolutely essential that ComReg takes into account the extent of the competition on the market and imposes differentiated remedies. As the European Commission has explained, the geographic differentiation of remedies "*may be appropriate in those situations where, for example, the boundary between areas where there are significant differences in competitive conditions are observed but the evidence may not be such as to justify the definition of sub-national*

[16] On the basis of UPC's public announcements, eircom expects UPC's footprint to increase from 648,700 to 750,000, following an increase of 180,000 in the past two years. Growth projections on LLU exchanges are based on operators' interest in expanding during 2011 into these exchanges.

[17] Bresnahan, T and Reiss, P (1991), "Entry and Competition in Concentrated Markets", *The Journal of Political Economy*, Vol 99 No. 5 (Oct 1001), pp. 977-1009, cited in SPC Network, *Wholesale Broadband Access: geographic Market definitions in the UK",* prepared for BT plc, 28 May 2010.

markets.”[18] In particular, it would be entirely insufficient, as ComReg proposes to do, to “monitor” the evolution of competition from UPC during the lifetime of the review.

C. SMP ASSESSMENT

Q.6	**Do you agree with ComReg’s preliminary conclusions on the competition analysis and 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 position.**

eircom does not agree with ComReg’s analysis of the wholesale broadband access market and believes that ComReg’s assessment of SMP is incorrect particularly in respect of ComReg’s failure to recognise the competitive force represented in urban areas by UPC. eircom notes the following:

- ComReg finds that eircom has a 98% share of the market only on the basis of an unrealistically narrow definition of the market. eircom does not believe that this market share is in any way a true reflection of the level of the competitive constraints existing on the market. In this regard, in circumstances where ComReg has excluded UPC’s self-supply from the market, then ComReg must take into account the constraints indirectly exercised by UPC on the WBA market: in urban areas, eircom clearly does not have the ability to act independently of its competitors, customers and ultimately end-users. eircom thus notes that not only, for the reasons set out in response to Question 4, are any price increases at the wholesale level going to be translated into price increases at the retail level, but also any price increases, even if they were “diluted” as ComReg contends (¶ 6.24), would have very negative consequences on the areas covered by cable and/or WPNIA providers. Such areas, far from being negligible, are very significant representing between over a third and almost a half of the addressable market over the lifetime of the review.

- eircom does not agree with ComReg’s analysis of the barriers to entry on the market. In particular, the success of UPC following investments in the cable TV networks and the regulation of the upstream WPNIA market (including the obligation on eircom to provide in effect free access to its network in the form of Line Share) are not consistent with ComReg’s finding that barriers to entry are high in the market, especially in urban areas having regard to the economies of density which can be achieved, as acknowledged by ComReg (¶ 6.51). eircom does not believe that the criterion used by ComReg at ¶ 6.46 to determine the significance of the barriers to entry – namely whether investments could be undertaken on a speculative basis – is either relevant or appropriate. (Furthermore, as stated above, eircom does not believe, and does not accept, that there are any reasons why BT would not achieve co-location and backhaul.)

- The fact that BT’s WPNIA footprint will, through the review period, allow BT to offer WBA services so as to cover 40% of the addressable broadband market significantly increases the countervailing buyer power of eircom’s current

[18] Case AT/2008/0757.

WBA customers. The relevant question is not whether the BT/Vodafone deal is replicable but whether other purchasers of WBA would turn to BT in the presence of a small but significant non-transitory increase in price for WBA. It is difficult to see why not, where such increase could be avoided for 40% of the market.

- It is clear that European Regulators and the European Commission recognise that even within a single national market, an operator's market power is subject to variations: both ERG/BEREC and the European Commission recognise that it is appropriate in these circumstances to impose differentiated remedies. ComReg's insistence on focusing on the differences in geographical coverage of LLU and cable operators' footprint in this regard prevents any meaningful analysis of eircom's market power. ComReg's approach in this regard is difficult to understand in the light of its acknowledgment of the existence of sizable economies of density in the market.

This means that while a finding of SMP in relation to rural areas (that is, those areas outside the urban reach of cable and LLU providers of their own WBA service, and those areas outside the National Broadband Scheme (NBS)) may be justified, this is not so in relation to urban areas, characterised by multiple competing platforms. eircom in particular very strongly disagreed with ComReg's assessment that neither the expansion of WBA based on WPNIA nor the continuing growth of retail cable-based broadband could have a material effect on the competitive structure of the WBA market. While it is true that substitution would be weak, even non-existent in rural areas, it would be prevalent in urban areas, such that at the very least differentiated remedies are necessary so as to avoid over-regulating urban areas and as a result dampening competition.

III. ADDRESSING THE COMPETITION ISSUES ARISING

A. COMPETITION PROBLEMS

Q7	**Do you agree with ComReg's preliminary assessment of potential competition problems in the WBA 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 position.**

On the face of the Consultation Document, it does not appear to eircom that ComReg has in fact undertaken an assessment of potential competition problems in the WBA market. The purported competition assessment set out by ComReg in section 7 of the Consultation Document is limited to a list of the types of abuses by dominant firms which have been condemned by enforcement agencies and the courts under the competition law. It is difficult to see how such a catalogue can in any way assist in designing remedies which are based on the nature of the competition problems identified and be proportionate and justified in the light of the objectives set out in section 12 of the Communications Regulation Act.

Such a competition assessment would require ComReg to take into account the intermediary position of the WBA market, upstream from the retail market and downstream from the WPNIA market. eircom does not believe that under the Greenfield approach, properly implemented, ComReg could possibly find that the incentives of eircom, as the SMP operator, to deny access to WBA operators are as strong as they are on the WPNIA market. It also appears difficult to understand how the same market conditions could provide eircom with the incentive of imposing excessive prices and too low prices. This is not coherent.

eircom notes that while ComReg intends to impose a price control obligation on eircom "to maintain an appropriate economic space between prices set for WBA and those set for WPNIA", there is no detailed analysis in either this consultation document or the price control consultation document which explains why such an obligation is appropriate to remedy the competition problems identified in the market analysis.

It appears to eircom that remedies which do not take into account the various degrees of market power enjoyed by eircom throughout Ireland, and acknowledges the severe competitive constraints faced by eircom in urban areas as a result of existing and future competition from cable and Line Share operators cannot be considered to be "based on the nature of the competition problems" and accordingly proportionate. eircom accordingly submits that failing a reassessment by ComReg of the competition problems which *in fact* rather than in theory arises on the WBA markets, ComReg will over-regulate the market for WBA, dampening competition to the detriment of end-users.

Q8	**Do you have evidence/examples of any further competition problems in the WBA market? Please provide all relevant factual evidence supporting your position.**

Existing regulation severely and unduly dampens eircom's ability to compete on the retail market with alternative platforms in urban areas. Any remedies imposed on eircom as a result of a SMP finding must take into account the very different competition conditions in those areas and at the very least vary the obligations imposed on eircom accordingly.

B. THE RIA

Q9 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.

eircom does not believe that section 8 in the WBA market analysis constitutes a fit for purpose Regulatory Impact Assessment (RIA). As explained further below, eircom believes that the analysis needs to be deepened in a number of key areas, and needs to substantially extend the range and number of options considered.

Neither does the market analysis consider the possible impacts of defining sub-national markets, in light of the clearly established radically different competitive conditions which exist in urban and rural areas. In paragraph 8.88, for example, the market analysis refers to the proposed remedies supporting "*the development of effective and sustainable broadband competition, in turn promoting an environment capable of delivering important improvements in the price, choice and quality of retail broadband services*". Clearly, in urban areas where cable and mobile are already winning substantial business at the expense of eircom and other fixed operators, competition may be reduced if eircom and operators using eircom's Bitstream service are forced to compete with unreasonable constraints.

The RIA has attempted to demonstrate some impacts on various stakeholders of certain options in relation to particular proposals. While this is welcome, as far as it goes, the analysis does not go nearly far enough, and, in most cases, significant alternative options are omitted or are given only superficial consideration. The RIA does not quantify or predict the effect on stakeholder welfare of the limited number of options identified. As a general point, ComReg should apply objective cost-benefit analysis principles in its RIAs. Moreover, there is no discussion of the appropriate weight that should be attached to the various costs and benefits experienced by each of the relevant stakeholders. Examples include the following:

- In ¶ 8.66, the RIA discusses the potential effects on eircom of the introduction of service credits and concludes the impact "*to be a minimal additional burden for the operator*". In this analysis, it appears that the RIA is merely considering the administrative burden on eircom of the introduction of service credits, whereas, clearly, of far more impact on eircom would be the financial impacts of the potential outpayments. Obviously also, the adverse impact would be directly proportional to the size of the directed service credits, although this dependency is not mentioned in the RIA.

- Similarly, in ¶ 8.69, the RIA concludes that the impacts on eircom of revised notification and publication timelines would be "*minimal*". Again in this case, the focus appears to just consider the administrative burden on eircom, rather than the substantive effect on eircom's competitive position of having to notify and publish products well in advance of launch.

- At ¶¶ 8.71-8.72, there is a reference to potential impacts on eircom of proposals (around the publication of the WBARO and of KPIs) being "*relatively low*" in each case. Such a subjective and qualitative description, devoid of any supporting analysis, is inadequate.

- At ¶ 8.73, in discussing the proposed non-discrimination obligation, the RIA surmised that "*there may be some costs associated with this* [but] *ComReg does not consider them to be significant*". Again, ComReg has not presented any analysis to support this statement, nor has it made any effort to quantify these costs.

- where the impact on stakeholders is not adequately assessed is the proposed imposition of an additional transparency obligation on eircom in relation to the publication of a WBARO. Yet, in paragraph 8.70, this is described as a "*proposed refinements to the transparency obligation*".

The RIA also frequently quotes general statements of opinion as facts, without any basis or supporting material. For example, in paragraph 8.55, ComReg addresses the issue of NGA and fibre in the access network, stating that "*Failing to impose some form of remedial obligations over NGA infrastructure would ultimately be contrary to ComReg's statutory responsibility to promote competition and the interests of end users*". This opinion is stated without justification or supporting material.

We also believe that the various options are selected and the respective impacts analysed in such a way as to lead to a preconceived outcome, namely that eircom should be designated as having SMP and that a full range of remedies should be applied.

We also note the statement in paragraph 8.16 (and elsewhere) that ""*the predominant means of delivering retail broadband is still via DSL*". This viewpoint is used as justification for the finding that eircom has SMP in the defined market. As explained in response to Q2 and to other questions above, this belief could be unsound, as Cable and Mobile are the preferred Broadband subscription choice by customers today in geographic markets where those services are available.

In view of the complexity of the market analysis, and all of the relevant considerations, clearly there are a large number of courses of actions which the market analysis could feasibly propose, for example:-

- How should the issue of NGA be addressed?
- How can competition be best promoted across both rural and urban areas?
- How can efficient investment be encouraged most effectively?
- What combinations of remedies are most appropriate to be applied?

In the specific case of remedies, for example, the RIA lists various types of potential remedies (i.e. transparency, non-discrimination, access, accounting separation, price control and cost accounting). Within these broad categories, there are many potential combinations – transparency on its own, non-discrimination on its own, transparency and non-discrimination together, etc. However, the RIA, does not address the potential impacts of any of these combinations, instead concluding, without clear justification, that it is appropriate to enforce all of the available remedies.

eircom therefore does not believe that ComReg should limit the options it presents in its RIA to just **two**. These are listed as options A and B on page 158, and relate specifically to the issue of whether to impose the full rigours of regulation on NGA now, or to defer this decision for a time. In paragraph 8.5, the RIA refers to the European Commission's own use of impact assessments, and notes that "*Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled*". Clearly, therefore, the EC envisages that the impacts of the various feasible options should be considered as an intrinsic part of the RIA.

10. Do you agree with ComReg's proposals regarding the application of access remedies in the WBA 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 position.

For the reasons discussed in previous sections of this document, eircom believes that a realistic assessment of competition in the Irish broadband sector would confirm that eircom is substantially constrained by increasingly strong competition from other infrastructure-based broadband providers, including in particular UPC and Line Share operators. eircom is of the view that these constraints are sufficiently significant to justify the identification of separate geographic markets, and the application of differentiated remedies on a geographic basis, distinguishing between urban and rural areas. eircom submits that to the extent that the remedies proposed by ComReg do not recognise the various degrees of competition to which eircom is submitted on the national territory, they lead to the over-regulation of eircom in urban areas, to the detriment ultimately of end-users.

It is worth noting that the principle of defining markets on a sub-geographic basis and introducing differentiated remedies is long established: in 2006 Ofcom defined 4 sub-geographic markets and introduced differentiated remedies in each; and Ofcom proposes to continue this approach in its most recent 2010 WBA review. As set out in response 4, this regulatory precedent is particularly important in view of the fact that ComReg is obliged under the Framework Directive and the Commission SMP Guidelines to take account of other NRAs decisions and activities.

eircom also notes that even in relation to rural areas where ComReg's finding of eircom having SMP may continue to be justified, the remedies proposed by ComReg appear to be disproportionate. In particular, ComReg proposed to increase substantially the level of regulation on eircom's WBA products and services. ComReg therefore proposes to extend regulation to portions of eircom's existing network that have never before been subject to WBA regulation (e.g., backhaul) and to next generation platforms that are still in the planning stages. eircom submits that this is not justified as eircom's market power cannot be considered to have increased since the last market review in view of the decline in its market share. This is even the case in rural areas where eircom must count on the direct and indirect constraints exercised by mobile operators, including in particular 3 as the NBS operator.

In the event that ComReg proceeds to maintain the imposition of remedies on eircom, eircom believes that a number of issues and concerns should be addressed in order to minimise the distortionary, burdensome and disproportionate effect of regulation:

1. The costs of implementing the proposed remedies, particularly where new systems may be required, must be assessed and weighed against the potential benefits. This is particularly relevant in view of the fact that any increase in eircom's support costs is likely to lead to an increase in the wholesale broadband access price, which in turn would be passed on at the retail level leading to an unintended increase in consumer prices. Arguably, in this scenario, the cost of regulation would be far greater than the benefits generated.
2. In the context of NGA, the regulator will need to be mindful of the risk of duplicated investment. It is likely that new systems will need to be developed to support the delivery of NGA. Therefore, it may not be appropriate to

introduce measures which will require any significant investment in the current generation of systems.

3. Wholesale product development will need to be managed to avoid wasted investment. Specifically, eircom is concerned that it may be forced to develop products for the access market without being able to determine whether demand will be sufficient to justify the costs of product development, the implementation and running of ordering systems and establishment of monitoring arrangements. In eircom's view, this risk of wasted investment could be reduced if wholesale customers were required to purchase products in advance thereby testing consumer demand and willingness to pay.

4. The imposition of regulations in NGA is likely to significantly impact the NGA investment case both directly, for those who expect to be regulated, but also indirectly given the impact of regulation on market prices.

In addition, and without prejudice to the above, eircom would make the following additional comments:

- An obligation to provide access is not necessary, and accordingly disproportionate, in relation to urban areas where eircom on the face of cable competition has a strong commercial incentive to offer Bitstream services to maximise return on DSL investments. The same applies in relation to the obligation not to withdraw access.

- eircom reserves its position regarding whether an access request for a naked Bitstream product could be considered to be reasonable. eircom notes that the provision of such a product would represent a significant change in the use of its copper network. It would also requires an entirely different approach to broadband pricing, including in the light of ComReg's Line Share pricing decision.

- eircom agrees that reasonable notice ought to be provided to OAOs in relation to withdrawal of access facilities already granted; however, a five year notice period as suggested by the European commission is unjustifiably long in such a dynamic environment as the WBA market. This would inhibit technological progress and act against the interests of consumers, the economy and the emergence of new forms of service-based competition in Ireland.

11. Do you agree with ComReg's proposals regarding the application of non-discrimination remedies in the WBA 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 position.

Without prejudice to its position that it does not hold SMP in a nationally defined WBA market and that it should not be obliged under law to comply with the non-discrimination measures currently applied in the WBA market, eircom agrees to the principle of non-discrimination between users of WBA services – to include eircom's own retail arm. In the urban parts of the WBA market, characterised by vigorous inter platform competition, such non discrimination is necessary for eircom to maintain market share for Bitstream services. It is important to note that eircom does not believe that, in urban areas it should be under a regulatory obligation to apply these remedies and is agreeing to this on the basis of market imperatives. In rural areas, where levels of competition are insufficient, eircom agrees that the introduction of a regulatory obligation is proportionate and justified.

eircom disagrees that an obligation to provide information to access seekers two months in advance of the launch of a new retail broadband product is proportionate and justified in all cases, This will stifle innovation in a rapidly growing dynamic market. Why should a third party share a new business idea with eircom if the result is that all resulting feedback would be shared with other Access Seekers. Without prejudice to the above eircom welcomes the flexibility proposed by ComReg in paragraph 9.47 that the general requirement to provide two months notice may be relaxed by ComReg where a product development is particularly small.

In the case where eircom is responding to a tender requiring a non standard bespoke network solution it is not feasible or practical to provide such information within the timescales involved. In this context eircom proposes that paragraph 9.44 should only apply to standard products and should not apply to non-standard bespoke network solutions.

12. Do you agree with ComReg's proposals regarding the application of transparency remedies in the WBA 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 position.

Publication Requirements

In paragraph 9.64 ComReg compares the publication requirements of the WBA Market and the LLs Market, which are not comparable. The WBA Market is a much more dynamic market, characterised by regular promotions, price changes and product upgrades and needs a more flexible framework.

The notification requirements proposed, i.e. one month notice to ComReg followed by two months notice to Industry, should only be for major product changes, in the context that all the product changes are first discussed and agreed at the Bitstream Industry Forum chaired by ComReg. All other Price changes should follow the existing one week notification requirement followed by a three week publication requirement.

eircom notes that ComReg reserves the right to "extend the publication and notification periods". If this were to happen, ComReg needs to set out in advance of finalising the Decision the criteria for doing so in an open and transparent manner.

Any obligation to publish a document which demonstrates that eircom's Bitstream Access Reference offer allows OAOs to provide a retail offering of at least an equivalent quality to eircom's own retail offer is unnecessary in a market that is working as well as this market. Without prejudice to this if ComReg mandates eircom to provide such a document, it should be on the same basis as was done for the WPNIA Market.

Proposed Obligation to Provide Operational Support Systems

With regard to the requirement that eircom should invest in an upgraded OSS system, eircom would point out that neither its investment in wholesale facilities (and investment risk) nor its need to make a reasonable return on capital employed have been considered by ComReg; nor has any proportionality test been applied that would evaluate the need for such intrusive and onerous obligations. For example, eircom has made all necessary information and technical interfaces available to OAOs to support the wholesale products in this market. Access to this information is provided through “gateway” and “broker” systems where necessary and eircom believes that this approach has worked well with industry. These processes allow for the timely provision of information to relevant OAOs. eircom therefore does not understand how an OSS system requirement could be considered cost-effective.

Apparently, no consideration has been given to whether such obligations make sense at this point in time, or how their imposition would impact plans for (or the availability of resources to be devoted to) the deployment of fibre access. There has been no attempt to develop a reasonable demand test (or consideration of potential volume commitments), and it is also unclear whether or by what mechanism eircom’s development costs would be spread over reasonably expected demand and reflected in the wholesale price control.

In summary, from a legal, technical and practical perspective, these proposals are unjustified. Moreover, the proposed obligations are not sufficiently detailed or clear and the costs and benefits would need to be evaluated meaningfully.

13. Do you agree with ComReg’s proposals regarding the application of accounting separation remedies in the WBA 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 position.

Without prejudice to the remainder of this response in respect of ComReg's market analysis, eircom is not in disagreement with the imposition of an accounting obligation on its designated WBA business. As noted by ComReg, eircom believes that compliance with this obligation is directly linked to ComReg document 10/67 “Accounting Separation and Cost Accounting Review of eircom Limited – Final Direction and Decision”. ✂

14. Do you agree with ComReg’s proposals regarding the application of price control and cost accounting remedies in the WBA 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 position.

ComReg’s proposals in terms of the appropriate price control for WBA are not in eircom’s view capable of supporting competition. This is because the proposed price control would apply as a single set of prices for a single set of national Bitstream prices based on a single national cost model. In failing to recognise the different pricing constraint to which eircom is subject in urban areas, this proposed form of price control would result in the exclusion of eircom in those parts of the wholesale broadband access market where services can be provided at a cost lower than the nationally averaged cost. A removal of demand from the more cost effective portions of the eircom Bitstream network will raise the national average cost of the eircom Bitstream service.

eircom submits that an appropriate price control remedy must have considerable gradation to address the different levels of competition in the different geographic parts of the market. This gradation must address the level of infrastructure competition in urban areas.

Price control for urban areas

In urban areas characterised by substantial infrastructure competition in the provision of Broadband services from LLU, cable, and wireless providers, eircom is not in the position to act independently from its competitors and is subject to such constraints that no price control is required.

Price control for rural areas

eircom would suggest that ComReg consider an approach similar to Ofcom in the UK where the WBA Market 1 – that corresponds broadly to the Irish provincial WBA market – has a separate price control remedy with prices cost oriented between LRAIC and SAC.

15. Do you agree with ComReg's proposals regarding the application of remedies in the WBA market in a Next Generation Access environment? Please explain the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

For the reasons discussed in previous sections, there is no basis for ComReg to establish any regulations that would apply to wholesale services in an NGA environment at this time due to the numerous uncertainties surrounding NGA access, not only in Ireland but across Europe. Open questions include how and where fibre will be deployed in the access network, what types of NGA-based wholesale services will be desirable and feasible, and whether market forces will obviate the need for any regulation at all. The regulatory environment will have a material impact upon the level of investment incentives in any particular market, and the effect can be particularly acute in the case of investments in new technologies subject to significant risk. ComReg should therefore address these issues as and when more details are known and this will avoid sending any mixed signals to the marketplace at this time.

NGN access investments clearly fall into the category of higher risk investments, and on this basis eircom welcomes ComReg's proposal to consider forbearance in this area. However, eircom sees no justification for the imposition of onerous conditions before deciding whether to forebear from direct intervention in setting prices for NGA-based WBA services. If any of these conditions are not met, ComReg would intervene anyway. ComReg's goal appears to be to encourage the resolution of commercial issues by negotiation between the parties involved, which eircom fully supports. However, the proposed conditions, as currently framed, would in fact be counterproductive, insofar as they would give OAOs little incentive to compromise. Moreover, in cases where the OAOs are not themselves ready to launch retail services, through no fault of eircom, the proposed conditions might be seen to give OAOs an indirect means of delaying eircom from bringing new products and services to Irish consumers. This clearly should not be the outcome of forward-looking, pro-consumer regulation.

eircom believes that it would be premature, at best, to attempt to resolve NGA pricing issues at this time. Indeed, it is not yet certain that there will be NGA-based WBA products or services to regulate. ComReg should therefore defer any further consideration of this issue until a later date. eircom therefore asks ComReg to make clear that:

- it will only regulate NGA wholesale access if market conditions warrant,
- it will encourage commercial resolution of the issues,
- it will keep the interests of Irish consumers, as well as competitors, in mind when it issues any future conditions that may be deemed necessary

In addition, eircom makes the following points:

- ComReg should consult further when NGA networks have evolved to determine if SMP conditions are appropriate to NGA and what Remedies would apply based on the geographic locations of NGA networks.
- Regulatory certainty: The regulatory rules should be clearly defined over the life of the investment so that investors can make informed decisions based on the regulatory and financial risks involved.
- Sound market analysis: Forward-looking demand and supply side substitution analysis is needed in order to define the scope of the relevant market which should be evaluated on a technology-neutral basis.
- Proportionate gradation of access remedies: Risk of "All remedies in all circumstances" approach. Transplanting all copper-based remedies to fibre before it is built may compromise the business case.
- Consideration of geographic segmentation: Recognising the potential importance of sub-national markets to the competitive assessment of the fibre environment with particular reference to cable.
- Diversification of Risk: encouragement of risk sharing models between investors and access seekers with due regard to the impact of different models on end-user retail prices given the disproportionate risk premium in the Irish market.
- Efficient Migration to NGA: reduce significant term and cost of parallel networking by encouraging commercial negotiations between operators for de-commissioning on a case-by-case basis in accordance with specific circumstances.
- Fair and proportionate ex-ante margin squeeze test: such a test would be the lowest wholesale input cost from the risk diversifying options for access pricing to avoid giving the access seeker a "free option" to wait and see if the fibre investment succeeds.
- Regulatory impact assessment: taking local circumstances into account before imposing ex-ante remedies

Further Specific Comments

Para 9.101

ComReg states that "NGA – based WBA services and Information should be provided to Access Seekers at lease six months prior to any corresponding eircom service or facility being made available". eircom's current approach is to share and agree - with Industry through the various Industry Fora - product information from the concept stage right through to contract before we begin Formal notification. Because this process generally takes several months, the formal notification should be relatively short e.g. two months. A formal notification period of six months would be totally unreasonable in this context and would mean that it would take over one year to being products to market.

Para 9.105

ComReg states "ComReg thus considers it proportionate and justified to oblige eircom to regularly publish and update industry of its network plans and developments. This would involve eircom publishing such network planning information on its publicly available website on a quarterly basis, or such other suitable regular basis as may be specified by ComReg, and to a sufficient level of detail which allow OAOs to complete effectively". If this remedy were to apply, eircom should not be obliged to publish any commercially sensitive information publicly but the information should be made available to WBARO Access Seekers who have signed an NDA as is the current practice.

Conclusion with respect to Remedies

In light of the wide range of material legal, technical, commercial and policy issues raised by the proposed remedies, ComReg should review its preliminary conclusions after further dialogue with eircom and the industry on the need for, and the most appropriate forms of, intervention in the broadband market at the wholesale level.

Any proposed remedies relating to NGN-based wholesale services should await further technical and commercial developments in relation to the deployment of fibre access in Ireland.

Ultimately, eircom believes that a fair and objective analysis of the bitstream market will conclude that it is effectively competitive. A reduction in eircom's existing regulatory obligations should therefore be implemented. In light of the strong and intensifying competitive constraints imposed by competing infrastructure-based providers of broadband services in Ireland, there is no justification for the imposition of any remedial measures beyond those targeted to ensure that wholesale customers of eircom's WBA products continue to have reasonable access according to existing terms and conditions, subject to a non-discrimination requirement and supported by appropriate accounting separation rules.

16. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? 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.

eircom's comments below are without prejudice to eircom's response to Questions 1 to 15 above.

Definitions and interpretation

- In relation to the definition of the BARO, it is not necessary (and indeed it may be confusing) to include in the definition what is in effect the substance of ComReg's direction in relation to it, namely that it should be replaced by the WBARO. The definition should accordingly read "Bitstream Access Reference Offer (BARO) means the offer of contract by eircom Limited to OAOs in relation to Current Generation WBA in place at the time of this Decision coming into force".

- The definition of "WBARO" also should not include the last sentence included in the definition. To the extent that this is necessary, it should be included in section 10 of the Draft Decision. eircom would suggest however that this introduces a doubt as to whether the WBARO replaces the BARO or not, that is, whether the BARO continues in existence after the WBARO is published. eircom believes that this confusion is detrimental to the transparency in the market. The same comment applies in relation to section 7.3 of the Draft Decision.

- There appears to be no difference in the definition of "Direct Access Wholesale Products" and "Indirect Access Wholesale Products", both described as "a wholesale product supplied by Eircom which allow an Other Authorised Operator to use it as an input to the Other Authorised Operator's retail offering".

- "Economic Space" should not be defined by reference to "space" – "difference" may be more appropriate.

- The definition of WBA does not appear to be consistent with the findings of ComReg and could be interpreted to include access on networks other than DSL networks.

- It is not necessary to define "SMP Obligations".

Part II

- The reference in section 7.2 to BECS/BCS is too specific and at least should allow the replacement of these services by equivalent backhaul services.

- The reference "in accordance with eircom's obligations of non-discrimination" in section 9.4 is superfluous and as a result, confusing.

- The wording of section 10.6 is not clear. In particular, eircom would suggest that the publication of KPIs should not be so much a “condition” of its obligation of transparency as “part” of that obligation.

- The findings in ComReg’s market analysis do not support the imposition of a price control in the form of a retail-minus obligation. Therefore Decision D01/06, which provides for such a mechanism, cannot be lawfully maintained. Sections 12.4 and 12.5 do impose general pricing principles which are largely sufficient were there to be a significant delay between the adoption of this decision and the price control decision.

BT Communications Ireland Ltd (“BT”) response to the
ComReg consultation and Draft Decision:

For the Wholesale Broadband Access Market

6th December 2010

Issue 1

1. Introduction

We welcome this important consultation addressing the Wholesale Broadband Access (WBA) Market including both the current and next generation environments. We broadly agree with ComReg’s analysis of the market and have provided our views and detailed comments within our answers to the questions. We are pleased that ComReg is setting a regulatory framework for next generation WBA but are deeply concerned that the nascent WPNIA LLU supply into the WBA market (2.2% share of DSL Retail provides) in Ireland will foreclose if the WBA market were geographically de-averaged. We consider that more regulation is required on eircom and not less given considerable competition problems experienced by WPNIA LLU providers trying to compete in the WBA market.

We note that question 1 is seeking our general comments hence we will go straight to our responses to the questions.

2. BT Response to Detailed Questions

Question 1: Do respondents have any general comments in relation to this Consultation Paper? If so, please explain your views, clearly indicating the

relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Answer 1.

General

The WBA market largely supports the provision of broadband services in Ireland and thus has a major impact on competition, broadband speed and the price of Broadband in Ireland. For example, in numerous other European countries the barriers to the WPNIA (Local loop unbundling) market have been removed and other operators have been able to establish competitive WPNIA based WBA solutions to the incumbent. These countries have seen a significant reduction in broadband pricing to customers whilst broadband speeds increased more rapidly than Ireland. Only after years of the legal challenges and regulatory arguments from eircom were ComReg able to reduce the WPNIA LLU prices in 2010. Given this extraordinary delay the WPNIA market in Ireland is years behind the same in other countries and thus WPNIA wholesale supply in the WBA market is negligible at 2.2% of the retail market. We are concerned that any de-regulation of the incumbent eircom at this time would act to foreclose LLU within the WPNIA market and further entrench eircom's dominance.

Geographic De-Averaging

A significant theme in this consultation is the consideration of geographic de-averaging of the WBA market in Ireland. We agree firmly with ComReg's conclusion that the market remains national in nature and support the proposal to continue applying regulation on eircom on a national basis. We consider that the market in Ireland is very different to the UK where the supply of WPNIA inputs from UK provider Openreach has transformed the market over the last five to six years with some 7.23 million lines now unbundled[1]. Progress in developing a similar WPNIA market in Ireland show's little signs of moving from the protracted difficulties that LLU providers have experienced from eircom over the past ten years and it's only with the active participation of ComReg that any progress has been made, but the WPNIA LLU market is still negligible at 2.2% of the retail market.

[1] UK Office of the Telecoms Adjudicator October 2010 report.

Given eircom's past behaviour against WPNIA LLU providers we consider that eircom have the ability and motive to foreclose WPNIA competition in any geographically de-averaged locations. There is no evidence or assurances that this won't happen.

We also consider that geographic de-averaging will open up the whole issue of the Digital Divide in Ireland where consumers in Dublin and other urban conurbations will benefit from lower prices whilst rural consumers will pay higher rates.

Next generation WBA

It is timely for Comreg to put in place the regulatory framework for Next Generation WBA based on high speed Next Generation Access (NGA) technologies (fibre to the curb and to the premises) as the incumbent is actively planning pilots of these services as demonstrated by the setting up of the eircom FTTH Industry Leadership Group Meeting. We consider that the introduction of a full regulatory framework with pricing being consulted later for next generation WBA at this time provides a proportionate response that brings both regulatory certainty to protect the industry from anti-competitive behaviour and provides forbearance for the incumbent to consider different investment options and solutions. This is similar to the approach taken for the original WBA market which over time has proven to be correct. However, the pricing should be kept under close review by ComReg and price control regulation employed when appropriate.

Competition Problems

This is a case of where do you start as the list has become exhaustive over the years and we believe highlights a systemic anti-competitive approach from eircom to the supply of WPNIA WBA. Even today when eircom is mandated with publishing what they self supply to their WBA product their response was less than helpful.

The CEO of eircom has recently said to Silicon Republic[2]

[2] http://www.siliconrepublic.com/comms/item/15230-eircom-to-embark-on-major-r

“In the past, we tended to be inward looking, closed and retail oriented. But into the future we're going to need to be forward looking. This will mean more open partnerships and recognising that the provision of wholesale services will be a more important part of the strategy than it has been,"

Our view is that the industry will judge eircom on its actions as it has in the past, however what is important now is that ComReg provide the correct signals to eircom and the industry that maintain regulatory certainty whilst creating the correct incentives for investment for the whole industry (not just eircom) and the correct regulatory framework to prevent anti-competitive behaviour.

Functional Separation

Given eircom’s continuing pressure to limit the supply of WPNIA LLU, for example their drawn out agreement on bulk migrations this year, and then the slow execution of the bulk migration project we are of the view that eircom’s poor behaviour towards the WPNIA LLU providers is systemic and the time has come for ComReg to carry out an in-depth investigation into eircom’s poor behaviour. Such an investigation would highlight the urgent need to functionally separate eircom at the ‘access layer’ and ComReg should prepare to trigger this new regulatory remedy once it is transposed into Irish Law for May 2011.

Assessment of the Retail Broadband Market

Question 2: Do respondents agree with ComReg’s preliminary conclusions on the retail 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 position.

Answer 2.

We agree with ComReg’s preliminary conclusions on the retail product market assessment. We would also add for mobile broadband there is anecdotal evidence that a number of customers in more rural areas, where DSL had not been rolled out, purchased mobile broadband to avail of the benefits of higher speed access above dial-up services, however, once their exchange became DSL enabled for broadband by eircom, many took taken up the DSL service.

Question 3: Do respondents agree with ComReg's preliminary conclusions on the geographic scope of the retail broadband 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 position.

Answer 3.

We agree with ComReg's preliminary conclusion that the WBA market should be defined as a national market in Ireland. We agree with the ComReg view that retail pricing in Ireland is national in nature and we had adopted this approach when we traded in the Retail Market until September 2009. Our experience as an entrant was that it was much easier to manage a national approach to pricing strategies, billing systems, advertising etc.

We will discuss later in our response our concerns that geographically de-averaging the WBA market in Ireland at this stage of market development will simply allow eircom to foreclose the nascent WPNIA LLU based WBA services in each de-regulated area. Moreover we believe this will damage confidence in the WPNIA LLU product as a whole.

Digital Divide

We believe that ComReg should consider the consumer in its review, i.e. national pricing minimises what is commonly known the Digital Divide in Ireland. Geographically de-averaging prices in Ireland will decrease the prices of services in Dublin and other urban areas whilst the price of broadband will becomes more expensive in the rural areas.

WBA Market Definition

Question 4: Do respondents agree with ComReg's preliminary conclusions on the definition of the WBA product 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 position.

Answer 4.
We welcome the depth of analysis carried out by ComReg and agree the preliminary conclusions on the definitions of the WBA market. We agree with ComReg's view that mobile broadband (due to different characteristics) is not in the same market as fixed broadband and agree with Comreg, that similar to many other countries, DSL provides the foundation for most fixed broadband supply. We are aware that ComReg formally collects market data from providers in Ireland on a quarterly basis and consider that ComReg is correct that DSL accounts for 72% of the fixed broadband market in Ireland. This figure highlights eircom's continuing dominance and their control of the retail and WBA markets at this time.

We are of the view that eircom is continuing to limit the supply of WPNIA LLU, for example their drawn out agreement on bulk migrations this year, and then the slow execution the bulk migration project which was only speeded up after regulatory intervention from Vodafone, BT and ComReg.

We are of the view that eircom's poor behaviour to WPNIA LLU is systemic and the time has come for ComReg to carry out an in-depth investigation into eircom's anti-competitive behaviour towards the supply of WPNIA LLU into the WBA market.

Such an investigation would highlight the urgent need to functionally separate eircom at the access layer and ComReg should prepare to trigger this remedy once it is transposed into Irish legislation for May 2011.

Geographic Wholesale Market Definition

Question 5: Do respondents agree with ComReg's preliminary conclusion that the geographic scope of the WBA market is national? 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.

Answer 5.
We agree with ComReg's preliminary conclusion that the geographic scope of the WBA market in Ireland is national. We welcome the comprehensive study conducted by ComReg however we would like to make the following comments.

a. The UK market is very different to the Irish market not least that Openreach is functionally separated from BT UK and provides the open and transparent WPNIA (WLA in UK terminology) services to all operators, including self supply to BT on the SAME basis. This is mandated by legal agreement (The Undertakings) between BT and the regulator Ofcom. Comprehensive sector regulation also applies in accordance with the European guidelines. The establishment of the Equivalence of Access Board (EAB) made up of senior representatives of BT and representatives nominated by Ofcom monitor and investigate issues of equivalence.

   There is nothing like the same transparency or equivalence of WPNIA access supply in Ireland and the recent introduction of the WPNIA remedy D05/10 Clause 10.10 for eircom to publish what they self supply appears to us to have been disrespected by eircom. In our view eircom's answers are meaningless and give no clue as to whether eircom self supply is the same as their offer to other operators. This demonstrates eircom's continuing poor behaviour towards fair competition. Our comments to question 4 also apply.

b. At the end of October 2010 the UK Office of the Telecoms Adjudicator reported that 7.23 million lines had been unbundled in the UK. ComReg report in clause 5.152 of the consultation that 1,989 BT UK exchanges (84.4% of UK delivery points) were unbundled. In the Irish market circa 22 thousand lines have been unbundled after ten years of service across 85 exchanges.

c. We consider that figure 11 on page 109 and the discussion around the Ofcom observation of a competitive break point when four or more principle operators are in an exchange needs to be considered in the context of Ireland otherwise this is misleading.

- **Assessing the correct Market.** We note that only one of the operators ComReg allude to in clause 5.153 is providing WBA services hence the others should not be included in the study. BT is also in a number of exchanges where we don't provide services in the WBA market. Please See C1 for confidential text.
- **Evaluating the Number of Lines -** We consider that in addition to the number of operators in an exchange ComReg should also analyse the number of lines unbundled in each exchange as its highly probable given the nascent size of WPNIA LLU supply some exchanges will have very low numbers of unbundled lines and some of the LLU equipment installations in those exchanges are for leased line services or a hangover from past 'Celtic tiger' aspirations of some operators.
- **Conclusion -** ComReg should first functionally separate eircom's access layer akin to the UK before using the UK model (see our comments in 'd' below. Once this is achieved ComReg could count the number of principle operators in an exchange, subtract those not selling into the WBA market and then consider the number of lines unbundled for WBA supply before taking any conclusion from the table.
- Moreover ComReg should consider that the players in the UK such as Sky and Carphone Warehouse have extensive retail consumer retail broadband bases equivalent to that of BT UK and the competitive WBA market is well established.

d. BT remains of the view that ComReg should start to prepare for the transposition of the Functional Separation regulatory remedy and consult on implementing this in Ireland to force openness in eircom's provision of access services. ComReg should not even consider geographic de-averaging the WBA market until eircom are functionally separated akin to the Openreach model at the access layer (not the wholesale layer) and WPNIA WBA competition becomes fully established i.e. a substantial market share should be achieved by WPNIA LLU providers.

We therefore consider eircom have no intention (see our response to questions 7 and 8) of allowing WPNIA LLU supply to the WBA market absent regulation hence its essential to maintain the national definition of the market to avoid the WPNIA LLU locations being foreclosed.

Competition Analysis and Assessment of Significant Market Power

Question 6: Do you agree with ComReg's preliminary conclusions on the competition analysis and 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 position.

Note. There appears to be a typo on page 135 of the consultation where question 7 should be question 6.

Answer 6.

We agree with ComReg's preliminary conclusion on the competition analysis and assessment of SMP. We note that eircom hold some 98% of the DSL WBA market in Ireland and this is a strong indicator that eircom maintain a position of Significant Market Power and should be SMP regulated.

ComReg address the BT/Vodafone deal as a potential longer term competitor to WBA and we agree that the arrangement is still in its infancy with regards to market share. However, the ComReg competition analysis appears to assume the absence of competitive barriers to the growth of WPNIA/LLU supplied WBA which in the Irish market we believe are considerable. The primary issue is eircom's poor behaviour towards WPNIA LLU WBA providers. We have detailed numerous of these issues in our response to question 8, but recent examples highlight that the poor behaviour is continuing:

a. eircom delayed the agreement of a bulk migration agreement for the migration of Vodafone WBA customers to the BT WPNIA LLU platform.

b. Once the migration process had commenced, it became evident that the rate of migrations was slower than that possible and the engagement of BT and Vodafone's regulatory teams with assistance from ComReg was required to speed up the process. The process was speeded up supporting our view that the process was running slow.
c. Why does it cost circa 45 Euro to migrate a customer from eircom WBA bitstream to WPNIA LLU whereas it costs only 30 Euro in the opposite direction even though it's the same work. The pricing benefits eircom.
d. Following ComReg action earlier this year to reduce the prices of WPNIA LLU to correctly align the prices with costs, eircom rapidly introduced its BMB product having the impact or dropping their WBA prices significantly and re-engaging significant pricing pressure on WPNIA LLU WBA services.

We believe these types of issue have significant importance to ComReg's Market Review as they indicate the growth of WPNIA LLU WBA services is being hindered by activities other than open competition. Please also see our response to question 8.

Competition Problems

Question 7: Do you agree with ComReg's preliminary assessment of potential competition problems in the WBA 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 position.

Answer 7.

We fully agree with ComReg's preliminary assessment of potential competition problems in the WBA market and that eircom have both the motive and ability to act anti-competitively. We have considerable experience over many years of eircom's poor competitive behaviour (as demonstrated over many years on ComReg's web site) and before documenting a number of competition problems, we draw ComReg's attention that the current non discrimination regulatory remedies in Ireland are of limited value. Please see our answers 11 and 12.

Question 8: Do you have evidence/examples of any further competition problems in the WBA market? Please provide all relevant factual evidence supporting your position.

Answer 8. Competition Problems
We have many examples of competition problems some of which are discussed below. We have divided this discussion into competition problems towards the upstream supply impacting WPNIA LLU providers in the WBA market and secondly competition problems towards re-sellers downstream to eircom's WBA product.

A. Competition problems towards the upstream supply impacting WPNIA LLU providers in the WBA market.

Migrations

a. **Customer Migrations –** It took ComReg several years and numerous ComReg consultations to force eircom to enable the customer to be offered a service where they could seamlessly move from WBA bitstream products to WPNIA LLU products, whilst eircom were readily migrating their WBA customers from one wholesale reseller to another reseller on their platform. The eircom approach over many years caused an awful end customer experience when migrating to WPNIA LLU WBA services in that they would be without broadband service for many days and potentially weeks.

b. **Bulk Migrations -** We had a difficult experience earlier this year (2010) where eircom were delaying progress in agreeing the process for BT to bulk migrate Vodafone customers from their WBA bitstream product to the WPNIA LLU product, whereas eircom were pushing the industry to meet eircom's own tight time scale for Wholesale Ethernet. Only when BT robustly threatened to slow eircom Wholesale Ethernet progress to that of the speed they were progressing WPNIA LLU did eircom move forward on Bulk Migrations from WBA to WPNIA (LLU). The support of ComReg was instrumental in progressing this issue and we thank ComReg for their help.

c. **Slow Migrations -** Once the migration process had commenced, it became evident late summer 2010 that the rate of migrations was slower than that possible and the engagement of BT and Vodafone's regulatory teams with assistance from ComReg was required to speed up the process. The process was speeded up supporting our view that the process was running slow.

d. **Migration Pricing -** Why does it cost circa 45 Euro to migrate a customer from eircom WBA bitstream to WPNIA LLU whereas it costs only 30 Euro in the opposite direction even though it's the same work. The pricing is cost orientated for both products and the work involved is the same so why is the pricing benefiting eircom?

Backhaul

e. Please see confidential text in Annex C2.

Pricing

f. **WPNIA Price Reductions –** Similar to the migration discussion above it took ComReg several years to drive WPNIA LLU price reductions through, having to endure legal challenges and long delays before the prices were eventually reduced. It was particularly frustrating that following a six month delay for the latest line share case to be heard, eircom settled out of court just days before the hearing, thus in our opinion gaming the regulator and the market. This and the migrations experience demonstrate how determined eircom are to prevent WPNIA LLU becoming a viable competitive threat to eircom's WBA product.

g. **Price Squeeze-** We have responded to various ComReg consultations with our concerns about a Margin/Price Squeeze between eircom WBA services and WPNIA LLU services. For example, the WPNIA LLU Line share prices was set at 8.41 Euro per month whereas the eircom entry WBA bitstream was being offered at 9.48 Euro per month, but this price also included the DSLAM, co-location, power, exchange cooling, land rental, backhaul, an ATM and an IP network. Following ComReg's decision to reduce the price of line share from 8.41 euro per month to 0.77cents per month earlier this year, we note that eircom have introduced BMB pricing which in our view is again encroaching the economic space for WPNIA WBA providers. Please see confidential text in Annex C3 for more detail of our margin concerns in both situations.

Individual vs. Basket price Squeeze Tests – we consider that eircom should be margin tested on a per service instance and on a basket approach to prevent product skewing to enable the basket test to pass. Additionally, for the Bitstream Managed Backhaul (BMB) type product it will be necessary to devise a test to cater for the 'build your own solutions' from the ports and backhaul arrangement. For example congestion less 8Mbit/s service could form an example proxy for the WBA Margin Squeeze between eircom WBA and WPNIA WBA at the Wholesale layer. What is clear is that it's essential to maintain a workable Margin Squeeze test.

We welcome and fully support ComReg recent Price Control Consultation Ref. 10/56 for the WBA market.

h. **Amber process -** This is an eircom WBA process they provide for free to their downstream bitstream re-sellers and to their retail customers. This process is triggered when an end user requests broadband for the first time and the broadband availability checker returns neither a good (Green) nor bad (Red) status, hence the name Amber Process. This can occur if the end user is near the range limit of DSL or there is something preventing a good status being returned. The Amber process comprises an investigation by eircom, including potentially changing the Network Terminating Unit (NTU) at the customer's premises etc. Whilst the provision of this service is laudable the issue is that eircom offer it for free for their WBA bitstream service but the equivalent WPNIA service (Special Investigation) is charged at 100 euro.

i. **Promotions** – We note that eircom constantly have promotions running for their WBA product such as free connection, however they are not offering equivalent to their WPNA WBA providers and thus are discriminating as connect is self supplied and should be supplied to all WPNIA LLU providers (line share and fully unbundled) in the same way and to the same price.

Supply Issues

j. **Nutley –** A key associated facility to provide WPNIA LLU is for the LLU provider to avail of a small amount of physical space in the eircom telephone exchange and line connection blocks on the eircom Main Distribution Frame (MDF) in the exchange. When BT ordered connection blocks on the MDF at the eircom Nutley exchange eircom informed BT there was insufficient capacity to meet BT's request, thereby preventing BT from entering the exchange (insufficient customer capacity to make BT investment viable).

   BT did not believe the eircom view and launched a formal regulatory dispute with ComReg. After some 18 months ComReg found in favour of BT. This situation restricted WPNIA LLU WBA to BT in the urban area serviced by this exchange for in excess of two years.

k. **SLAs –** We note that eircom is about to launch a business SLA for its business products, yet it is unwilling to meet the requirements of the industry's request for a business level call out SLA for WPNIA LLU products. This is a live and current issue and demonstrates we are still having competition problems.

l. **Equality of Provision and Cease Services.**
   Currently eircom leave end user customers of their bitstream solution connected to their DSLAMs and Voice switch network when they cease service. This has a number of benefits to eircom and its WBA re-sellers, such as reducing jumpering work and enabling electronic re-enablement of the customer service when it is re-purchased.

   However, for WIPNIA WBA providers' eircom insist the WPNIA WBA provider's equipment is physically disconnected from the eircom network which causes cost and resource wastage. Plus it means new customers have to wait for the service to be reconnected causing delay and preventing electronic enablement.

This problem is easily solved by eircom keeping good records of what network their wiring is connected to and initiating the correct activity at sign-up of any end user on any platform. eircom have told us they can't trust the OAOs not to use the service in its ceased state hence they must disconnect the WPNIA LLU wiring.

There are many simple ways this can be solved ranging from contractual conditions, mystery shopping, independent inspections by ComReg if such activity is reasonably suspected. The Irish industry has a good record compared to other jurisdictions of using Customer Authorisation Forms (CAFs) responsibly so why can't the industry be trusted here?

This situation is current and both significant and discriminatory.

m. **Enquiry Response Time.** We currently have the same product manager for both the WBA bitstream and WPNIA LLU services that we purchase from eircom and he has observed that it takes considerably longer for eircom to answer his operational WPNIA enquiries than WBA bitstream ones. Although this is a small point in the scheme of things, it highlights the systemic problems in eircom dealing with these two products equivalently.

n. Please also see confidential text in Annex C3 for a number of competition problems we have previously reported to ComReg.

Next Generation WBA concerns

o. Please See Annex A and confidential text in Annex C4.

B. Competition problems towards the downstream re-sellers of eircom WBA products.

a. Sync Checker - ComReg (Doc 08/95) found that eircom were discriminating against the OAOs in providing its downstream retail operation a facility to remotely test customers' broadband lines without making the same available to other operators in a similar and timely way. Other operators had to contact eircom to make such a check causing delay and customer frustration. This highlights that eircom should be forced to publish information on the services it offers to its downstream businesses as it does discriminate.

b. **CSID –** This feature enables the network operator to identify the customers' connection in the broadband world similar to the way Customer Line Identify (CLI) works in the PSTN. The importance of this feature is that it can be used to identify the customer eliminating the need for unique customer equipment user names and passwords. Managing names and passwords is a considerable overhead and cost for call centres managing customers. We found that it was impossible for us to use the eircom CSID system as it was not stable enough, yet noted from the eircom website that all the eircom customers had the same user names and passwords programmed into their Customer DSL modems suggesting they were using such. Only after we engaged ComReg's compliance team was the feature eventually stabilised and useable. We consider this highly technical and obscure issue provide a significant advantage to eircom in reduced calls [this was a major driver of calls to BT] to their call centre and associated cost reduction.

c. Appropriate New Service Launch Notification – The timescales for eircom giving formal notice to downstream providers of product changes and price changes is insufficient. Under principles of competition law an appropriate notification should be provided to enable other providers to compete with the incumbents own retail offering from the first day it is launched.

   Modern networks are now characterised by high levels of automation to both support a good customer experience and the ability to manage volume efficiently. It is simply not practical or responsible for other providers to redevelop and test their automated systems in a matter of weeks as is required by some eircom notifications. Hence we consider that the regulatory remedy should be modified as below:

Eircom shall provide sufficient notice, but not less than 3 months, of new product launches to enable operators to launch equivalent downstream products at the same time as eircom's self supply. Pricing should be a minimum of one months notice to enable billing systems to be updated. We note the recent ComReg draft decision in the leased lines terminating market where eircom have been given one year to migrate their charging from three months advance charging to one month's advance charging yet they regularly expect their downstream providers to change their system in three weeks. One or the other of these solutions is clearly not proportionate.

d. Access Requests – The whole process of making Access Requests for new or modified services from eircom is not working efficiently and this is particularly true of the SORs progressed through the industry groups. Our experience is that the bi-lateral approach is also inefficient and not working correctly. We are no longer prepared to accept the disingenuous responses that after a month or two of looking at the request eircom come back and say they will have to conduct feasibility, or provide updates that tell the industry nothing. Our perception is eircom will stall and obfuscate if they are requested to do something they don't want. We need a better process that forces SORS to conclusion in a timely way.

   See confidential text in Annex C5.

   We are of the view that ComReg should now implement similar to that which Ofcom introduced some six years ago and which we have campaigned in many ComReg consultations over the years and regulate the process for access requests.

Regulatory Impact Assessment

Question 9: 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.

Answer 9.
We agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment. We have sympathy with ComReg's dilemma on the level of regulation to apply to NGA. We agree that an environment to stimulate investment is required for NGA, however full forbearance could see eircom leveraging their dominance from existing services to NGA. Our view is that it's proportional in Ireland to mandate the key regulatory remedies from the outset, including provide access obligations including full Equivalence of Input (Eoi); non-discrimination, transparency and accounting separation etc.

We believe an incremental approach to bring forward pricing regulation is a pragmatic and proportional way forward. However, as seen in the competition problems above and eircom's behaviour over many years, eircom are experienced and competent at frustrating ComReg's ability to regulate in a timely way and thus tight monitoring and an ability to bring forward regulatory remedies quickly is needed.

Remedies

Question 10: Do you agree with ComReg's proposals regarding the application of access remedies in the WBA 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 position.

Answer 10.
We broadly agree with ComReg's proposals regarding the application of access remedies in the WBA market however we consider the following should be added.

a. Full Equivalence of Input (Full Eoi)

We propose a specific regulatory remedy of full Equivalence of Input for Next Generation WBA. The reason given over the years as to why full equivalence is not possible in Ireland is that it is too onerous for eircom to migrate their existing products to the same gateway and service as offered to the OAOs.

b. Please see confidential text in Annex C6.

c. KPIs

   The monitoring of progress of NGA will be essential going forward. We accept that technical trials etc are too early for KPI reporting, however, it should not take long to establish workable products in the pilot and it will be beneficial to all to understand through KPIs what is working and what is not. ComReg should have a concern in this matter as the pilot and any future offering will be supplying consumers and it's important for the regulator to understand the performance of the services to the consumer.

Question 11: Do you agree with ComReg's proposals regarding the application of non-discrimination remedies in the WBA 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 position.

Answer 11.

We agree that the proposals regarding the application of non-discrimination appear say the right things, however after many years of experience of similar obligations on eircom, we know it's difficult if not impossible to prove non-compliance with the non-discrimination obligations due to a combination of eircom confidentiality in contracts and eircom secrecy in self supply. Unless ComReg or OAOs are able to investigate fully eircom's internal processes and systems we have no confidence that the non-discrimination clauses are effective. For example BT was oblivious to the eircom Sync checker discrimination until we learned of it from ComReg.

Additionally, we had many experiences a couple of years ago where we had to continually ask our eircom account manager for the progress of a fault as he was able to obtain more up to date information than was being electronically reported to us, hence suggesting the industry did not have appropriate access to the eircom Fault Handling System (FHS). On the surface it appears that eircom have improved things in this area over the past year following our requests, but it highlights the disconnect between the wholesale gateway and the information available to eircom internally. We were convinced at the time, but could not prove that eircom retail had direct access to their FHS and thus had a better quality and more timely of information. Transparency is thus the key making the non-discrimination regulatory remedy effective. We note that ComReg found eircom to be discriminating towards their self supply as documented in ComReg doc.08/40 suggesting our suspicions could have been correct – but we could not prove it.

Question 12: Do you agree with ComReg's proposals regarding the application of transparency remedies in the WBA 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 position.

Answer 12.

As discussed in our response to question 11 we consider that the non-discrimination remedy is ineffective without supporting transparency regulation. We welcome the continuation of the traditional transparency rules which have limited benefit and we support the introduction of a new condition similar to the WPNIA regulatory remedy (ComReg Decision 05/10 Clause 10.10) which mandates eircom to publish the difference between self supply and the wholesale offer.

Extract - WPNIA D05/10 Decision Clause 10.10

Pursuant to its obligation of transparency, Eircom shall, within four months of the effective date, publish on its website sufficient information to identify and justify any differences between the services and facilities set out in the ARO and the comparable services and facilities which eircom provides to itself. The information shall include all material associated terms and conditions, including relevant processes, and shall be kept updated by Eircom as new services or facilities are developed and deployed or existing services or facilities are amended.

End of Extract

However, we note the eircom response to this WPNIA regulatory remedy was bland and meaningless which suggests to us their disrespect and non-compliance with this remedy.

We consider a huge amount of detail is missing from the eircom declaration for example how do eircom downstream wholesale and retail businesses offer 24/7/365 call out services yet the product does not exist in the upstream WPNIA market which eircom consume. A recent eircom offer to provide a call-out service in the upstream market offered repair times longer than available from eircom in the downstream market.

We are of the strong view that there are current compliance issues surrounding WPNIA clause 10.10 which need investigation, however we consider the inclusion of a similar clause in WBA Decision Notice should reflect the experience to date within its drafting. We would add this is not functional separation by the back door; it's simply making equivalence of input (EoI) work and to flush out discrimination issues. If there is nothing to hide why is it so difficult to do?

We consider ComReg should review the WPNIA and proposed WBA remedies [WBA draft decision clause 10.9] and analyse why eircom were able to, in our view, disrespect the WPNIA Decision.

Question 13: Do you agree with ComReg's proposals regarding the application of accounting separation remedies in the WBA 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 position.

Answer 13.

We fully agree with ComReg's proposals regarding the application of accounting separation remedies in the WBA market as we consider that eircom have both the ability and motive to act in an anti-competitive way. We have also experienced considerable pricing pressure in the past from eircom WBA products on the WPNIA LLU price such that we believe it unreasonably restricted the WPNIA LLU product (Please see confidential text in Annex C3). To ensure that eircom are trading correctly and not cross subsidising the WBA solutions from other aspects of their business it's essential that the accounting separation obligation on eircom is maintained.

Question 14: Do you agree with ComReg's proposals regarding the application of price control and cost accounting remedies in the WBA 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 position.

Answer 14.
We agree with COMREG for the need to apply regulatory remedies for price control and cost accounting remedies. Given the extreme pricing pressure that eircom has applied to the WPNIA WBA solutions we strongly believe left uncontrolled and absent regulation, WPNIA WBA would be foreclosed. We also refer ComReg to our response to their recent consultation (Consultation and draft decision on the appropriate price control reference 10/56) in this matter.

Question 15: Do you agree with ComReg's proposals regarding the application of remedies in the WBA market in a Next Generation Access environment? Please explain the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Answer 15.

We consider that ComReg should apply the same set of regulatory remedies and sub-remedies to NGA in the Next Generation as to the current WBA solution, but with ComReg consulting later on setting a price control. However, eircom's pricing should be closely monitored with the ability for ComReg to impose regulation should abuse be suspected. We also consider further remedies are needed as outlined to our response to question 10.

Draft Decision Instrument

Question 16: Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? 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.

Answer 16.
As discussed in our answer to question 15 we consider the same regulation should apply to eircom's NGA based WBA solutions as to the current WBA market but with ComReg consulting later on a on a price control thus enabling investment decisions become stable.

We are also of the view that additional regulatory remedies as outlined in question 10 are required to address current abuses and the NGA environment.

Annex A – Generic Ethernet Access

498v3p2.pdf

Annex B – Press Link.

http://www.siliconrepublic.com/comms/item/15230-eircom-to-embark-on-major-r

Magnet Networks

Question 1: Do respondents have any general comments in relation to this Consultation Paper? If so, please explain your views, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Magnet Networks welcomes this consultation. The content of the consultation is vast and it is a thorough investigation of the broadband market as a whole. This consultation supplies a comprehensive overview of the broadband market including a view of mobile, cable and DSL broadband.

Question 2: Do respondents agree with ComReg's preliminary conclusions on the retail 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 position.

Magnet Networks agree with ComReg's preliminary assessment. Magnet Networks agree that narrowband and broadband as well as mobile satellite are not substitution products for fixed WBA. Magnet Networks agree that fixed broadband mechanisms e.g. cable, fibre to the cabinet/home, FWA and Wimax are within the same retail market. Magnet Networks agrees that mobile though potentially may be seen at the retail level as being a substitute when it is compared side by side with fixed broadband methods, mobile broadband speeds together with its pricing and download limits ensure that it is not a fully substitute product.
One question that needs to be answered in relation to the SSNIP test is what pricing was used by ComReg in their assessment. Is the pricing wholesale cost orientated? This is important to show if the prices were to increase then it would be passed on to the customer. If it was not passed on it may be because the incumbent is not passing it on and absorbing the cost into their model. If this happens there is a potential foreclosure of the market as the OAO can only absorb increase in prices to a certain level before it becoming untenable.

Question 3: Do respondents agree with ComReg's preliminary conclusions on the geographic scope of the retail broadband 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 position.

Overall Magnet Networks agree that the geographic scope is national. Magnet Networks feel that there are too few exchanges unbundled for WPNIA WBA products to become a national product.

Question 4: Do respondents agree with ComReg's preliminary conclusions on the definition of the WBA product 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 position.

Magnet Networks agree that FTTX, cable and mobile would not pose a threat to the incumbent supplier. Magnet Networks feel that WPNI supplied WBA due to its geographic disbursement does not compete with the incumbent supplied WBA.

Question 5: Do respondents agree with ComReg's preliminary conclusion that the geographic scope of the WBA market is national? 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.

Magnet Networks agree that the geographic scope of the WBA market is national.

Question 6: Do you agree with ComReg's preliminary conclusions on the competition analysis and 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 position.

Magnet Networks agree with ComReg's conclusions that eircom has SMP in the WBA market. Looking at all the factors that ComReg considered including the definition espoused in the Hoffman La Roche decision in relation to dominance measurements. With eircom having 95% market share as well as owning the ubiquitous network infrastructure this shows that they have SMP in the WBA market.

Question 7: Do you agree with ComReg's preliminary assessment of potential competition problems in the WBA 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 position.

Overall Magnet Networks agree with the preliminary assessment of the potential competition problems. In relation to the vertical integrated competition problems ComReg outlined the majority of the issues that Magnet Networks believes arise due to vertical integration e.g. the 'Sync Checker' issue.
Also, at paragraph 7.27 ComReg states that where WBA inputs are priced too low relative to WPNIA inputs, this could potentially discourage efficient infrastructure investment. In Magnet Networks opinion WBA inputs are already priced too low namely, 8/24MB managed bitstream backhaul as well as the Turbo/Sprint IP packages. This pricing makes unbundling an exchange especially the NGN enabled exchanges unattractive.

Magnet Networks

Question 8: Do you have evidence/examples of any further competition problems in the WBA market?
Please provide all relevant factual evidence supporting your position.

Magnet Networks will provide confidential information relating to lineshare/LLU pricing versus the pricing for 24MB managed bitstream backhaul.

Question 9: 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.

Magnet Networks overall agrees with ComReg's preliminary conclusions.

Question 10: Do you agree with ComReg's proposals regarding the application of access remedies in the WBA 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 position.

Magnet Networks overall agree with the proposals outlined by ComReg. However, Magnet Networks feel that there is a requirement for the following:-

1. Prioritised SLA's – Across both Market 4 and Market 5 were previously provided on a commercial basis only. However, if OAO's are requesting these services the original SLA is obviously not fit for purpose. Also, these SLA must be looked at in comparison to the SLA's offered by eircom retail.
2. NGA Migrations – This may not be an issue currently but in future. It is necessary to regulate this now to ensure that there are not barriers to migrating from current WBA to next gen WBA.

Question 11: Do you agree with ComReg's proposals regarding the application of non-discrimination
remedies in the WBA 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 position.

Overall Magnet Networks agrees with the proposals that ComReg have set out in relation to non discrimination. However, Magnet Networks feel that more examination needs to be done in relation to ordering and fault reporting. As eircom retail and OAO's ordering/fault reporting are done via two different mechanisms. Thus, if the UG (OAO on line ordering/fault reporting mechanism) fails or goes down then the OAO is unable to log faults, order or upgrade services. However, does the eircom retail ordering system stall as well to ensure equivalence and ability to order. If not there is discrimination at this level.

Question 12: Do you agree with ComReg's proposals regarding the application of transparency remedies in the WBA 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 position.

Overall, Magnet Networks agrees with the proposals ComReg have set down especially the requirement that eircom must outline their equivalent products and explain any differences that arise. This is extremely important in relation to SLA (Service Level Agreements) and ensuring that there is equivalence in services and fault repair times.

Question 13: Do you agree with ComReg's proposals regarding the application of accounting separation remedies in the WBA 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 position.

Magnet Networks agree as having accounting separation prevents cross subsidisation.

Question 14: Do you agree with ComReg's proposals regarding the application of price control and cost accounting remedies in the WBA 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 position.

Overall, Magnet Networks agree with ComReg's proposals regarding the application of price controls and cost accounting remedies in the WBA market.

Cost accounting ensure there is relevant allocation of costs to services, whilst imposing a price control means that eircom cannot completely foreclose the market. However, Magnet Networks feel that paragraph 9.87 is happening in the marketplace and

Question 15: Do you agree with ComReg's proposals regarding the application of remedies in the WBA market in a Next Generation Access environment? Please explain the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

1. Magnet Networks agree to a point with ComReg's proposals however, we feel that already there are issues arising in the Next Generation Access environment. have their own proprietary gateway except for the insistence of OAO's.

Thus, CoMReg's proposal to impose current obligations is very welcoming however, Magnet Networks feel that specific obligations with regard to access, migrations and pricing might be appropriate now at this early stage. Being conservative now may ensure that healthy competition emerges. Magnet Networks feel that ComReg should learn from the mistakes of LLU and ensure that there is early intervention by the regulator so that the incumbent does not get a chance to foreclose the market.

Question 16: Do respondents agree with ComReg's draft Decision Instrument set out above? Do
respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? 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.

Magnet Networks agree with ComReg's draft decision and feel that the definitions and interpretations set out in Part 1 of the Decision Instrument.

Vodafone Response to the ComReg Consultation and Draft Decision on Market Review: Wholesale Broadband Access (Market 5)

Non-confidential version

Ref. ComReg Document 10/81 Response Date: 3rd Dec 2010

Introduction

Vodafone welcomes the opportunity to respond to this consultation on the review of the Wholesale Broadband Access Market (Market 5) and the Draft Decision Instrument. Vodafone is in general agreement with ComReg's conclusions in respect of the market analysis and the regulatory remedies to address the identified competition problems as specified in the Draft Decision Instrument. Our views are set out fully in response to the consultation questions below.

Response to Consultation Questions

Q1. Do respondents have any general comments in relation to this Consultation Paper? If so, please explain your views, clearly indicating the relevant paragraph numbers to which your comments refer, along with any relevant factual evidence supporting your position.

Vodafone is of the view that this Consultation paper represents a comprehensive review of the WBA market and that the preliminary views of ComReg in respect of the definition of the WBA product market, its geographic scope and the SMP analysis are well grounded and objectively justified on the basis of the available evidence. Where appropriate, Vodafone has in this response set out additional information not considered by ComReg reinforcing ComReg's preliminary analysis and conclusions.

In respect of the proposed remedies Vodafone agrees with the overall thrust of the ComReg approach however we have a number of specific comments on how the proposed remedies might be made more robust and more likely to be effective.

Vodafone notes the overall context for this review is that eircom is currently regulated and that one possible outcome is for the removal or lessening of such regulation. While there should not be regulation where none is warranted it is Vodafone's view that where there is a judgement to be made in respect of the appropriateness of regulation then such judgement should be exercised so as to minimise the risk to the protection of competition in the retail market. In this regard Vodafone believes that at each stage of the market review process it is proportionate, reasonable and justified (and in keeping with ComReg's functions and objectives) for ComReg to adopt positions which offer maximum protection to the preservation of competition in the provision of retail broadband services. In the case of this review this would involve adopting positions and remedies which limit the potential for regulation to be prematurely attenuated or lifted entirely.

Q2. Do respondents agree with ComReg's preliminary conclusions on the retail 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 position.

In general Vodafone agrees with ComReg's preliminary conclusions on the retail product market assessment.

Vodafone would make the following specific observations.

Is dial-up narrowband access an effective substitute for DSL-based retail broadband access?

Vodafone agrees with ComReg's assessment that dial-up narrowband access is neither a demand side nor supply side substitute for fixed Broadband. This lack of substitutability is implicit in the National Broadband Scheme sponsored by the Department of Communications Energy and Natural Resources. If dial-up narrowband access was an effective substitute such a scheme would have been un-necessary. Similarly it is unlikely that eircom would invest in further broadband roll-out if its existing switched network met demand side requirements.

Is cable-based retail broadband access an effective substitute for DSL based retail broadband access?

Vodafone has not identified a material issue with ComReg's proposal to include cable-based broadband access in the same relevant retail market as DSL-based broadband access for the purposes of this Consultation Paper. However Vodafone notes the caveats that ComReg has voiced in respect of the geographic reach of cable. In this regard Vodafone believes that cable based broadband is primarily positioned as a bundled offering with TV services. In the TV market cable competes against satellite which has the effect of reducing the service penetration of the former into homes passed within its geographic coverage area. This in turn may limit the constraints that cable places on eircom in the retail broadband market.

Is FWA-based retail broadband access an effective substitute for DSL based retail broadband access?

Vodafone has not identified a material issue with ComReg's proposal to provisionally include FWA based broadband in the same relevant retail market as DSL-based broadband access for the purposes of this Consultation Paper. Vodafone believes however that the issues identified by ComReg, such as contention, along with others, act to limit the substitutability of FWA in the Wholesale Market.

Is FTTx-based retail broadband access offered by alternative networks an effective substitute for DSL-based retail broadband access?

Vodafone has not identified a material issue with ComReg's proposal to provisionally include FTTx-based retail broadband access offered by alternative networks in the same relevant retail market as DSL-based broadband access for the purposes of this Consultation Paper.

Is satellite-based broadband access an effective substitute for DSL-based broadband access?

Vodafone agrees with ComReg's preliminary conclusion that retail broadband offered via satellite is not an effective substitute for DSL-based retail broadband. Therefore it is Vodafone's view that it should not be considered to be in the same relevant market for the purposes of this Consultation Paper.

Is broadband access based on leased lines an effective substitute for DSL based broadband access?

Vodafone agrees that given the distinct pricing and functional differences between retail DSL-based broadband and leased line connections, these products would not be considered to be substitutes. Therefore it is Vodafone's view that broadband access based on leased lines should not be considered to be in the same relevant market as DSL based broadband access for the purposes of this Consultation Paper.

Is mobile-based broadband access an effective substitute for DSL-based broadband access?

Vodafone agrees with ComReg's view that, for the reasons set out in the Consultation paper, there are considerable functional differences between mobile broadband and fixed broadband which mean that they are not likely to be considered effective substitutes by most fixed broadband customers.

In terms of market evidence for this view Vodafone endorses ComReg's analysis that its investment in its fixed line business is intended to allow Vodafone to service new markets and access a new customer base that has distinct needs.

Vodafone notes ComReg's analysis that it would not be commercially rational for the diversifying mobile broadband network operator to operate two networks in parallel (i.e. a mobile broadband and a DSL broadband network) were mobile broadband to be considered a close substitute for fixed broadband in the retail market.

A similar analysis can be applied to eircom. It is investing in the network enablers for Mobile Broadband (via its wholly owned subsidiary, Meteor) in areas which overlap with its existing fixed broadband capability. Indeed in these areas it is also investing in upgrading its fixed broadband capability. Given the financial constraints which the company itself reports it is improbable that it would make such investment decisions if it believed there was significant substitutability between fixed and mobile broadband at the retail level.

Vodafone notes ComReg's most recent proposals in respect of the liberalisation of the 800MHz and 900MHz bands. Based on these, deployment of LTE services is unlikely to be on a widespread commercial basis within the period of the WBA market review. Therefore even if LTE based Mobile Broadband was a functional substitute for Fixed Broadband services (a view that Vodafone does not currently hold) then it would still not be relevant for the purposes of this review.

On the basis of the analysis set out in the consultation and considering the market evidence Vodafone agrees that retail mobile broadband and retail fixed DSL broadband would not fall within the same retail broadband market for the purposes of this review.

Q3. Do respondents agree with ComReg's preliminary conclusions on the geographic scope of the retail broadband 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 position.

Yes. Vodafone considers that the geographic scope of the market is national and will remain so at least over the period of this market review. This is demonstrated by unified pricing and marketing strategies currently pursued by providers of retail broadband services across the areas that they serve. In the case of most broadband service providers, such as Vodafone, the scope of service provision is national subject to the availability of wholesale inputs and each operator adopts a common pricing and marketing approach throughout the country.

The nationwide nature of the demand side for retail broadband is reflected in the National Broadband Scheme sponsored by the Department of Communications Energy and Natural Resources.

Even in the case of service providers whose coverage is more limited and/or regionally based (such as the cable operator UPC) there is no evidence that pricing and other elements of commercial strategy are differentiated across discrete areas within their overall coverage footprint and any differences in functionality on a geographic basis appear to be driven by technical rather than commercial or competitive considerations.

The essentially unified pricing and marketing strategies of individual retail broadband service providers is indicative of the lack of any material differences in terms of competitive conditions on a sub-national basis. This strongly supports ComReg's preliminary conclusion that the conditions of competition in the retail broadband market are still sufficiently homogeneous to suggest a market that is national in scope. Moreover Vodafone believes that practical considerations around the economics of commercial retail broadband service provision mean that the emergence of sub-national markets is unlikely to occur on a forward looking basis, at least within the period of the current review (2-3 years).

In respect of the emergence of eircom's NGB service in a footprint less than its "traditional" broadband offerings, Vodafone notes that the availability of NGB is driven by the extent of eircom's NGN network. This is perhaps most obvious in the form of the "NGN coverage map" on eircom's wholesale website. This map has the possibility to turn on and off layers of products and the map will show which exchanges these services are available in. The current range of services includes WEILs, WSEAs and BMB. There appears to be a very significant overlap between these and it is Vodafone's view that over time eircom will continue to extend its NGN network, eventually replacing its embedded circuit switched network. As this NGN deployment progresses Vodafone expects that the availability of BMB/NGB will also extend to the NGN boundary. On this basis it would appear that any differences in functionality and geographic availability between NGB and traditional DSL based broadband is not indicative of a separate sub national market but is a function of the gradual replacement of one by the other. Essentially it represents a technical network upgrade.

Vodafone notes that eircom has not consulted its wholesale customers as to the speed or extent of this product replacement. That eircom is able to effect such a fundamental change without taking account of the requirements of its wholesale customers is indicative of an entity that can act independently of the market.

Vodafone agrees that ComReg must adopt a cautious approach when attempting to assess future evolution of coverage and market share growth, which are contingent on a range of factors including economic and financial conditions, around which there is currently a much greater than normal level of uncertainty.

Vodafone agrees that the roll-out of NGA by eircom will not significantly change the competitive structure of the market in areas where it is present, or on a national basis over the period of the review. Vodafone is of the view that at the service layer WBA services offered over NGA are in principle substitutable for WBA services offered over legacy networks on both the demand and supply side and are therefore in the same market.

Q4. Do respondents agree with ComReg's preliminary conclusions on the definition of the WBA product 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 position.

In general Vodafone agrees with ComReg's preliminary conclusions on the definition of the WBA product markets.

Relationship between the WPNIA and WBA markets

Vodafone concurs with ComReg's conclusion that wholesale physical access (WPNIA) and wholesale non-physical/virtual access (WBA) are in separate economic markets for the purposes of this Review. Vodafone also agrees with ComReg's use of the Modified Greenfield approach in adopting the assumption that regulation is present on the upstream WPNIA market but absent in the market under consideration, i.e. the WBA market.

Approach to defining the WBA market

Vodafone agrees that ComReg's approach to the market definition is appropriate

Assessment of possible constraints from vertically integrated operators on a HM supplier of (DSL-based) WBA

Vodafone believes that the conclusion set out at paragraph 5.19 of the consultation that non-physical broadband access provided over Eircom's access network falls for inclusion within the WBA product market is correct. Vodafone in particular notes that this includes the WBA self-supplied by eircom to its downstream retail arm.

Possible direct constraints from WPNIA purchasers, cable operators, FWA operators, alternative FTTx operators and mobile operators on a HM supplier of (DSL-based) WBA

WBA supplied by WPNIA purchasers

Vodafone agrees with ComReg's preliminary view that the ability of a WPNIA purchaser to offer an effective non-physical WBA product is limited by the very low levels of WPNIA uptake to date.

Vodafone also agrees that the any impact of the Vodafone/BT transaction is more appropriately dealt with in the context of assessment of SMP.

Vodafone would supplement ComReg's analysis in respect of LLU based WBA's ability to constrain a SSNIP as follows :

Vodafone has considered the application of a SSNIP test to assess whether LLU based WBA offers any constraint to a hypothetical monopolist. In applying such a test Vodafone considers that the following are the appropriate assumptions:

1. there is a national market for Wholesale Broadband Access (WBA),

2. there is a Hypothetical Monopolist (HM) using DSL to provide WBA,

3. by definition if there is a monopolist then broadband is not being provided via any other medium,

4. where LLU exists the Access Seeker network facilities which have been implemented are associated with the provision of the LLU and service platforms but not specific WBA services,

5. the LLU Access Seeker does not have the same geographical reach as the DSL services of the HM and can address some 50% of the HM's DSL base.

6. the pricing prior to the introduction of a small but significant non-transitory increase in price (SSNIP) is at the "competitive level" i.e. cost based,

7. the HM has a WACC of 10%,

8. the HM introduces a SSNIP of 10%.

The following is Vodafone's assessment of the substitutional constraints offered by LLU based WBA in the event of the implementation of a SSNIP.

In the case where the LLU Access Seeker is active in the retail broadband market then because of the initial conditions for the test, which include a monopoly in WBA using DSL, then the LLU Access Seeker must be providing retail broadband via the HM's DSL. To move to self supply via LLU the LLU Access Seeker faces investing in network, billing and customer operational support systems to support LLU based broadband. The network and systems development costs of a move to self supply potentially yield economies of scale with a large installed base. These costs are proportionately higher with a smaller base.

In addition to the steady state advantages and costs some account must be taken of the activity involved in migrating from the HM's DSL to LLU based WBA. The HM also is the LLU supplier. The effect of the change of input is to reduce revenue for the HM. The HM therefore has no incentive to facilitate such a transition. Notwithstanding any regulatory obligations in place in respect of the upstream market the HM still has significant scope to make the transition less efficient than a willing provider.

The Eircom's current Bitstream pricing is on a "retail minus" basis and is of the order of €10 per month. It is Vodafone's view that a HM pricing at a competitive level would have lower prices. This indicates that the SSNIP price increase of 10% would be less than €1 per month. Also implicit in this scenario is the fact that the underlying costs of providing broadband via LLU are higher than purchasing DSL based WBA. Otherwise there would be a business case for self supply using LLU even absent the SSNIP and there would not be a monopoly. In this scenario Vodafone does not believe that the difference in level between the pre and post SSNIP pricing is sufficient to allow a LLU Access Seeker to recover the costs of a move to self supply.

It should be noted that in this scenario the LLU Access Seeker is in effect migrating its installed base of customers to self supply. It faces no retail constraints of minimum contract term and does not have to grow the volume of end-users on its self supplied solution by acquisition.

In an alternative variant, if the cable operator was not already in the market then it has no installed base and must move end-users to its self supplied solution by acquisition. It also faces constraints due to the fact that minimum contract terms are common in the retail market and a significant proportion of the retail market will be effectively uncontestable while it is inside such minimum term periods.

The third variant is where the LLU Access Seeker is not vertically integrated but offers LLU based WBA onto the merchant market. Here the costs outlined in the first scenario are shared between the retail provider and the LLU Access Seeker. It should be noted that in this scenario a retail provider offering a national proposition based on the HM's DSL based WBA faces additional costs associated with implementing a product with two wholesale suppliers. In the case of the LLU base, WBA faults and provisioning associated with this input also have a longer supply chain and issues that arise relating to the LLU are less amenable to speedy resolution from the retailers point of view because it has no direct relationship with the underlying LLU provider.

Consider a specific example of a HM with 1,000,000 customers charging €10 per month. Total wholesale revenue is therefore €10,000,000 per month. Because the initial pricing is at the competitive level the total net margin is the level of the WACC or €1,000,000.

If the HM increases the price to €11 the margin is now €2. The total wholesale revenue goes to €11,000,000 but the margin goes to €2,000,000 an increase in margin of €1,000,000.

On the basis of this increase, if a LLU Access Seeker enters the market and acquires 100,000 customers then the HM loses €1,100,000 in revenue. However it loses only €200,000 in margin. It still has an overall margin increase of €800,000. In order to render the HM's price increase uneconomic from a margin point of view the Access Seeker would have to acquire 500,000 customers or 100% of homes passed in the areas it serves. It is Vodafone's view that this is improbable.

This model has not taken account of the HM's recovery of sunk costs. Vodafone is of the view that a significant proportion of the underlying WBA costs are scalable and the associated network assets reusable. Therefore in the context of a growing Broadband market it is appropriate to omit these elements from the model.

Based on the above, even if it were possible for a LLU Access Seeker to substitute LLU based WBA for that of a DSL HM then it could not reach sufficient substitution levels to constrain the HM from applying a SSNIP in the WBA market. To render such an increase uneconomic the LLU Access Seeker would need to reach monopolist levels in terms of share of customers in the areas it would serve. Therefore while there is theoretically functional substitution between a HM's WBA and alternative LLU based WBA this would not act to constrain the HM from profitably imposing a SSNIP on the market.

Non-physical WBA products offered over alternative platforms (cable, FWA, FTTx, mobile)

Cable

Vodafone agrees with ComReg's assessment of the direct constraints offered by cable.

Where a Cable operator decided to offer WBA on the merchant market, in order to move to WBA supply via cable the WBA wholesale purchasers would face a number of costs. These include writing off any investment in end user DSL modems (which are not compatible with a broadband service provided over cable), and investing in network, billing and customer operational support systems to support cable based broadband and providing end-user cable modems. While the network and systems development costs of a move to self supply potentially yield economies of scale with a large installed base issues relating to end-user modems do not have such scale efficiencies as they are incurred on a unit basis for each customer. Eircom's current Bitstream pricing is on a "retail minus" basis and are of the order of €10 per month. It is Vodafone's view that a HM pricing at a competitive level would have lower prices. The SSNIP price increase of 10% would therefore be less than €1 per month. Vodafone does not believe that the difference between the pre and post SSNIP pricing is sufficient to allow a WBA purchaser to recover the costs of moving its installed base to cable based WBA.

Therefore it appears that there would be almost no scope for a cable operator to enter the merchant market and therefore the only relevant consideration is whether the Cable operator's self supply offers a constraint. The appropriate initial condition in the context Irish market is to assume that the cable operator was not already purchasing the HM's WBA. In this scenario then any constraint offered by WBA offered over cable is not direct as the HM does not face a loss of revenue or margin at the wholesale level which might be offered if the cable operator threatened to cease the purchase of the HM's WBA.

Alternative FWA and FTTx networks

Vodafone agrees with the ComReg position regarding the direct constraints offered by FWA and FTTx.

In addition to the analysis carried out by ComReg Vodafone notes that the specific example of the SSNIP test that Vodafone has set out in respect of LLU based WBA is readily adapted to this scenario by reducing the proportion of home passed to match actual market reach of these alternatives. In this case it would be impossible to construct a response based on FWA or FTTx which would result in a position where it would be unprofitable for the HM to impose a SSNIP on the market.

In addition the issues that would arise with replacement of end-user DSL modems which has been previously outlined for the case of cable would also apply to these solutions.

Mobile

Vodafone agrees with ComReg's conclusion that Mobile broadband does not offer a constraint to DSL based WBA.

The differences in functionality and technical performance are such that it is Vodafone's view no material substitution would occur in the face of a SSNIP imposed on the wholesale market. To implement such a substitution the WBA purchaser would have to migrate its existing end-user base to a service which is materially different to its current supply. It is Vodafone's view that such a material change would constitute a change to the conditions of service and would fall within the ambit of Regulation 17(4) of the Universal Service and User Rights Regulations (SI 308 of 2003). This would allow in-contract end-users terminate their agreements without penalty. Given the analysis of the retail market set out by ComReg this is highly likely given the different end-user requirements for fixed and mobile broadband. Even for those customers who opted to maintain their contracts the provider would face similar user modem issues as have been outlined previously in the case of cable.

In respect of the NBS, Vodafone notes that this solution was only implemented on foot of a government subvention. There has been no commercial market supply of fixed broadband services using mobile technology. This is evidence that there is no stand alone commercial business case for the provision of fixed broadband using mobile technology. Given the current lack of a commercial business case and the upfront costs of implementing a fixed broadband solution based on mobile technology outside the NBS areas Vodafone does not believe that the potential margin improvement which would potentially be accommodated by a SSNIP would provide any basis for a mobile operator to enter the fixed broadband area in either the retail or wholesale level or for the existing NBS operator to expand its area of operation.

Possible indirect constraints from WPNIA purchasers, cable operators, FWA operators, and alternative FTTx operators on a HM supplier of (DSL-based) WBA

Vodafone agrees with the general thrust of ComReg's analysis and its conclusions in respect of the indirect constraints offered to a SSNIP imposed by a HM. However Vodafone believes that ComReg has seriously underestimated the difficulties that would be faced by purchasers of the HM's WBA in passing any price increase through into the retail market. If the wholesale price increases cannot be passed through to any material extent then this greatly attenuates the indirect constraints on the wholesale market.

Specifically ComReg has not considered the following:

Service providers are constrained by their retail contracts, they cannot increase retail prices without terminating these contracts or affording end-users still within a minimum term period to cancel without penalty (Regulation 17(4) of the Universal Service and User Rights Regulations 2003).

At the point in time that the SSNIP is applied in the wholesale market there are a given set of retail competitive conditions in the market including various retail price points. Where a purchaser of the HM's WBA has set its retail price level relative to the existing retail prices of service providers using alternative wholesale inputs it could not increase these prices without damaging its competitive position in the retail market.

Most retail prices are set to yield marketing friendly headline pricing. Input cost increases due to a wholesale SSNIP would be unlikely to be fully passed through if they could not be aligned with a suitable headline retail price point.

The downstream arm of the HM would not face the same constraints as purchasers of WBA. A WBA SSNIP in its cost stack would in effect move margin from the retail to wholesale product with no increase in retail price. In any event the overall margin for the HM would be the same on its self supplied input.

Because the HM's retail arm would not have to increase its retail price in the face of a wholesale SSNIP this would provide a competitive constraint at the retail level on the ability of WBA purchasers to pass through the SSNIP.

Even where the WBA purchaser were to pass through the SSNIP any loss of market share or customer base due to retail price increase would yield a new pool of contestable customers. These are contested for on the pre-existing retail prices by the alternative WBA suppliers AND by the HM's downstream arm which has not needed to increase its retail price. Given the common underlying functionality between the HM's retail offering and the WBA Purchasers retail offering it is likely that the HM's downstream arm would have an advantage in competing for these customers.

All of the above factors represent a very significant dampening effect on the ability of purchasers of the HM's WBA products to pass through a SSNIP at the retail level. If there is limited or no cost pass through then there is likewise limited or no retail substitution due to the SSNIP and no indirect constraints on the WBA HM.

Q5. Do respondents agree with ComReg's preliminary conclusion that the geographic scope of this market is national? 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.

Geographic wholesale market definition

Vodafone agrees with ComReg's overall approach with respect to the geographic wholesale market definition.

Distribution of market shares and their evolution over time

Vodafone agrees with ComReg's analysis of the extent and likely market impact of an increase in the market share of WPNIA based WBA, in particular that of BT.

Vodafone notes that WPNIA based WBA is available in a subset of eircom's DSL enabled exchanges. Of the approximately 85 exchanges which ComReg indicates have been unbundled not all have multiple Access Seekers present. This pattern indicates that the decisions in respect of unbundling are not driven by a clear set of conditions delineating a separate WBA sub-market but by individual Access Seeker business decisions including network topology and retail propositions.

Pricing patterns and commercial behaviour of incumbent and alternative operators over time

Vodafone agrees with ComReg's overall analysis and conclusions. In addition Vodafone notes that where operators offer services on a national or wide area basis the WPNIA based WBA inputs that they use appear to be aligned with eircom's WBA propositions in terms of price structure and level. This lack of differentiation between WPNIA based WBA and eircom's WBA indicates that the existence of unbundled exchanges does not create a separately identifiable sub national market, rather this is a partial competitive response within the wider national WBA market.

Geographic differences in other supply and demand characteristics including entry conditions across different areas

Vodafone agrees with ComReg's analysis in respect of other supply and demand characteristics in assessing whether there is a sub national wholesale market.

In addition Vodafone would make the following observations:

At the wholesale level the fact that there are economies of scale and density to be achieved in urban areas as opposed to rural areas does not in Vodafone's view in itself define boundaries between sub-national markets.

Eircom has continued to enable exchanges with DSL extending the footprint of its retail and wholesale broadband offerings. Such expansion is beyond the extent of the cable network in Ireland and overlaps variously with FWALA and WiMax solutions. There is no evidence of a market driven delimiter which defines separate sub-national markets at the retail or wholesale levels.

Eircom does not consult its wholesale customers as to which new exchanges to enable with broadband. It may advise, but does not consult with, its wholesale customers prior to deciding the extent or phasing of its NGN based WBA roll-out. It appears that these decisions are made by eircom based on its own internal network considerations. In similar circumstances Vodafone would consider network issues such as availability of capital funding, exchange line density, availability of transmission backhaul and synergies with other services which might utilise eircom's NGN network. The extent to which these define the boundary of the service offering are mainly conditioned by internal considerations rather than external market considerations.

The boundary of the eircom DSL network is not stable but is evolving. The speed and extent of such evolution would not appear to be driven by external market dynamics in the WBA market but by density of demand in the retail market, a desire on the part of eircom to offer extensive (although not ubiquitous) retail fixed broadband and by internal investment and network architecture decisions. In particular Vodafone is of the view that this expansion by eircom is in large measure due to the desire to be able to offer retail ”bundles” of narrowband access, retail broadband and retail calls (especially where the calls element favours calls to eircom's mobile brands). Vodafone believes that this approach is designed by eircom to increase the “stickiness” of retail customers. Therefore this driver for geographic boundary shifts in the availability of wholesale broadband is not related to any sub-national market for WBA.

Eircom has automatically upgraded its retail base to its retail NGB product. This product has a headline speed of 8Mb and is characterised as being “uncongested”. This upgrade has been automatic and at the same price point as pre-existing retail broadband offerings which had lower headline speeds and were “contended”. Because of this traditional broadband offerings and their associated Bitstream equivalents are effectively obsolete in these areas. There are over 120 eircom exchanges from which the wholesale equivalent of its NGB service is currently available[1]. Unless an OAO has unbundled all of these exchanges then it must use two wholesale inputs to provide its retail proposition, one being eircom BMB and the other being LLU based WBA. In order for the OAO retail proposition to be consistent over a geographic area, then these two wholesale inputs must be aligned in terms of functionality. Therefore LLU based WBA is effectively tied to eircom's WBA offering. Its extent is less than eircom's WBA offering and it is not sufficiently differentiated for its existence to define a separate sub national market.

As set out previously in respect of the retail market Vodafone notes that the availability of BMB/NGB is driven by the extent of eircom's NGN network. This is perhaps most obvious in the form of the “NGN coverage map” on eircom's wholesale website. This map has the possibility to turn on and off layers of products and the map will show which exchanges these services are available in. The current range of services includes WEILs, WSEAs and BMB. There appears to be a very significant overlap between these and it is Vodafone's view that over time eircom will continue to extend its NGN network, eventually replacing its embedded circuit switched network. As this NGN deployment progresses Vodafone expects that the availability of BMB/NGB will also extend to the NGN boundary. On this basis it would appear that any differences in functionality and geographic availability between BMB/NGB and traditional DSL based broadband is not indicative of a separate sub national market but is a function of the gradual replacement of one by the other. Essentially it represents a technical network upgrade phased over a long period.

[1] Based on the NGN coverage map on eircom's wholesale website

Q6. Do you agree with ComReg's preliminary conclusions on the competition analysis and 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 position.

Approach

Vodafone agrees with the overall approach adopted by ComReg in respect of the competition analysis and assessment of SMP.

Existing competition in the WBA market

Market shares

Vodafone agrees with ComReg's analysis in respect of market shares. Even if cable were included in the market, eircom has a persistently high market share. The scope for cable to grow market share is also limited by geographic reach and retail competition constraints.

Overall size of the undertaking and relative strength of existing competitors

While BT may be supplying a WPNIA based WBA offering its competitive constraint on eircom is limited. Vodafone is effectively no longer contestable and neither is eircom's self-supply which therefore leaves only the balance of the WBA purchasers as contestable. These purchasers tend to be smaller and are less likely to have sufficient scale to absorb the additional operational and financial overhead of managing a supply chain with two wholesale inputs or the costs (direct and opportunity) of a bulk migration of an embedded base. This weakens BT's ability to compete with eircom.

As set out previously cable only has an indirect constraint on eircom in the Wholesale market and for the reasons outlined in the previous sections this constraint is weak.

Potential competition in the WBA market

Control of infrastructure / inputs not easily replicated

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of WPNIA based WBA.

Sunk costs

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of sunk costs.

Economies of scale, economies of scope and economies of density

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of economies of scale, economies of scope and economies of density.

Vertical integration

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of vertical integration.

Potential competition from purchasers of WPNIA

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of potential competition from purchasers of WPNIA.

In addition Vodafone notes ComReg's approach in setting prices for LLU where it took a view that it was most unlikely that exchanges with fewer than 2,500 lines would be unbundled in the period of the control. The current view as to the low likelihood of WPNIA based WBA reaching levels where it constrains eircom is consistent with this position.

Vodafone also notes that apart from the underlying unbundling, for WPNIA based WBA to have any prospect of acting as an effective constraint on eircom would require that it would be possible to migrate a customer from eircom's WBA to WPNIA based WBA. Vodafone is of the view that this represents an ongoing bottleneck in terms of functionality (in terms of throughput) and cost.

As outlined previously while BT may be supplying a WPNIA based WBA offering its competitive constraint on eircom is limited. Vodafone is effectively no longer contestable and neither is eircom's self-supply, this leaves only the balance of the WBA purchasers as contestable. These tend to be smaller and are less likely to have sufficient scale to absorb the additional operation and financial overhead of managing a supply chain with two wholesale inputs or the costs (direct and opportunity.

The effect of the BT/Vodafone relationship in terms of WPNIA based WBA is therefore limited to the extension of the BT LLU footprint. There is a programmed expansion, provided for in the Agreement ✂

Vodafone's practical experience of attempting to migrate from eircom's DSL based WBA to BT's WPNIA WBA type offering has not been straightforward. Eircom was slow to define a bulk migrations process and apparently gamed the industry product development process by only providing updates to Migrations related action points at industry meetings rather than on due dates. This meant that where meetings were postponed discharge of action points was also delayed. ✂ Volume throughput for such migrations has been limited by eircom ✂ and any operator wishing to bulk migrate an embedded customer base cannot do so quickly. There are pricing issues relating to the migration charge from WBA to LLU line Share which impact the business case for such migrations and it is not clear that a SSNIP in itself would be sufficient to render a migration to WPNIA based WBA economic for operators without scale or scope.

Potential competition from cable, FWA, alternative FTTx and mobile platforms

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of Potential competition from cable, FWA, alternative FTTx and mobile platforms.

Strength of countervailing buyer power in the WBA market

Vodafone agrees with ComReg's analysis and preliminary conclusions in respect of strength of countervailing buyer power in the WBA market.

Additional Inputs

In addition to the points made above Vodafone wishes to document what it believes are examples of revealed behaviour which indicate that eircom is not subject to competitive constraints in the WBA market.

As an initial point in this regard we would note that if eircom was truly subject to a competitive constraint in the WBA market it would act so as to make the purchase and use of WBA easier than any alternative and would behave in a manner consistent with a supplier motivated to make sales and retain customers. In this context we would expect that eircom would ensure that it offered WBA products which were at least functionally equivalent to its internal self supply. However this is not currently the case. Vodafone notes in particular:

- Eircom has been found in breach of its non-discrimination obligation in respect of the Sync Checker facility being made available to OAOs.

- ComReg conducted an investigation into the provision of CSID to WBA Access Seekers. Information Note 09.64 states that "…that CSIDs are **now** available to OAOs". [emphasis added] This implies that at the time the investigation commenced this functionality was not being provided by eircom.

- At the launch of its BMB service eircom did not provide a wholesale SLA in accordance with its obligations.

- Eircom does not consult its wholesale customers as to which new exchanges to enable with broadband.

- It may advise, but does not consult with its wholesale customers prior to deciding the extent or phasing of its NGN based WBA roll-out.

- Eircom has implemented a number of automatic upgrades of its portfolio. This impacts on OAOs retail price tiering, requires updating of marketing and sales materials, and necessitates IT and support system changes. To Vodafone's knowledge such upgrades have not been driven by WBA purchasers but have been imposed on the market unilaterally by eircom.

- Eircom announced on 29 November the availability of a new 24 MBit/s BMB as and from 20 December 2010. In common with other telecoms providers eircom has a network and IT "freeze" over the Christmas period. In order to effect a launch on 20 December eircom must have had prior knowledge of the parameters of this product in order to carry out its IT and support systems development. The notice it has given to OAOs is the minimum required by regulation and spans the period of network freezes reducing further the likelihood that OAOs will be able to make use of this product on 20 December 2010.

Q7. Do you agree with ComReg's preliminary assessment of potential competition problems in the WBA 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 position.

Yes. Please see the response to question 8 below.

Q8. Do you have evidence/examples of any further competition problems in the WBA market? Please provide all relevant factual evidence supporting your position.

Vodafone agrees with ComReg's preliminary assessment of potential competition problems in the WBA market and that absent regulation, there is the potential and incentive for an SMP operator in the WBA market to engage in actions which could impact on competition and customers in related broadband markets, and ultimately inhibit competition in the WBA market itself.

Vodafone wishes to provide the following specific examples of potential competition problems.

Excessive pricing

Vodafone agrees that this is a potential issue however given the presence of a price control there is limited scope for eircom to actually engage in such activities. Absent such regulation Vodafone believes that this is a substantial and material risk.

Inefficiency / inertia

Vodafone agrees that this is a potential issue. Some indications of this exist. In particular Vodafone notes the following:

1. eircom's WBA reference offer has not been updated in some time and does not for example reflect the existence of resellers in the market, nor does it incorporate improvements which have been made in other reference offers. While this document is now under review the review was initiated by Industry and not eircom.

2. There have been delays in providing facilities to WBA customers vis-à-vis eircom's retail arm. Examples include Sync Checker and CSID outlined previously.

3. In addition Vodafone notes that there has been no significant improvement in eircom WBA SLA metrics for many years (the version of the SLA on its wholesale website is labelled Version 1 dated 20 October 2004).

Leveraging

Vodafone agrees that this is a potential issue. Some indications of a tendency toward leveraging behaviour by eircom, even with current regulation, exist. In particular Vodafone notes that in the context of the current retail minus price control in WBA it is impossible to set a wholesale price without the retail price being known. This means that Eircom Retail would always have knowledge of product or pricing developments in advance of OAOs as the definition of the upstream wholesale inputs was in effect reverse engineered from the retail offering.

Vodafone believes that the issues it has outlined in response to Question 6 indicate a propensity for eircom to actually leverage its position even in the context of existing regulation. This, Vodafone believes, justifies the strengthening of the existing remedies in line with ComReg's proposals in this consultation.

Exclusionary practices

Vodafone agrees that this is a potential issue. Vodafone notes that eircom's position in discussions on termination clauses in Reference Offers is to seek the shortest possible notice period if regulation is removed. The initial eircom position is of the order of weeks not months. A supplier who genuinely faced competition would not seek short termination notice periods. Vodafone views this approach by eircom as indicative of a supplier wishing to be in a position to withdraw supply from the market as soon as possible. The type of supplier which would adopt such an approach is one which is vertically integrated and with SMP in the upstream market who wishes to leverage this SMP.

More recently a request was made at the WBA industry forum for eircom to investigate the possibility of providing "naked DSL". Eircom's initial response at the next meeting 1 month later was that it might take another six months to provide a full response. Vodafone believes that this is indicative of artificially protracted negotiations which might amount to exclusionary activity.

Q9. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Vodafone agrees with ComReg's overall approach to the Regulatory Impact Assessment. Vodafone agrees with ComReg's preliminary conclusions which indicate that a full suite of remedies is necessary, reasonable, proportionate and justified to impose on eircom as the SMP operator in the WBA market.

Is regulation still required in the WBA market?

Vodafone notes that following a finding of SMP ComReg is obliged to impose at least one ex ante remedy. In this context there is no freedom but to regulate the market, the question is the extent to which the market should be regulated. Given the competition issues set out previously, the specific examples outlined by Vodafone in response to previous questions and breaches of obligations by eircom in the WBA and other regulated markets[1] Vodafone believes there is ample justification for the imposition of a full suite of remedies in this market.

Does current regulation achieve its objectives as simply as possible?

It is Vodafone's view that while the current breadth of remedies is appropriate further refinement of the individual remedies is required in order to ensure that they properly achieve their objectives.

SMP obligations in relation to current generation WBA

[1] Examples include transparency breaches in the markets for Wholesale Call Origination, Transit and Termination, non-discrimination breach in the retail narrowband access market in respect of fault repair, non-discrimination breach in the WBA market in respect of "Sync Checker" and ongoing breaches in respect of USO service performance.

Access obligation
Vodafone agrees that it is appropriate to continue to impose an Access obligation. However in order to make this remedy effective Vodafone believes it is necessary to specify it in detail so as to remove the scope for regulatory gaming. In this regard Vodafone believes that it is proportionate and justified to require eircom to provide written reasons for a decision not to meet a request for Access. However Vodafone also believes that there is a requirement to specify a maximum timeline for eircom to provide an initial response to such a request. This initial response should be a statement of whether eircom believes that the request falls within the scope of its access obligation[1].

Non-discrimination obligation
Vodafone believes that it is proportionate and justified to continue to impose a non-discrimination obligation. There have been a number of breaches notified to eircom of non-discrimination obligations in the WBA and other markets. These indicate that the issue of discrimination is not just potential but actual. Vodafone agrees that discrimination may arise in a material way in the provision of information and that this aspect of the current obligation should be clarified.

Transparency obligation
Vodafone believes that it is proportionate and justified to continue to impose a transparency obligation. There have been a number of breaches notified to eircom of its transparency obligations in other markets. These indicate that the issue of transparency is not just potential but actual and that eircom has the incentive and ability to limit the level of market transparency to the detriment of Access Seekers.

Accounting separation obligation
Vodafone believes that it is proportionate and justified to continue to impose an Accounting separation obligation.

Price control and cost accounting obligations
Vodafone believes that it is proportionate and justified to continue to impose price control and cost accounting obligations. Vodafone has set out its views on the proposed price control in its response to ComReg Document 10/56.

SMP obligations in relation to next generation WBA
Given that services provided over Next Generation Networks are in the market for WBA the competition issues identified early also apply to them. In this regard Vodafone believes that it is also appropriate to impose the full range of remedies on eircom in respect of these services.

Vodafone agrees with ComReg that given the nascent level of deployment of this technology it may not be appropriate to specify the obligations of Accounting separation, Price control and Cost accounting to the same level as for current generation WBA. However Vodafone believes that it is appropriate and necessary to specify the Access, Transparency and Non-Discrimination obligations to the same level as for current generation WBA.

When one examines both the market harm that these obligations are designed to protect against and the variety of breaches of obligations committed by eircom and considers the scope of market

[1] In this regard Vodafone notes eircom’s response to a request to eircom via the Bitstream industry forum as to whether it would provide “naked DSL”. Eircom responded verbally at the forum meeting following the request (some 4 weeks later) stating that the request was being assessed internally and that it could take up to a further six months to provide a definitive answer.

harm that could be caused by eircom leveraging its SMP in the introduction of Next Generation WBA it is clear that there is a need to specify these obligations to the same level as current generation WBA.

In this regard Vodafone notes that eircom is proposing to conduct a FTTH pilot (essentially Next Generation WBA). It is making technology choices regarding the FTTH delivery mechanism and network architecture choices which, once embedded in its network, will be virtually impossible to reverse subsequently. Where these choices limit or constrain the type of Next Generation WBA that can be provided eircom has scope to leverage its SMP in designing a network solution which is optimised for a vertically integrated operator. In addition the lead times for Access Seekers wishing to deploy next generation WBA based services are likely to be longer than for current generation services. This is due to a variety of factors including proposition development, billing and care system development, Customer Premises equipment specification and procurement. This is in addition to the development timelines associated with the interface to eircom for service ordering, provisioning and repair. In this context eircom has very significant scope to leverage its SMP in the absence of robust transparency and non-discrimination obligations. Eircom is in the process of making design decisions in respect of FTTH and there is a substantial risk that by the time a further consultation process is completed to detail the remedies in respect of Next Generation WBA such decisions will be embedded in eircom's network.

The impact of proposed changes

Vodafone believes that balancing the impacts on the various stakeholders of the proposed changes are reasonable, proportionate and justified.

Impact on Eircom

Vodafone agrees with ComReg's assessment that the proposed clarifications in eircom's existing obligations would not require significant incremental effort on the part of eircom. In fact the majority simply codify behaviour that eircom should be exhibiting under its existing obligations. In this regard the clarifications bring additional regulatory certainty to eircom. The proposed changes relate mainly to the documentation of information that should already be available to eircom and set out defined timing for the provision of this information. Such clarity enables more structured processes to be designed and potentially yields efficiency gains for eircom.

Impact on competition

Vodafone believes that the proposed changes would yield a welfare surplus in terms of enhanced competition. The certainty that accrues from the requirement for eircom to give reasons for not meeting access requests, the certainty arising from the minimum lead times for provision of information, and the improvements in the transparency obligations would all allow Access Seekers to design more efficient internal processes and would reduce the scope for regulatory gaming and delay in eircom's interactions with Access Seekers.

These clarifications would also give assurance and objective indicators that eircom is meeting its access and non-discrimination obligations. Such improved confidence in the correct operation of the market remedies is likely to engender a less conservative approach to investment decisions.

Impact on consumers

As this is a wholesale market remedies do not have a direct impact on consumers. However the competition benefits mean that the retail broadband market is likely to be more competitive with a consequent positive effect on consumer welfare.

Preliminary conclusions on the RIA

With the exception of its views on the detailed specification of some of the Next Generation WBA remedies Vodafone agrees with ComReg's preliminary conclusions on the RIA.

Q10. Do you agree with ComReg's proposals regarding the application of access remedies in the WBA 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 position.

Yes. Vodafone strongly agrees with the application of all of the access remedies proposed by ComReg for the WBA market. Access to a regulated Bitstream product on the essentially ubiquitous local access network of eircom is an essential safeguard for the preservation of effective competition in the provision of retail broadband services on a national basis. Access to Bitstream is particularly important for competition in those areas of the country not covered by the footprint of the alternative broadband networks identified as forming part of the relevant retail market.

It is essential that OAOs have the ability to provide retail broadband services on a truly national basis using Bitstream inputs so that they have the opportunity to build up their customer bases. There is otherwise little prospect of their achieving and maintaining sufficient scale to offer robust competition to the SMP operator. Given the high sunk costs and economies of scale, scope, and density which ComReg has identified as characterising eircom's access network, the alternative of one or more OAOs seeking to replicate eircom's existing network (with an equivalent coverage footprint) is simply not an economically viable solution.

BECS and BCS are the products currently defined by eircom to effect interconnection between the Access Seeker and eircom networks for the purposes of giving end-user traffic connectivity to the Access Seeker network. In this regard they are an associated facility required for the provision of service and are intrinsic to the Bitstream product set. Not to regulate these elements runs the risk of leaving effective bottleneck control in the hands of eircom.

In-Building/In-Span handover represents the minimum amount of eircom network facilities that an Access Seeker with its own network infrastructure requires to buy from eircom. Not to mandate their provision runs the risk that eircom would insist on Customer Sited Handover. This would force un-necessary costs into Access Seekers, preventing them leveraging advantages from their own network investment.

Migrations are key enablers for market innovation and competition. Unless it is possible to move end-users from one wholesale input to another in a cost effective and efficient manner then Access Seekers become locked-in to their current WBA product.

Vodafone believes that the obligation to negotiate in good faith is a necessity. There is a significant asymmetry between eircom, the SMP operator, and Access Seekers. Eircom enjoys full visibility of its technical capability, its network, its IT systems and its internal operational processes. In addition eircom has full visibility and control over its development plans and timetables for network and IT innovation. In this context it is proportionate reasonable and justified that eircom be required to give written reasons where it does not meet requests for access. As set out previously Vodafone also believes that there is a requirement to specify a maximum timeline for eircom to provide an initial response to such a request. This initial response should be a statement of whether eircom believes that the request falls within the scope of its access obligation[1].

Vodafone believes that the requirement not to withdraw facilities already granted is required. Absent this requirement eircom can withdraw WBA product types entirely from the market. Where an Access Seeker is using hybrid WPNIA based and eircom DSL based supply this would result in it being unable to offer broadband services in at least some geographical areas in the retail market (which is national in scope) thus impacting its competitive effectiveness.

Eircom's automatic speed upgrades have in the past meant that Access Seekers must rework their retail pricing strategies and marketing material. The timing of these changes are in eircom's control and can be timed to minimise the impact on eircom retail but are likely to have a disproportionate adverse impact on Access Seekers.

Vodafone agrees with ComReg's proposal to mandate open access to technical interfaces, protocols and other key technologies, and to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services. As a vertically integrated operator the withholding by eircom of external access to such facilities allows it to leverage its SMP in the WBA market into the retail broadband market.

Vodafone believes that that the conditions that ComReg proposes to attach to the Access Obligations are appropriate, reasonable proportionate and justified and are necessary to give proper effect to the access obligations proposed.

Q11. Do you agree with ComReg's proposals regarding the application of non-discrimination remedies in the WBA 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 position.

Vodafone agrees that eircom should be subject to an obligation to apply equivalent conditions in equivalent circumstances, and to ensure that services and information are provided under the same conditions and of the same quality.

As set out in its response to ComReg Consultation 10/56 Vodafone notes that in the context of a retail minus price control it is impossible to set a wholesale price without the retail price being known. This means that Eircom Retail would always have knowledge of product or pricing developments in advance of OAOs as the definition of the upstream wholesale inputs was in effect reverse engineered from the retail offering.

A wholesale price control derived from a forward looking cost model means that the regulated price of the wholesale input is not derived from the price of the downstream retail product but rather the retail product is derived from the wholesale input parameters. Breaking the link between the retail price and the upstream regulated market through this latter approach means that eircom's

[1] In this regard Vodafone notes eircom's response to a request to eircom via the Bitstream industry forum as to whether it would provide "naked DSL". Eircom responded verbally at the forum meeting following the request (some 4 weeks later) stating that the request was being assessed internally and that it could take up to a further six months to provide a definitive answer.

obligations of non-discrimination are more readily enforced as there is no reason why eircom retail should receive any wholesale product development information in advance of OAOs.

Vodafone also agrees with ComReg's analysis and conclusion that eircom should be subject to non-discrimination obligations in respect of access to OSS and information.

Q12. Do you agree with ComReg's proposals regarding the application of transparency remedies in the WBA 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 position.

Vodafone in general agrees with ComReg's analysis and conclusions in respect of the imposition of a transparency obligation on eircom.

In particular Vodafone agrees with the change control and notification procedures associated with the WBARO.

The requirement in respect of the publication of information about WBA products and services is proportionate reasonable and justified. If the information is required in order to allow an Access Seeker to be able to compete effectively based on Eircom's WBA inputs then its withholding by eircom is an obstacle to competition in the market.

Vodafone has set out its views on the publication of KPIs in its response to ComReg Consultation 10/74. As outlined in that response Vodafone notes that the issue of KPIs has been positioned as one which ComReg must consult on before being implemented. This approach, while appropriate for establishing the initial framework for the publication of KPIs is not responsive or flexible enough to deal with possible future market developments or the evolving needs of OAOs. An example of this might relate to the issue of Next Generation Voice or Next Generation WBA where absolute or comparative metrics are not currently specified. On this basis Vodafone suggests that ComReg further specifies eircom's transparency obligations in the relevant markets so that eircom has an obligation to publish additional comparative information on foot of OAO requests. Such an obligation can be limited to instances where the subject of such information can be justified as being a material comparator of service quality between eircom's self supplied inputs and its wholesale offerings to OAOs, or to where the metric requested forms a material part of the product performance or determines its fitness for purpose for incorporation into OAO offerings to the merchant or end-user markets. This would not preclude consultation on issues but would afford a mechanism for the market to directly establish a requirement for such amendments, initiate their implementation and control the timing of their initiation. The counterbalance to this facility being afforded to OAOs would be the requirement to establish a need and the ability of either eircom or the OAO to raise a regulatory dispute in the event of a disagreement over whether the metric should be provided.

Vodafone agrees with the proposal to mandate the publication of information on self-supplied WBA products and services. Vodafone believes that market requirements for this are strongly aligned with the rationale for requiring the publication of comparative KPIs. Such publication yields significant benefits in terms of market confidence that eircom is meeting its non-discrimination obligation and addresses the information asymmetry outlined in its response to Question 10.

Q13. Do you agree with ComReg's proposals regarding the application of accounting separation remedies in the WBA 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 position.

Vodafone agrees with ComReg's proposals in respect of accounting separation remedies.

Q14. Do you agree with ComReg's proposals regarding the application of price control and cost accounting remedies in the WBA 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 position.

Vodafone's position on the appropriate WBA price control is set out in its response to ComReg Consultation 10/56.

In particular Vodafone wishes to reiterate its view that retail minus price controls result in the situation where an SMP operator in an upstream market is able to set the price of regulated products in this market by varying its retail pricing in a downstream market which is not subject to regulatory controls. In this situation the retail arm of the operator will have advance notice and control of pricing and product changes as these are driven by changes to the retail product which it initiates. The retail minus approach therefore has the effect of undermining the effectiveness of a remedy imposed in the wholesale market by linking it to a price which the SMP operator has freedom to set in a manner optimised to its own business needs in a competitive downstream market.

A move to a price control in the wholesale market which is derived from a forward looking cost model removes the ability of the downstream retail arm of the SMP operator to effectively control the cost inputs and cost structure of its competitors.

Pending the conclusion of this parallel consultation process it is important that there is some price control regime in place on the market and on that basis Vodafone agrees that pending any revised decision in relation to the appropriate price control for WBA resulting from the above consultation 10/56, prices charged by Eircom for access to, or use of, WBA products, services or facilities should be subject to the existing price control obligations as set out in ComReg Decision D01/06.

Q15. Do you agree with ComReg's proposals regarding the application of remedies in the WBA market in a Next Generation Access environment? Please explain the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

As set out previously Vodafone agrees with ComReg that given the nascent level of deployment of this technology it may not be appropriate to specify the obligations of Accounting separation, Price control and Cost accounting to the same level as for current generation WBA. However for the reasons set out in its response to Question 9 Vodafone believes that it is appropriate and necessary to specify the Access, Transparency and Non-Discrimination obligations to the same level as for current generation WBA.

Q16. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part

I? Please explain t the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Subject to the specific comments made in the body of its response Vodafone agrees with ComReg's draft Decision Instrument. It is sufficiently precise to transpose the principles set out by ComReg into an unambiguous set of obligations.

O2

Response to Wholesale Broadband Access market review

Response to Document 10/81

O2 welcomes the opportunity to respond to ComReg's consultation on Wholesale Broadband Access (WBA). The WBA market review is the basis of access obligations to offer 'bitstream' products and in the past years has been the basis of the growth of broadband access to consumers. The retail market for broadband products has converged significantly in the last few years and it is common now for Irish consumers to access the internet via broadband products from cable, mobile and fixed operators.

O2 is an active competitor in the Irish broadband market offering broadband access via mobile dongles and smartphones. O2 is also active offering fixed broadband services to the business sector. O2 are committed to investing in expanding its range of services to Irish consumers and continue to offer value propositions in the Irish market based on a pro competition regulatory regime.

Question 1: Do respondents have any general comments in relation to this Consultation Paper? If so, please explain your views, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

O2 welcomes the publication of this consultation document however O2 would remind ComReg of the EU Commission guidance detailed in the recommendation on relevant markets where market 5 should be reviewed at the same time as market 4. These markets are interrelated in terms of addressing the dynamics of the broadband market and in terms of ensuring the correct regulatory remedies are put in place to ensure access at appropriate access prices which reflect investment.

O2 would ask ComReg to ensure these markets are reviewed at the same time and offer the industry full visibility of the regulatory strategy ComReg's is adopting. Publishing the regulatory strategy through market reviews for market 4 and market 5 allows operators to adjust or confirm their operational strategies in the short term. Operators find it difficult to operate in a market where the regulator is making piece meal decisions.

O2 would also point out that there has been significant progress and competitive developments in this market and in the related retail market in Ireland since the last market review. A number of regulators in the EU have recognised the progress in their retail broadband markets and recent decisions by regulators in the market review for wholesale broadband market have sought to deregulate and amend remedies, where appropriate, to reflect the increasing competition. The objective of remedies and the underlying objective of the competition basis of regulation in the telecommunications framework are to set remedies which address market failure. ComReg need to ensure that the progress made in this market is maintain through the appropriate set of remedies which aim to address the market failure.

Question 2: Do respondents agree with ComReg's preliminary conclusions on the retail 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 position.

O2 welcomes the market definition and analysis of the retail market. ComReg are correct to include both fixed, cable and fixed wireless in the same market. This definition is consistent with the previous market review and the majority of regulatory decisions in the EU. O2 would also agree with the proposal that the retail mobile broadband is separate to the retail broadband market.

O2 would have concerns in relation to the segmentation of the retail broadband market. O2 would recommend that ComReg looks at the segmentation of the market between business and residential. Regulators in the EU have recognised this distinction.

It is important to note that only 0.6% of business broadband is delivered by cable. It is clear the residential broadband market is dominated by eircom and UPC with other fixed access seekers as weak competitors. For potential entrants to this market, O2 would need to have the certainty of credible margins given the existing low retail prices. O2 has found it difficult to make the business case for entry into this market given the current regulatory environment. In the business segment there is a different market structure which depends more on regulated access through LLU or 'bitstream'. In this segment ComReg appear to favour one business model which is based on a ladder of investment and encouraging operators to invest in local loops. For operators such as O2, who are currently offering broadband services to the business segment, we depend on a 'bitstream' service at a competitive wholesale price to offer services to business customers. For mobile operators, without fixed competences, the ability to offer fixed services to complement our mobile offerings to business customers is important to our continued presence in the retail broadband market.

Question 3: Do respondents agree with ComReg's preliminary conclusions on the geographic scope of the retail broadband 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 position.

O2 agrees with the geographic approach to this market

Question 4: Do respondents agree with ComReg's preliminary conclusions on the definition of the WBA product 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 position.

O2 would in general support ComReg's analysis of the Wholesale Broadband Access market definition. However, O2 believes ComReg have not shown sufficiently that an indirect pricing constraint does not exist in this market. In the previous market review a rational thesis was put forward, based on the limited market data available, that as cable, FWA and fixed DSL were substitutes in the retail market an increase in the wholesale price of bitstream would have a direct impact on the retail pricing of cable and FWA products. ComReg's review of substitution in this review still maintains that the various products as substitutes at the retail level, but does not convincingly show that a rational operator in the wholesale market would not be constrained in a SSNIP test from passing any increase or decrease into the retail market. Using empirical data is useful but ultimately as most broadband is bundled in the retail market it is difficult to see the changes in broadband prices between wholesale and retail. The analysis is also difficult to apply when using a SSNIP test and is further complicated by the no availability of wholesale inputs from both cable and FWA.

There is a risk that in not accepting an indirect price constraint at this stage leads to a narrow market definition and an automatic SMP finding at the next stage. To counter this O2 would argue that the pricing constraints are assessed at the market analysis stage in terms of potential competition which at least may give, even with a narrower market definition, a consideration to the extent of the competition between these products which does exist in the market.

Question 5: Do respondents agree with ComReg's preliminary conclusion that the geographic scope of the WBA market is national? 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.

O2 supports the geographic definition of the market.

Question 6: Do you agree with ComReg's preliminary conclusions on the competition analysis and 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 position.

O2 supports ComReg's conclusions on the market. O2 believes a vibrant wholesale market for bitstream should be developed and welcomes the moves by BT and others in this space. O2 would ask ComReg to monitor developments in this market and continue to promote alternative wholesale providers in this market.

Question 7: Do you agree with ComReg's preliminary assessment of potential competition problems in the WBA 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 position.

O2 agrees with ComReg's assessment of the competition problems.

Question 8: Do you have evidence/examples of any further competition problems in the WBA market? Please provide all relevant factual evidence supporting your position.

No Comments

Question 9: 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.

O2 supports the approach taken by ComReg in the RIA specifically in relation to next generation WBA. O2 would welcome further consultation on these remedies but remedies are required at this stage to ensure regulatory certainty. A future review may find that access to next generation WBA is available on commercial terms from eircom and ComReg can forebear.

O2 would ask ComReg to continue monitoring the retail pricing and consequently the margins available to operators suing wholesale bitstream. A move to cost pricing needs to be made with a view to setting the bitstream prices at levels which sustain a rational business case especially in the current market conditions.

Question 10: Do you agree with ComReg's proposals regarding the application of access remedies in the WBA 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 position.

O2 agrees with ComReg's approach to these remedies.

Question 11: Do you agree with ComReg's proposals regarding the application of non-discrimination remedies in the WBA 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 position.

O2 agrees with ComReg's approach to these remedies.

Question 12: Do you agree with ComReg's proposals regarding the application of transparency remedies in the WBA 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 position.

O2 agrees with ComReg's approach to these remedies.

Question 13: Do you agree with ComReg's proposals regarding the application of accounting separation remedies in the WBA 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 position.

O2 agrees with ComReg's approach to accounting separation.

Question 14: Do you agree with ComReg's proposals regarding the application of price control and cost accounting remedies in the WBA 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 position.

O2 supports the approach ComReg are taking on cost accounting and price control but would express concern that ComReg are currently consulting on the current remedies. It would be more correct to conduct a market review which may then lead to a review of bitstream pricing. It is difficult to assess ComReg's regulatory approach to this market when it is not accompanied by an assessment of market 4 and there is current pricing work on bitstream.

Question 15: Do you agree with ComReg's proposals regarding the application of remedies in the WBA market in a Next Generation Access environment? Please explain the reasons for your answer, clearly indicating the relevant remedies and paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

O2 agrees with ComReg's set of remedies for next generation WBA access. O2 would encourage eircom to engage with industry to develop commercially negotiated access products which met access seekers needs and seek to develop a wholesale WBA access market for next generation products.

O2 will participate in any further consultation on pricing but would encourage ComReg to allow time for eircom to put forward commercial negotiated access in advance of a regulatory solution.

Question 16: Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? 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. O2 agrees with the draft decision instrument.