Market Review

Physical Infrastructure Access (PIA)

Annex 5: Submissions to Consultation

Non-confidential

Submissions to Consultation

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Consultation: Physical Infrastructure Access (PIA) Market Review - Ref: 23/04

Submission By ALTO

Date: March 3rd 2023

ALTO is pleased to respond to the Consultation: Physical Infrastructure Access (PIA) Market Review – Ref: 23/04**.**

ALTO welcomes this opportunity to comment on this important consultation.

Preliminary Remarks

ALTO welcomes this Market Review as a positive step towards enabling the Gigabit economy in Ireland and one that is overdue in terms of its timing.

ALTO's view is that the PIA market has not operated as it should have for a number of reasons. Those reasons range from technical, to operational, to asset lifecycle and expiry, to competition related issues.

ALTO also welcomes ComReg's *ex ante* approach to the remedies and procedures within the Market Review, the complimentary consultant's report, and the other supporting documentation consider.

ALTO notes that compliance with existing and simple wholesale regulations concerning Significant Market Power – SMP, designations and access obligations in Ireland has resulted in multiple appeals to the Irish High Court. Over the past number of years ComReg and industry have worked under a settlement called the Regulatory Governance Model – RGM, which seems to achieve equivalence of input and often also output on the market. If simple and pre-existing regulations had been complied with fully, there would be no need for the now welcomed *ex ante* measures proposed by ComReg in this Market Review.

In answer to Question 4 of the Consultation paper, ALTO calls on ComReg to deploy a Minimum Standards approach on the PIA market. The Minimum Standards approach has been successful in other markets and jurisdictions, and we have cited the Ofcom 2014 market review as an example of where the Irish market should be

in terms of PIA at this juncture. We believe this approach would be a progressive step in the right direction for PIA in Ireland and remove currently established and ineffective practices concerning PIA provisioning, service, maintenance and repair.

Response to Consultation Questions:

Q. 1 Do you agree with ComReg's definition of the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A. 1. ALTO agrees with ComReg's definition of the Relevant PIA Market. It is clear to ALTO that Eircom remains the only provider with a ubiquitous national telecoms network coupled with a designed access network. Clear demand for PIA products is demonstrated by the NBP Intervention Area and separately by operators in the commercial area. Eircom itself has demonstrated its own interest in facilitating PIA and customers in the 300K carveout that was formerly in the State NBP Intervention Area.

Q. 2 Do you agree with the SMP assessment above and that Eircom is likely to have SMP in the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 2. ALTO agrees with ComReg's approach in carrying out the Three Criteria Test ("3CT") set out at Section 4.1 of the Consultation and the clearly documented conclusion that the 3CT is passed, and that the market needs to be reviewed for competition regulation.

ALTO also agrees that Eircom likely has SMP in the Relevant PIA Market as documented at Section 4.2 for the reasons provided by ComReg (this assumption includes consideration of FNI).

Q. 3 Do you agree that the competition problems and the associated impacts on competition end-users identified are those that could potentially arise in the related markets downstream of PIA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A. 3. ALTO agrees with ComReg's assessment of competition problems and the associated impacts on end-users identified are those that could potentially arise in the related markets downstream of PIA. ComReg's remarks at Section 5.5 are notable and we agree that in that is not necessary to catalogue actual abuses on the market. We fully agree that the purpose of *ex ante* regulation is to prevent or mitigate the risks of anti-competitive behaviours arising, given that an SP has been identified on a preliminary basis as having SMP in the PIA Market and having regard to Eircom having both the ability and incentive to engage in specific practices, to the detriment of competition and, ultimately, end-users.

One of the main concerns for ALTO members is the issue of delivery and repair/performance. This concern has the ability to stymie the deployment of WLA services in the Intervention Area (IA) and the Commercial Area and could have the effect of stranding end-users in the newly deregulated CG and IA NG areas before the emergence of NBI or other competitors on the market. We propose that a sunset period for the removal of IA regulation at a given exchange area level be considered so that regulation is only removed 1-year after a figure of 80% or higher of an exchange area is passed. A similar approach is needed in the Commercial area.

Q. 4 Do you agree with ComReg's proposed non-pricing remedies in the PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A. 4. ALTO agrees with and welcomes almost all of ComReg's proposed non-pricing remedies including the material improvements to certain of the remedies such as the improvements to the Non-Discrimination Regulation and the use of 'same' offerings. Transparent publication of data such as KPIs and PIARO go some way to meeting policy obligations, it is often the case that the statistics do not reflect the reality on the network. The same can be said for the issue (often underlying) of cross-subsidisation and incentives to undertake cross-subsidisation kinds of activity (Section 6.6) which must be strongly prohibited and disincentivised on the market in for PIA in Ireland.

ALTO notes the position set out in the Consultation paper, concerning scope (Section 6.28); close-monitoring (Section 6.44) non-discrimination (Section 6.159 – 6.170); SLAs (6.134); product development (Section 6.126); Passive Infrastructure Records (Section 6.86 – 6.106) and remedies more generally (Section 6.3). We generally agree with ComReg conclusions in those areas.

ALTO suggests that ComReg considers a new remedy in the context of the PIA Market Review. That new remedy is a Minimum Standards threshold levied on those undertakings subject to regulation or *ex ante* regulation. See Ofcom's Fixed Access Market Review 2014, volume 1 and the conclusions and findings therein:[1]

"11.267 Our view is that BT should be required to meet the standards in full as soon as reasonably possible. However, in setting mandatory minimum standards for the first time, we need to recognise the need for BT to restructure and resource in a

[1] https://www.ofcom.org.uk/__data/assets/pdf_file/0032/78863/volume1.pdf

manner that will allow it to guarantee delivery. It follows that it would be inappropriate to set standards within the identified acceptable range if we consider that there is a significant risk of failure. Equally, however, we would not wish to allow service levels to deteriorate. Accordingly, as a transitional measure we consider it appropriate to impose somewhat lower minimum standards for the first two years."

ALTO's aspiration in recommending this approach to minimum standards is to:

1. Enhance the quality of service for on-time installations and repairs; and
2. Enhance the reliability of service offerings on the market.

ComReg would have the option to take a phased approach to review and ratcheting-up service levels in the PIA space by deploying minimum standards approach on the market for PIA. We believe this remedy would be a 'game changer' for the Irish market – coupled with some of the other positive conclusions called out in the Consultation paper.

ALTO notes that on the PIA market, the above minimum standards suggestion and submission is particularly appropriate to the subject of pole access. ALTO understands that the current processes and procedures for providing pole: access; replacement; and maintenance is a manual procedure and one that requires various steps that could be classified as inefficient in the context of a fast paced and dynamic market.

We have already made ComReg aware of our views concerning RGM currently and the IOB, consequently we will note rehearse those view again here.

Q. 5 Do you agree with ComReg's view that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA? Please provide reasons for your response.

A. 5. ALTO agrees with ComReg's view that a cost-oriented price control model is appropriate for deriving the prices for Eircom's PIA as set out at Section 7.17.

ALTO also agrees with the main competition problems assessed by ComReg at Section 5 of the Consultation paper – particularly when considering the subject of Eircom's ubiquitous network and reach which is addressed variously throughout. ALTO's main concerns in this area are twofold:

First, there remains a cross subsidisation risk on the market in relation to the State IA, which if found would be intolerable and should be assessed by ComReg on an ongoing basis.
Secondly, the entire industry requires pricing and models that will sustain any future appeals and legal challenges.

Q. 6 Do you agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for Eircom's PIA? Please provide reasons for your response

A. 6. ALTO agrees with ComReg's conclusion that a combination of BU-LRAIC+ and TD HCA costs should be used as the costing methodology for determining the prices for Eircom's PIA. ALTO notes the position adopted by ComReg as set out at Section 7.68 of the Consultation paper and taking of account of the comments made by the European Commission in its Serious Doubts letter (referred to at Section 7.11) previously as part of the Article 32 and 33 procedures. ALTO submits that this is also consistent with Paragraph 31 of the EC Non-Discrimination and Costing Methodologies Recommendation which provides for the BU-LRIC+ costing methodology (which includes a contribution towards common overhead costs).

Q. 7 Do you agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready? Please provide reasons for your response

A. 7. ALTO agrees with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready.
ALTO submits that ComReg should consider valuing PIA Reusable Assets by reference to actual costs using a Top-Down HCA approach.

Q. 8 Do you agree with ComReg's view that a straight-line depreciation approach should be applied in the context of Pole Access and Duct Access (Including Direct Duct Access) while a tilted annuity depreciation approach should be used for sub-duct? Please provide reasons for your response

A. 8. ALTO is not able to properly address this question.

Q. 9 Do you agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30 years? Please provide reasons for your response.

A. 9. ALTO agrees with ComReg's preliminary view that pre-existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively. Sub-duct should be set at 30 years. Ducting and quality of PIA remains

a particular issue and challenge for the industry to contend with when attempting to deliver and connect services.

Q. 10 Do you agree with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access, as described in section 7.5. Please provide reasons for your response.

A. 10. ALTO agrees with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access as described in section 7.5. ALTO submits that ComReg's approach appears to provide an appropriate mechanism by which to proceed to properly cost model and regulate the market.

Q. 11 Do you agree with the proposed financial threshold for duct remediation costs of [€11,000] per kilometre of duct? Please provide reasons for your response.

A. 11. ALTO notes that ComReg is endeavouring to address a valid issue in the PIA market. The €11,000 per kilometre of duct we believe is reasonable and we agree that the access seekers need the ability to repair and clear blocked and broken ducts both in the provisioning and repair scenarios.

Q. 12 Do you agree with ComReg's view that the 'per operator' approach should continue to be used to allocate / share the relevant Pole Access costs among all of the Pole Access Seekers, including Eircom? Please provide reasons for your response.

A. 12. ALTO agrees with ComReg's view that the 'per operator' approach should continue to be used to allocate / share the relevant Pole Access costs among all of the Pole Access Seekers, including Eircom. ALTO believes that given the concentration of PIA assets available on the market that ComReg's proposed approach provides for an equitable and forward-looking approach to access seekers and incumbents on the PIA market.

Q. 13 Do you agree with ComReg's view that the 'per metre of duct access equivalents' approach should be used to allocate / share duct related access costs among all Access Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm? Please provide reasons for your response.

A. 13. ALTO agrees with ComReg's view that the *'per metre of duct access equivalents*' approach should be used to allocate / share duct related access costs among all Access Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm.
ALTO submits that this should optimise space allocation management and address the potential for hording which can prevent other operators from entering ducting. The suggested minimum of 25mm sizes provides added confidence to price stability. It is a working assumption that this rationale will also apply to copper and act as an incentive to Eircom to migrate from Fibre to Copper.

Q. 14 Do you agree with ComReg's view that Pole Access rental prices should be set as a single national price based on a national average cost of providing Pole Access in all three geographic footprints (Urban Commercial Area, Rural Commercial Area and Intervention Area)? Please provide reasons for your response.

A. 14. ALTO agrees with ComReg's view that Pole Access rental prices should be set as a single national price based on a national average cost of providing Pole Access in all three geographic footprints (Urban Commercial Area, Rural Commercial Area and Intervention Area). ALTO submits that based upon previous market analysis and review exercises and contemplating the nature of the PIA market that ComReg's approach appears to be appropriate and encompass all aspects on the market and areas of coverage or footprint that may change over time.

Q. 15 Do you agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively? Please provide reasons for your response

A. 15. ALTO agrees with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively.

ALTO supports the evidential basis set out and provided by ComReg at Section 7.242 of the Consultation paper. We agree with ComReg's conclusion that contractor rates to Eircom do not appear to differentiate between Dublin and provincial and are instead based on a single rate. We also note the rates do vary per surface type and we understand certain surface types are more costly to excavate and reinstate than others.

Q. 16 Do you agree with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs? Please provide reasons for your response

A. 16. ALTO agrees with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs. ALTO's strong preference is for price stability of a longer period of time; however, we clearly recognise the import of ComReg's role and the need for market monitoring in the short to medium term.

Q. 17 Do you agree with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.266-7.267? Please provide reasons for your response

A. 17. ALTO agrees with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.266-7.267.

ALTO submits that it is likely to make deployment for access seekers more efficient it should also enable longer term lower rentals. Furthermore, it should more clearly attribute costs to the party benefiting from those specific processes and facilities.

ALTO notes that for the purposes of equivalence, the same processes should be available to all on the market.

Q. 18 Do you agree with ComReg's view that Eircom should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced, and calculated and

pre-notified in advance by Eircom based on the template described at paragraphs 7.266-7.267? Do you agree that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, in its cost accounting systems. Please provide reasons for your response.

A. 18. ALTO agrees with ComReg's view on recovery of additional pole replacement costs and assumptions concerning pole furniture removal and replacement cost capitalisation. ALTO submits that in both instances ComReg's approach appears to provide for a fair and equitable approach to regulated and access seeker undertakings on the PIA market.

Q. 19 Do you agree that (i) tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price and (ii) tree trimming costs to prepare aerial cable routes in advance of cable deployment should be recovered by means of a one-off charge (calculated and pre-notified in advance based on the template referred to at paragraphs 7.266-7.267)? Please provide reasons for your response

A. 19. ALTO agrees with ComReg's proposals under items (i) and (ii) above. In both instances the proposals are both appropriate and necessary for proper regulation to function on the market for PIA.

Q. 20 Do you agree with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access? Please provide reasons for your response

A. 20. ALTO agrees with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access. Undertakings with smaller deployment plans and limited access to civil engineering resources could choose the Eircom offering. However, PI Access seekers may be in an alternative position and have access to civil engineering resources.

ALTO submits that it is critical that Eircom is mandated to maintain the PIA network. Otherwise, industry and PI Access seekers will end-up pay an inefficient rent to Eircom to maintain its own network and infrastructure along the way.

Q. 21 Do you agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA? Do you agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.97.9? Please provide reasons for your responses

A. 21. ALTO agrees with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA.
ALTO also agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.97.9.

ALTO supports the regulatory remedies set out as they represent the best practice ways of both monitoring whether the prices controls are accurate and that monies declared are associated with the appropriate regulated product. We also acknowledge that fibre roll-out is still maturing in Ireland and note the ComReg indication that the original connection costs appear to be failing as experience is gained and the roll-out appears cheaper in more densely populated areas. In consequence, ALTO agrees with ComReg's approach to monitoring so that it will have accurate cost information going forward.

Q. 22 Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A. 22. ALTO has certain concerned with the proposed Regulatory Governance Obligations for the PIA market as proposed by ComReg. In effect, the industry has seen an ineffective regime take years to audit and review compliance status of Eircom under the operation of the Independent Oversight Board ("IOB") and the coming in to being of that IOB from the settlement of legal proceedings.

ALTO's strong preference is for ComReg to appoint independent experts paid to audit and to examine compliance with regulation in the PIA space on an on-going basis. This should have the effect of also assisting ComReg with the newly legally mandated task of enforcement and compliance in the communications market in Ireland. Independence and effectiveness remain a key concern for ALTO and industry members as we move towards PIA regulation.

Q. 23 Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly

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

A. 23. ALTO agrees with ComReg’s regulatory Impact Assessment and ComReg’s preliminary conclusions set out therein.

ALTO
3 March 2023

BT Response to ComReg Consultation 23/04:

Physical Infrastructure Access (PIA) Market Review

1.0 Introduction

BT Ireland welcomes this PIA and associated WLA and WCA market review consultations.

We would like to make the following key comments to this consultation followed by our responses to ComReg's specific questions.

1.1 General

We acknowledge and welcome ComReg's proposed effective remedies to resolve problems in the PIA market, however, after many years operating in the Irish market and within the PIA market, BT is concerned that these proposals do not go far enough to make the PIA market operate correctly.

1.2 Effective regulation

PIA regulation has been in place since the ComReg Wholesale (Physical) Network Infrastructure Access Market (Market 4) dated 20 May 2012 and notwithstanding the improvements made by ComReg's D10/18 Decision, BT believes that the PIA market in Ireland does not function properly. We note that ComReg's Access Regulations look impressive.

In our view, ComReg's proposed changes together with a series of market breakthroughs as discussed in paragraph 1.4 are necessary to develop this market. We suggest that ComReg use the powers it will be afforded under Regulations 51 to 56, 58 and 62 50 of the EECC Regulation 2022[1] to ensure the effective operation of the PIA market and to promote competition to the end-user's interest. We note conditions covering fairness, reasonableness and timeliness may also be attached to obligations of access under Regulation 12(4) of the Access Regulations/Regulation 55(3) of the EECC Regulations and we perceive this type of regulatory enforcement action the least intrusive means of achieving fair competition in the market. .

1.3 Governance Concerns

In line with ComReg's governance remedies discussed in section 8 of the consultation and described as obligations in section 15 of The Decision Instrument at Annex 1[2], we recommend that ComReg undertake or commission a reputable independent audit of the processes carried out by Eircom Limited to assess the remedies set by ComReg and managed through the Eircom Regulatory Governance Model. This type of audit would give confidence that the regulatory governance processes are carried out in an appropriate manner. This includes, but is not limited to, the imposition of PIA charges on open eir for the space they occupy.

Fibre Networks Ireland (FNI)

In 2021, ComReg appeared to be critical of the Independent Oversight Board (**IOB**)[3], namely because the IOB provided reports based solely on information Eircom has provided to it. ComReg's governance proposal in this Market Review does not proactively test the information shared. The reliance on

[1] Due to replace the current regulatory framework. Not yet commenced.
[2] We believe this should be more correctly called the Draft Decision Instrument as it's not yet in force.
[3] ComReg Statement on IOB Opinion – ComReg document reference 21/95 dated 05/10/2021. Paragraph 5 in particular although the rest of document applies.

information provided by Eircom's written policy and operational documents risks failure of the actual operation as there have been no independent checks or tests carried out. The lack of governance represents a significant threat to the PIA market (already outlined to the IOB in 2021). The IOB's governance obligation of overseeing and assessing Eircom's regulatory governance arrangements should permit ComReg to conduct internal audits of the IOB at least annually given the 'RGM' case to formally assess its effectiveness. This is particularly important as the IOB is set to lose its legal basis to exist in May 2024.

1.4 Achieving a market breakthrough

We outline some of our ideas below and we include a few learnings from our European counterparts (e.g. Portugal and Spain) and the UK where PIA services are working correctly and effectively.

1. From 1999 to circa 2020, ComReg was engaged at industry group meetings where it typically chaired or facilitated discussions[4]. ComReg's noticeable absence from these industry group meetings has led to our perception that ComReg has become too distant from what is happening at industry meetings and it is losing out on observing the behaviour of all parties. We believe that ComReg has limited its view by only relying on what the formal minutes say. In our view, ComReg should re-engage properly with the wholesale industry including Eircom so it can act more efficiently and use its regulatory powers to impose obligations where anti-competitive behaviour is demonstrated. This type of engagement for PIA is capable of commencement immediately via the CEI Forum. We believe closer participation by ComReg in the market as previously occurred would never have resulted in PIA issues reaching the formal and onerous dispute process which we have been involved recently. We observe ComReg has invested its own resource directly into the Nuisance Communications Industry Taskforce (**NCIT**) including commenting on industry specifications and scheduling bilateral meetings with all following the NCIT meetings.
   In Spain, for example, the regulatory lead for PIA is perceived as being accessible and very engaged with the issues that Other Authorised Operators (**OAOs**) have and those that OAOs raise formally. OAOs typically do not expect any recrimination for engaging with ComReg bilaterally. We believe OAOs need to know they can freely engage with ComReg – and vice versa, we believe ComReg should become more engaged with OAOs directly to understand their situation in this market.
2. The market must be open and transparent. We are concerned that ComReg needs to consider approaches to address any practice that may limit the rights of operators at industry groups from speaking freely. We see some operators not participating and we see moves to bi-lateral discussions. We are concerned the increase in the number of bi-lateral discussions leads to increased risk of discrimination as each operator may feel they are getting a better deal but this may not be the case.
3. As discussed earlier, effective enforcement of the regulations.
4. At this critical stage in the PIA product development (e.g. approximately 1-2 years), we believe more pace is needed in the industry meetings to raise, discuss and potentially resolve PIA issues. For example, we propose shorter more frequent meetings (e.g. fortnightly each at 1 hour) with senior ComReg attendance and we suggest ComReg offer proposals to address behavioural issues in the market and to reach practical and amicable solutions[5]. The Irish industry worked this way to develop NGNP, CPS, LLU, WLR, NGN, and NGA and these wholesale services largely serve the end-user's market well. By adopting these precedent practices to address the current issues inherent in the PIA market could prove invaluable.
5. We need industry meetings, including ComReg's attendance at them, where OAOs can agree their priorities, their solutions and their ideas for product development and to assist, more generally, in the delivery of the outcomes of this PIA Market Review.
6. We need frequent relevant metrics on the volume of deliveries, the quantum delivered on time/late, repair performance etc. Today, the percentage stats not in context are relatively meaningless. For example, Eir only report performance against Order Validation, Order Forecast and Due Delivery Date (or Reforecast Delivery Date). The latter metric is deemed irrelevant when Eir can report

[4] December 2020 was the last ComReg chaired IEF/CEI Industry Forum.
[5] BT believes monthly meetings are far too slow to make progress.

against the (e.g. if there will be a delay) Reforecast Delivery Date instead of the initial Due Delivery Date. For OAOs, the performance against the initial Due Delivery Date is key as plans, schedules and budget will be based on this. Our experience has been for long Due Delivery Dates which we wonder if they are reflective of an efficient delivery. We reflect, as ComReg did in Appendix 16 of 18/94, on the reported timelines for an NGN delivery relative to a PIA one. For a more recent snapshot, we note Eir's published KPI reports showing within a tight SLA for delivery and repair of NGN services. There are no service assurance metrics reported for PIA.

7. We need confidence that ComReg is actively reviewing, questioning, and validating what it receives from Eircom. For example, Eircom report to ComReg on all CRDs. We see CRDs rejected and CRDs accepted but then gradually altered/descoped as they move through Eircom's processes. We see some CRDs that we submitted become fractions of what they once were; to the point of being virtually meaningless. Industry needs ComReg's support in this space to ensure the incumbent acts appropriately and in accordance with it's legal and regulatory obligations.
8. We need the provision and repair issues to be urgently fixed. –We acknowledge these are in the Market Review under the 'Same' proposal but it could be years before any Decision is implemented. A solution for repairs must be fast-tracked as the vision ComReg have for PIA as a remedy will never come to pass without reasonable repair times. For example, the repair SLA for Sub-Duct is Eir's BAFO of 9 working days (before exclusions) to repair the infrastructure. We offer here some suggestions:
    a. ComReg should refer to the Minimum Standards approach adopted by Openreach that, per Ofcom, has led to improvements in delivery and repair timelines.[6] Related to this, BT has requested Eir for some time to offer a 24*7 approach to CEI repairs. Our perception/recollection is that this is unwelcomed or shared as not viable for Eir.
    b. We welcome ComReg's view in 7.7 (ii) that allows for an OAO to undertake repairs of ducts in the provision of an SDSI or in the repair of an existing SDSI service; and for those costs to be recoverable from Eir. This is particularly welcome given Eir's rejection of our CRD954 that requested such a facility for non-MIP related services.
    c. We wish for the right to repair ducts and sub-ducts (as above) be extended to the Sub-Duct product (with no MIP restriction).
    d. An SLA is needed for the clearance of blocked ducts. It is unsatisfactory and impractical for Eir to only provide a forecast clearance date by T+10.
9. Eir frequently refer to licences and recently traffic management as a factor in their delivery delays. In the repair scenario, permissions/wayleaves/traffic management etc are included in the list of 'exclusions'. We need assurance that Eir is working efficiently, that they are working in an equivalent manner and that they are working to the current planning guidelines. We need ComReg to support at an industry level to improve the current planning processes to mitigate the types of delays alleged by Eircom. We suggest this may be achieved through the incorporation of more favourable licensing measures in the draft Planning and Development Bill 2022.
10. We welcome ComReg's view that Eircom should provide a network where Poles, Ducts, Sub-Ducts and Associated Facilities are fit for use (s7.5). We welcome ComReg's view to move towards Eircom removing their unused cables.

1.5 Fibre Networks Ireland (FNI)

We have several concerns regarding FNI, particularly the operational control exercised by Eircom. There is very little known by OAOs about FNI and the practical implications the formation of this new entity has on the PIA market. Our perception is that Eircom are reticent or dismissive when we raise the subject, therefore, we seek clarity on the following matters:

1. We need clarity around the role that FNI will have in the market and how it will or could impact OAO's ability to access PIA. We are concerned about the availability of PIA to OAOs (as Eir has no obligation to create additional capacity). We see the development of many multi-way related CRDs. We wonder if these are driven by FNI (serving Eir's expansion plans) and thus, the potential of reduced or non-existent capacity for OAOs.

[6] Improving broadband and landline standards (ofcom.org.uk)

2. The PIA market is defined as passive components. Will FNI become another PI operator in the market, separate and distinct from Eircom's current offering?
3. We wish to understand if ComReg have a complete understanding of the effect of this new player in the market and who's needs it serves.

Q1 National Regulation – impact on WCA

We welcome the finding of a national market for the regulation of PIA but ComReg should note the following:

- The cost of reaching this highest upstream regulatory level will be beyond the economic viability of new entrants;
- There are significant practical barriers to entry here given the lengthy processes associated with on-boarding/set-up (i.e. document approvals especially with long delays, staff accreditation, approval of photo templates, Google Drive set-up, costs to re-develop IT system stack, creating new process workflows to take on PIA etc). We perceive that these barriers coupled with the poor delivery and repair SLAs including the lack of clear information around PARs will together serve to minimise the number of entrants to this market.
- The ability to reach WCA locations for any player may not be permissible when they consider the pre-qualifications around the use of PIA;
- Once on-boarded, the cost of reaching WCA locations for any player may be too high (for example: civils, duct rental, equipment, exchange related costs (ISH/IBH) etc.) relative to the return they expect for their forecast count of subscribers over the short to medium term.
- Once delivered, the disruption to OAOs from a service outage perspective where there is an entire dependency on Eir to resolve it is substantial. Some OAOs may not be able to take on this risk versus the reward; and thus remain reliant on Eir's downstream solutions. Other OAOs may take on this risk but as of today, they face penalties for breach of service commitments to end customers as OAOs have no right of recourse to Eircom (i.e. Third Party Compensation) due to the consequences of their outages.
- We see downstream regulation as necessary for many years in some less dense Commerical Areas where investment by entrants is unlikely.

2.0 Response to ComReg Questions

Q. 1 Do you agree with ComReg's definition of the Relevant PIA Market?

Please explain the reasons for your answer, clearly indicating the relevant

paragraph numbers to which your comments refer, along with all relevant

factual evidence supporting your views. 73

BT Response

Based on a review of the information provided by ComReg, we agree with ComReg's definition of the Relevant PIA Market as provided. In terms of the geographic scope, we note Eircom is the only provider with a national ubiquitous telecoms designed access network and that demand for the PIA product is demonstrated by the NBP Intervention Area and separately by operators in the Commercial Area.

Q. 2 Do you agree with the SMP assessment above and that Eircom is

likely to have SMP in the Relevant PIA Market? Please explain the reasons

for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting

your views. 87

BT Response

We agree with ComReg's approach at paragraph 4 of carrying out the 3CT test set out in Article 67(1) of the EECC and provided all three criteria are met, a competition assessment is carried out to determine whether that market is characterised by the presence of any service providers having SMP.

We also agree that Eircom (including FNI) is likely to have SMP in the Relevant PIA Market based on criteria provided at paragraph 4.2. BT as an aggregator in the Irish market also notes from experience that it is not trivial to use different access providers as order handling needs to be automated and invariably every access provider supplies services differently. These costs are typically substantial. Hence many of the suppliers mentioned would not be viable for aggregation with BT given the barriers and costs to establish processes with them.

Q. 3 Do you agree that the competition problems and the associated impacts on competition end-users identified are those that could potentially arise in the related markets downstream of PIA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. 98

BT Response

We fully agree with ComReg's assessment of competition problems and the associated impacts on end-users identified are those that could potentially arise in the related markets downstream of PIA. We note ComReg's comment in paragraph 5.5 that is not necessary to catalogue actual abuses and we feel we must adopt the same approach given the possibility of litigation that now appears to be present in the Irish market for identifying such issues.

We would agree that the SMP provider has both the opportunity and motive to apply the various practices and rather risk these happening it is better for ex ante-regulation to be deployed in the forms of remedies.

Re 5.13 – Leveraging while indirectly related, we do see competition problems in this market arising from the presence of a dominant player. For example, for Sub-Duct and SDSI, Eir deny their duty of care to Access Seekers if they damage their assets. We have raised this point consistently with Eircom since 2018 and we find them to be intransigent on this point with no sense of the duty of care; yet they expect and insist that Access Seekers have a duty of care towards their assets.

Re 5.17 – Restrictions on, or denial of Access. We welcomed ComReg's support on a Dispute we raised where we were initially denied access to a route. We do see that this anti-competitive behaviour does limit access and thereby hinders competition with widespread implications.

Re 5.19 – Delaying tactics. We note the new player in this space, FNI, and question whether Eircom have engaged in delaying practices to give FNI (& ultimately itself) an advantage in this market (ordering/consuming large tracts of duct space). We also note the very long involved process to on-board an Access Seeker end-to-end as a potential delaying tactic and barrier to entry for all but the determined. The manual processes at most stages in the process are onerous and do not lend themselves to automation by an Access Seeker in their current form. We see the limits on manual orders today, only, as a blocker for Access Seekers who need/want to work at scale (in the non-MIP world). We cannot speak to what happens in the MIP world.

Re 5.21 – Creating or exploiting information asymmetries and withholding relevant information We welcome the Non-Discrimination proposals and the access to the same OSS – and presumably, the same data set. We find that if we do not ask the exact question, a different answer is provided from

the one we expected. If Eircom have more or better information than Access Seekers, then Eircom trump.

Re 5.37 – **Inefficiency and inertia.** We agree with ComReg's read of this. We fear but anticipate the lack of capacity to limit us/other Access Seekers ability to participate and compete in the PIA and then also, the WLA market. We remind ComReg of our experience with the Nutley exchange in Dublin many years ago that was the subject of a Dispute.

A current concern for us is the slow uptake of PIA due to problems inherent in the product including but not limited to (difficult availability/delivery and poor repair performance of PIA), plus the system costs of onboarding PIA and the long on-boarding process will act to slow the deployment of WLA services in both the Intervention Area (IA) and in the Commercial Area (CA). This could have the effect of stranding end users in the newly de-regulated CA and IA long before either NBI (IA) or competitors (CA) arrive. Thus, a delay or failure of this PIA market could leverage and seriously undermine the proposed regulatory changes in the WLA market. We believe ComReg must act to prevent these competition issues from adversely impacting the PIA market. For example - to sunset the removal of IA regulation to the exchange area level so that regulation is removed 1yr after passing a minimum threshold of an Exchange Area. A similar approach is needed in the Commercial area.

The poor delivery SLA for the sub-duct product minimises the relevance of the sub-duct product to meet immediate customer requirements. Deliveries today, if they meet the rigid standards of a Type 1 Sub-Duct order and if they are delivered on time, take over 1 week longer than what Eir can offer for the fully managed end-to-end NGN service.

The poor SLA offered by Eir for repair times impact customer service, the operations and the commercials of OAOs who consume PIA as an input into their downstream offerings. We see in the Eir KPI reports, that Eir can mostly repair their SEAs within the target SLA (8 working hours = 1 working day) but their BAFO Repair SLA for the Sub-Duct product is 9 times longer (9 working days). While the comparisons are not like-for-like – some reasonable inferences can be drawn that this is not a level playing field for Access Seekers wishing to use PIA to deliver downstream services.

Q. 4 Do you agree with ComReg's proposed non-pricing remedies in the PIA Market? Please explain the reasons for your answer, clearly indicating

the relevant paragraph numbers to which your comments refer, along with

all relevant factual evidence supporting your views. 160

BT Response

We largely agree and welcome most of ComReg's proposed non-pricing remedies including the material improvements to certain of the remedies such as the improvements to the Non-Discrimination Regulation as set out in section 8 of the Decision (including the principle of 'Same'). The other significant improvements we observe is around the Passive Access Records (**PARs**). This should significantly speed up planning, reduce survey costs and potentially speed up deployments as OAOs use the more advanced features of modern GIS systems subject to availability.

With regards to Non-Discrimination, it is often difficult to detect wholesale abuses hence the Transparency obligations should go hand-in-hand with Non-discrimination. Whilst we note the significant improvements to Non-Discrimination, ComReg has implemented the standard suite of Transparency obligations i.e. Publication of a Passive Infrastructure Access Reference Offer (**PIARO**). Whilst the KPIs should help us all identify equivalence, they may be diluted by complex definitions and different operators addressing different markets, and varying interpretations of what is to be reported on. Given the experience with the RGM, we believe ComReg must include a test to investigate processes independently of what it is being told. Such an obligation should create a different dynamic and incentive to ensure compliance.

We would also like to make the following specific comments.

6.16 - Remedies for the Relevant PIA Market We are concerned that there is a motive and opportunity to engage in discrimination through cross subsidy of a completely different service or feature, or even the use of other service credits that could undermine the non-discrimination obligations. We request ComReg to impose an obligation to strongly prohibit this type of cross subsidy discrimination both within Eircom and between Eircom and other operators/entities.

6.28 – Access Remedies An automated order handling system is required as the manual approach through busy Account or Customer Success Managers is not efficient. OAOs need the benefits of an automated system to even do simple things such as looking up the status of orders rather than the manual approach today. We welcome the draft decision by ComReg to ensure OAOs will receive the same solution delivered in the same way – services, T&Cs, delivery, SLA etc. We note that the more alignment there is between the systems Eir use and those OAOs have access to – then, the more efficient the process will become.

6.4 – Dark Fibre We note ComReg are very dependent on the dark fibre remedy as now available in circumstances where sub-duct space is not (e.g. where there is no space or where ducts are extensively damaged (s7.9)). We welcome the expansion of the criteria. However, we need to share ComReg's confidence that this will be available and when it would be a suitable solution.

6.43 – Network Integrity we are puzzled by ComReg's suggestion that Eircom should have an SLA around supervision. Our understanding has been that Access Seekers can work independently of Eircom – therefore they are not limited by their attendance or otherwise.

6.44 – Reasons to be given (i.e. Reasons for refusal of an Access Request). The reasons must be material. The current drafting lends itself to delay as there is an incentive and opportunity to wait 1 month with a trivial response leading to an open-ended debate and delay.

6.49 – Requirement to negotiate in good faith We agree with ComReg's view here. The obligation to act in good faith should include not misleading the Access Seekers. If an internal process already exists, this should be shared. The industry should not be forced into a game of 'battleships' whereby unless you ask for the exact question, the answer is not reflective of the spirit of the question. This should also cover but not be limited to approaches to industry meetings and any future SLA negotiations.

6.52 – Access to Eircom's Operational Support Systems ('OSS') We support ComReg's proposal that Eircom provide Access Seekers with access to its Operational Support Systems (**OSS**) and processes it uses for its own purposes. BT agrees that access to OSS (or similar software systems) is essential to the effectiveness and efficiency of the operational aspects of the supply of the wholesale PIA products, services and associated facilities that are used as inputs to the supply of service(s) to end-users. Equivalent access may mitigate the risk of future delays, will manage the expectations of access seekers and remove the investment hurdle that Eir may face if they needed to re-create a different OSS just for other Access Seekers Access to the same OSS may address some of the concerns that Access Seekers have around repair and delivery timeframes.

6.68 – Duct Access Access seekers are capable of determining the urgency of a repair situation and should be able to request or commence the appropriate priority of response (as suggested by us in CRD900). In some cases the situation may not be urgent, in other cases an urgent response is needed with no alternative (re-routing, or viable remedial measures etc.). Access seekers should be able to avail of a Eircom priority repair service or have the right to fix the PIA issue themselves. The timelines to repair non-priority faults (including duct/sub-duct) should be less than 5 working days total. We welcome the proposal by ComReg to allow OAOs to undertake repairs themselves (for provide and in-life situations). We see this of equal relevance across the sub-duct and the SDSI product sets.

6.74 – Direct Duct Access We welcome the clarity for multi-strand fibres being used as was agreed within industry. During the 60R version of the SDSI specification it was oddly removed. Whilst we believe this option is currently available in practice clarity in the product text is needed.

6.79 – Access to Chambers We welcome ComReg's opinion on access to the exchange chamber for practical reasons. Within the OE exchange, we support ComReg's proposal to permit access to all the

chambers between the Main Distribution Frame (**MDF**) and Optical Distribution Frame (**ODF**) and the customer as such would afford us efficiency in managing the cables such as from the exchange cable chamber up to the ODF.

6.86 to 6.106 - Access to Passive Access Records ('PAR') We welcome ComReg's many proposed improvements to Access Seekers rights of access to/use of Eircom's Passive Access Records/GIS. The limited information we have worked with to date from Eircom has limited our planning solutions and unnecessarily increased our costs.

6.126 – Product Development We agree with the ComReg conclusion that the product development process appears to be a one size fits all approach and many of the PI facilities are processes (and in most case today manual processes) that could be quickly designed and put into service to reduce roll-out delays. We would agree with ComReg's view of 10 months and 14 months respectively as max times but would be concerned there is both opportunity and motive to delay simple process changes to the 10 or14 month deadline. We therefore welcome the recognition of this in 6.131 but we are still concerned there is a greyness to proving such delays.**6.134 Service Level Agreements (SLAs').** We appreciate this is the process that was developed in D10/18 which we believe was to address the problems with agreeing SLAs in the period prior to that Decision. We are concerned that where dominance is overwhelming, the ComReg SLA proposal in D10/18 and now in this consultation does not work. The Access Seeker's request can be to all effective purposes ignored but the process must still be worked through. For example, we remind ComReg of the SLA BAFO 'negotiations' held over summer 2022 re CRD900. We also note the effect of a dominant operator insistence on moderating the meetings and note-taking too. This does not promote a level playing field and we found it disappointing that attempts to run the negotiation through the independently chaired CEI forum were not agreed by Eircom.

We consider this whole area of SLAs needs a new review or consultation in its own right. We do not see the proposed solution in this market review working. We believe the SLA process is tilted in favour of the dominant player. As the summer 'discussions' around CRD900 evidence, the dominant player's SLA is carried even when no agreement is reached by the attendees. The only recourse an Access Seeker has is to raises a Dispute and then face costs, delays, time consuming activities and more. We also point out the irrelevance of Eir connecting the provision of 'reasonable' volume forecasts with the payment (or not) of service credits. Whilst such may work for a whole area deployment it does not work for the leased lines market where provision would follow a customer order. It is really unclear as to why forecasts are relevant and why this should be the 'natural' penalty of getting it wrong or not submitting.

We also note ComReg's long term reluctance to take SLA disputes hence a better process is required. We would ask ComReg to review the poor SLAs in place today and its own text in 6.147 about Fit-for-purpose SLAs and ask the question as to why this is not happening. It's great to have the text of 6.147 but what we need is actual fit for purpose SLAs and in our view this is not happening for PIA.

6.155 - 6.160 – Non-Discrimination Given some of the difficult situation in Ireland such as the RGM in 2015 we welcome that ComReg proposes to follow the European Commission view of true equivalence with the inclusion of 'the same' in the regulation of Non-Discrimination. We trust that this can be adopted across the board including the lack of duty of care that Eircom have re the assets of Access Seekers in their areas.

6.161 – 6.167 We welcome ComReg's position on Equivalence of Inputs.

6.171 – We agree with ComReg that where we or other access seekers use the same telecoms civil contractors then we assume they can use the same Eircom distributed PI records for Access Seeker deployments as for Eircom deployments.

Given the situation that arose with the RGM first presented to industry in 2015 and that the IOB that was founded based on the ComReg settlement is to close in 2024, we ask ComReg to conduct or hire an independent firm to actually audit that Eircom is compliant with these new rules to boost confidence that it's happening, plus knowledge of an audit will act as a strong incentive for compliance. i.e. it's not about what's written, it's about what's done.

Q. 5 Do you agree with ComReg's view that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA? Please provide reasons for your response. 169

BT Response

Generally we have had concerns about ComReg past approach to PIA pricing and strongly disagreed with what looked like an industry cross subsidy of the state aided area known as the Intervention Area. We trust this is completely out of the system and if such still exists it should be removed as such is inappropriate on the basis that the Government is providing State Aid to the NBP provider and there is nothing in legislation requiring commercial operators to do the same. What we need is pricing that will withstand appeal and also not be rejected by the European Commission. We would like to make the following comments.

7.17 PIA price control obligation - We agree that cost orientation is required to address the competition problems identified in section 5 and that Eircom has a ubiquitous telecoms access to last mile access. We believe this is the best approach for an efficient PIA market.

Q. 6 Do you agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for Eircom's PIA? Please provide reasons for your response. 178

BT Response

We agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should be used as the costing methodology for determining the prices for Eircom's PIA as this aligns with common practice. We also agree with paragraph 7.68 and footnote 218 which relates to the European Commission's Serious Doubts letter of 25 November 2021(as referred to in paragraph 7.11). This aligns with our position of a previous consultation, and we welcome the correction.

Q. 7 Do you agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready? Please provide reasons for your response.

184

BT Response

We agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready.

We have reviewed the detail in the consultation and consider it helpful for ComReg to value PIA Reusable Assets with the reference to actual costs through the Top-Down Historical Cost Accounting approach.

Q. 8 Do you agree with ComReg's view that a straight-line depreciation approach should be applied in the context of Pole Access and Duct Access (including Direct Duct Access) while a tilted annuity depreciation approach should be used for sub-duct? Please provide reasons for your response.

BT Response

The reasoning shared by ComReg seems reasonable. However, we believe the heavy users of PIA are better informed to comment on this question.

Q. 9 Do you agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30 years? Please provide reasons for your response. 193

BT Response

Given the wet Irish environment, we agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30. We find it disappointing that records were not kept up to date and we would not expect a repeat of this. In addition we would not expect to see the asset lifetime counters reset due to the change of ownership of the assets.

Q. 10 Do you agree with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access, as described in section 7.5? Please provide reasons for your response. 213

BT Response

We don't have any comments to this as our usage volume is relatively small and we feel those that are heavy users of the service will be better informed to comment.

Q. 11 Do you agree with the proposed financial threshold for duct remediation costs of [€11,000] per kilometre of duct? Please provide reasons for your response. 213

BT Response

We refer to ComReg's citation of ComReg 21/99 re SDSI, where Access Seekers are reimbursed for the reasonable costs associated with unblocking a duct (including de-silting). Figure 16 sets out the available options. We firstly question are the thresholds considered here similar to those that apply/would/could apply arising from ComReg 21/99?

We welcome that ComReg is trying to address what we believe to be a significant issue in the Irish market for PIA. We agree that Access seekers need the ability to repair and clear blocked and broken

ducts in the provisioning and repair scenarios. We also need this issue to be resolved now and not in a years' time for SDSI (MIP/Non-MIP) and for the Sub-Duct product.

We note to ComReg that Eircom has rejected our CRD952 regarding the right to repair/clear broken ducts for SDSI Non-MIP. We welcome ComReg's reference in Footnote 281 that it intends to provide Access Seekers with the right to repair ducts. We expect that this will also cover the sub-duct too as is relevant to the Sub-Duct Access Seekers need these facilities to improve on service delivery andservice assurance timelines – especially at the currentSub-Duct Delivery and Sub-Duct/SDSI repair SLAs are so poor.

We welcome ComReg's note in 7.174 that it will request Eircom to share details of incidences/costs relating to duct remediation. In our quite limited experience of using PIA and discussions with informed others.

7.173 – We welcome ComReg's recommendation that whatever applies to Access Seekers should also apply to Eircom.

Q. 12 Do you agree with ComReg's view that the 'per operator' approach

should continue to be used to allocate / share the relevant Pole Access costs

among all of the Pole Access Seekers, including Eircom? Please provide

reasons for your response. 215

BT Response

As BT Ireland does not use poles we will leave it to those users that are better informed to provide their response. i.e.

Q. 13 Do you agree with ComReg's view that the 'per metre of duct

access equivalents' approach should be used to allocate / share duct related

access costs among all Access Seekers, including Eircom, and that the

minimum threshold in terms of the diameter space should be set at 25mm?

Please provide reasons for your response. 219

BT Response

We agree with ComReg's view that the 'per metre of duct access equivalents' approach should be used to allocate / share duct related access costs among all Access Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm. We consider this should help prevent space wastage and the potential for hording that may prevent others entering the duct and the minimum 25mm sizes provides added confidence to price stability.

We also assume this will apply to copper and this should act as an incentive for Eircom to migrate from Fibre to Copper. We welcome ComReg's confirmation on this. We expect Eircom will benefit from the recovery and sale of this valuable copper (which in turn should help reduce the wider product costs).

Q. 14 Do you agree with ComReg's view that Pole Access rental prices

should be set as a single national price based on a national average cost of

providing Pole Access in all three geographic footprints (Urban Commercial

Area, Rural Commercial Area and Intervention Area)? Please provide reasons for your response. 222

BT Response

As BT Ireland does not use poles, we will leave it to those users that are better informed to provide their response.

Q. 15 Do you agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the Non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively? Please provide reasons for your response. 227

BT Response

We agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively.

The basis for our view is the evidence provided by ComReg in paragraph 7.242 that the agree contractor rates to Eircom don't differentiate between Dublin and provincial and are instead based on a single rate. We also note the rates do vary per surface type and we understand certain surface types are more costly to excavate and re-instate than others. This sounds familiar based on our own experiences, but are seeking to have this checked.

Q. 16 Do you agree with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs? Please provide reasons for your response. .. 229

BT Response

Our preference is for stable pricing over the period of the market review as instability in what are large infrastructure investments would be unhelpful to downstream markets and end customers. That said we recognise that ComReg need to monitor the wider market to ensure the basis of ComReg setting prices is still correct. For example, following ongoing hikes in interest rates – the cost of money has become expensive. This has created a change in conditions and ComReg is reasonable in monitoring the situation.

Q. 17 Do you agree with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.266-7.267? Please provide reasons for your response. .. 230

BT Response

We agree somewhat with ComReg's proposal that the process related costs for the PIA offer should be recovered by Eircom as an upfront payment – say for Field surveys in certain instances. We do not agree that processes such as billing and order administration should be charged as separate line items. It is surprising to us that a dedicated person is assigned to managing billing for the PIA product in Eircom. We understood PIA to follow the Data Model which would, surely, have led to some degree of automation and inclusion then in the opencell billing system, for example.

However, for the purposes of equivalence we would expect the same processes to be available to all.

Q. 18 Do you agree with ComReg's view that Eircom should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced, and calculated and pre-notified in advance by Eircom based on the template described at paragraphs 7.266-7.267? Do you agree that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, in its cost accounting systems? Please provide reasons for your response. 233

BT Response

As BT Ireland does not use poles, we will leave it to those users that are better informed to provide their response.

Q. 19 Do you agree that (i) tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price and (ii) tree trimming costs to prepare aerial cable routes in advance of cable deployment should be recovered by means of a one-off charge (calculated and pre-notified in advance based on the template referred to at paragraphs 7.266-7.267)? Please provide reasons for your response....................... 235

BT Response

As BT Ireland does not use poles, we will leave it to those users that are better informed to provide their response. However we note for LLU that a similar option is provided between repair on a one-off basis or within the rentals. If we were to deploy poles going forward, then we would welcome the choice of payment approach as not poles are close to trees.

Q. 20 Do you agree with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access? Please provide reasons for your response. 241

BT Response

If Access Seekers must contribute (upfront, DIY or via their rental charges), then we agree with the range of approaches outlined by ComReg. Some operators such as those providing large rollouts with access to their own civil engineering facilities may find it faster to do the repair themselves, and then face a reduce rental. . Other operators with a small deployment and limited access to civil engineering resource may choose to go with the Eircom offering.

Underlying concern – we are concerned that Eircom must be required to maintain its network to an appropriate standard as to do otherwise will have the impact of the industry paying for the upkeep of the Eircom platform. i.e. Eircom should have an efficient pole replacement programme and a maintenance programme of the duct network programme built into their recurring cost base.

Q. 21 Do you agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA? Do you agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.9? Please provide reasons for your responses. . 252

BT Response

We agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA. We also agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.97.9.

We support these regulatory remedies as they are best practice ways of both monitoring whether the prices controls are accurate and that monies declared are associated with the appropriate regulated product. We also acknowledge that fibre roll-out is still maturing in Ireland and note the ComReg indication that the original connection costs appear to be falling as experience is gained and with roll-outs cheaper per unit in more densely populated areas. Hence we agree with ComReg's approach to monitoring so that it will have accurate cost information going forward.

Q. 22 Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. 262

BT Response

Whilst we can see the intended purpose of the proposed Regulatory Governance Obligations, we are not aware of any evidence from ComReg that this remedy is effective. In our view this governance remedy needs to be seriously strengthened. This is similar to the IOB matter raised earlier. There should be an external independent audit of whether regulations are being complied with. We also question

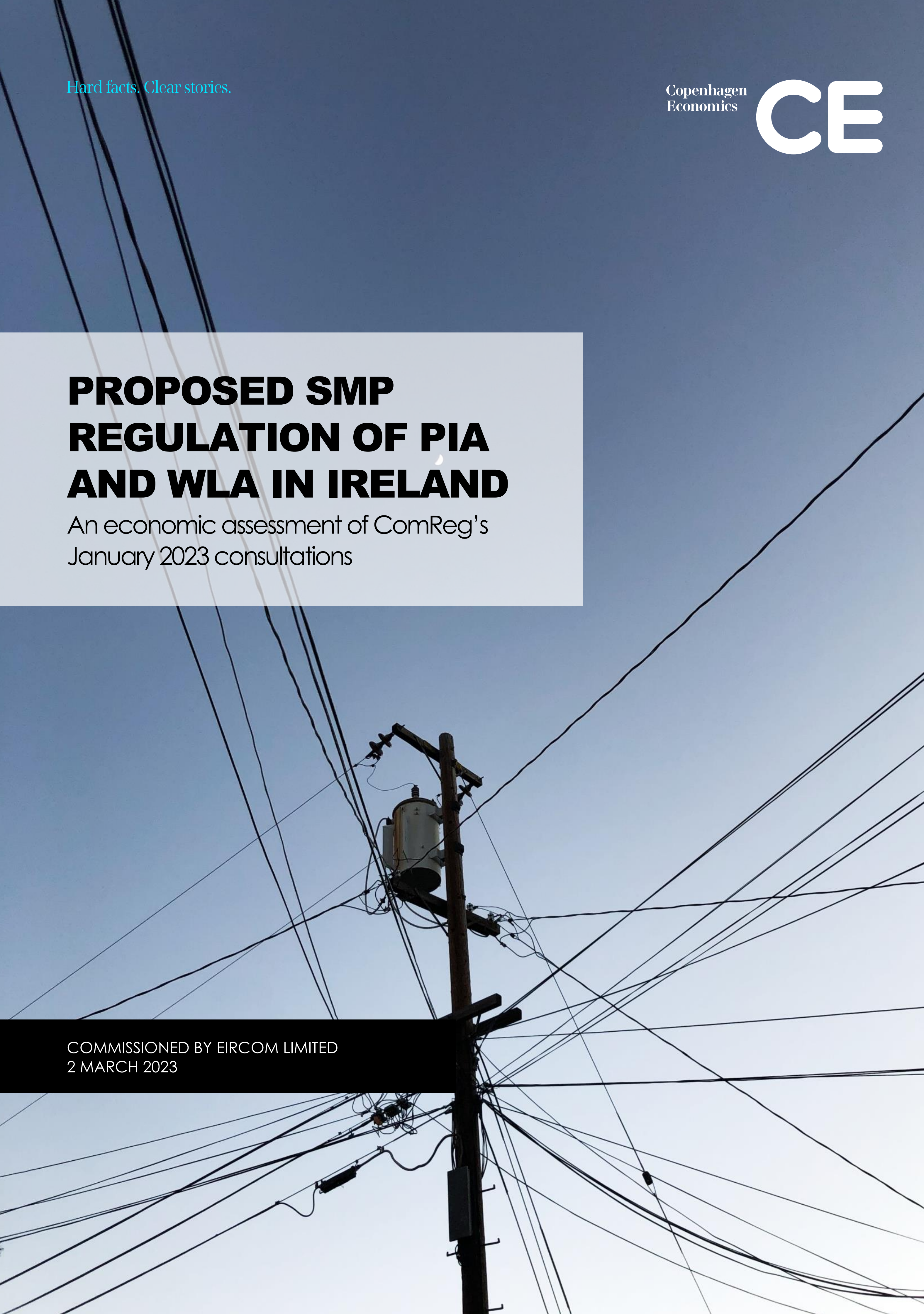
whether statements of Compliance are working given that we and another Access Seeker have had to take and won regulatory disputes against Eircom in recent times. We note ComReg's frustration at the IOB 2021 report whereEircom had not permitted the independence and effectiveness of the functions to be independently assured in a way. ComReg could not rely on the IOB report in 2021 (ComReg document reference 21/95 dated 05/10/2021). Our view is the Governance obligations need to be strengthened by a full audit of the application oif the RGM by a reputable independent auditor with the appropriate expertise to review governance. This should both incentivise compliance and increase confidence that the governance is working.

Q. 23 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. 28

BT Response

We have reviewed the regulatory Impact Assessment and agree with ComReg's preliminary conclusions. On review, we can see that the approach is logical and aligns with many similar RIAs of the past. In regards the Accounting Separation analysis in Table 17 of page 280 we would agree that given the introduction of the Fibre Network Ireland (FNI) venture, that it is even more important to apply Accounting Separation Obligations given there may be a split in the accounts between the two organisations Eircom and FNI.

End



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PROPOSED SMP REGULATION OF PIA AND WLA IN IRELAND

An economic assessment of ComReg's January 2023 consultations

COMMISSIONED BY EIRCOM LIMITED
2 MARCH 2023

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PREFACE

Proposed SMP regulation of PIA and WLA in Ireland

On 9 January 2023, the Commission for Communications Regulation (ComReg) published two consultations relating to wholesale telecoms markets in Ireland: one concerning the market for physical infrastructure access (PIA) and another concerning the market for wholesale local access (WLA).

According to ComReg's provisional findings in the consultations, eir has significant market power (SMP) on both markets. In relation to PIA, ComReg finds that eir has SMP on a national market. In relation to WLA, ComReg finds that eir has SMP in a part of Ireland referred to as the 'commercial area', covering approximately 80 per cent of premises, for access provided to fibre networks, including both fibre-to-the-cabinet (FTTC) and fibre-to-the-home (FTTH). ComReg has proposed a range of regulatory obligations to address the competition concerns it identifies.

Eircom Limited (eir) has requested Copenhagen Economics to provide an economic assessment of ComReg's two consultations. Our assessment is provided in this report.

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INTRODUCTION AND EXECUTIVE SUMMARY

ComReg provisionally finds that eir has SMP in relation to PIA and WLA

On 9 January 2023, the Commission for Communications Regulation (ComReg) published two consultations relating to wholesale telecoms markets in Ireland: one concerning the market for physical infrastructure access (PIA) and another concerning the market for wholesale local access (WLA). According to ComReg's provisional findings in the consultations, Eircom Limited (eir) has significant market power (SMP) on both markets. Consequently, ComReg has proposed a range of regulatory obligations to address the competition concerns it identifies.

Against this background, eir commissioned Copenhagen Economics to assess ComReg's PIA and WLA consultations from an economic perspective.

PIA: SMP regulation of eir's entire network may be disproportionate

ComReg finds that eir has SMP in a national market for physical infrastructure. Based on our analysis, we agree that there is an economic case for securing access to physical infrastructure, the wholesale input most upstream in the telecoms supply chain. However, it is not clear that SMP regulation is the most proportionate approach.

First, **there is already regulation in place which secures access to physical infrastructure.** The Broadband Cost Reduction Directive (BCRD) already requires all physical infrastructure providers to grant access to their networks, regardless of market power. Article 72 of the European Electronic Communications Code (the Code) also allows national regulatory authorities to impose access to physical infrastructure as a stand-alone remedy. It is disproportionate to impose additional regulation if existing regulation already addresses the same concerns. ComReg should reconsider whether there is a need for additional regulation beyond the BCRD and other forms of symmetric regulation, in combination with the safeguard of competition law.

Second, **there are other physical infrastructure networks in Ireland**. While eir's network is national and ubiquitous, there are other physical infrastructure networks which already today support the provision of wholesale telecoms services in Ireland, including i) the network of the national electricity provider ESB, which is also national and ubiquitous (and which supports fibre operator SIRO), and ii) the network of the cable operator Virgin Media. As ComReg appears to acknowledge, downstream competition does not depend on access to eir's physical infrastructure.

Third, **demand for access to physical infrastructure is very low**. Commercial operators have requested access to only 0.5 per cent of eir's duct network. ComReg acknowledges that volumes on the commercial market for access to physical infrastructure are relatively trivial. This limits the extent of any impact that regulated access to eir's physical infrastructure would have on competition, and consequently mitigates the extent of any competition concern.

Even if eir is deemed to hold SMP in relation to PIA, **SMP regulation need not apply to eir's entire network**. ComReg's decision to define a single national market for PIA may mask some differences in competitive conditions, and it may not be necessary to regulate all of eir's physical infrastructure. Moreover, SMP regulation of newbuild, specifically, is likely to distort competition. This would be the case since eir's incentive to invest in newbuild would, as the only physical infrastructure provider subject to SMP regulation, be weakened relative to competing providers.

WLA: Evidence is not consistent with eir having SMP in the entire commercial area

ComReg finds that eir has SMP in the market for fibre WLA in a part of Ireland defined as the 'commercial area', covering approximately 80 per cent of premises in the country. We have scrutinised ComReg's analysis and the supporting evidence. We find that ComReg's analysis and the supporting evidence is not consistent with the finding that eir has SMP in the entire commercial area.

First, **market outcomes are not consistent with eir having SMP in the entire commercial area**. eir's own retail market share is relatively modest and declining, and the majority of high-speed retail volumes derive from wholesale networks other than eir's. eir should have an incentive to continue providing access on commercial terms as eir is reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. eir has also reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market, which is not consistent with an SMP operator acting independently of competition.

Second, **evidence shows that the pricing of fibre WLA is constrained**. ComReg finds that wholesale fibre does not compete with other technologies, but the SSNIP[1] test which leads ComReg to this conclusion does not stand up to scrutiny. A corrected SSNIP test shows that the relevant market should be broadened and could reasonably include cable, as has been the case in several other European countries. Regardless, the results of the corrected SSNIP test show that a hypothetical monopolist of fibre WLA would be unable to profitably exercise market power, which is not consistent with ComReg's conclusion that eir holds SMP in the entire commercial area.

Third, **eir's network has extensive overlap with rival networks within the commercial area.** Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap will increase to 84 per cent by 2026, during the regulatory period. Recent case precedence suggests that such a level of overlap may not be consistent with a finding of SMP. At the very least, the evidence regarding overlap, along with evidence showing differences in the developments of eir's wholesale volumes in different areas, supports that competitive conditions are not homogenous within the commercial area.

Fourth, **eir may not have the ability and incentive to exercise market power even where there is no overlap**. eir does not currently price differentiate its FTTH pricing between different geographic areas. In fact, competitive pressure currently flows the other way: when eir has reduced its wholesale FTTH prices in response to competitive pressure in areas with overlap, this has resulted in lower wholesale pricing nationwide, also in those areas where eir does not overlap with a rival network. [text redacted]

[1] Small but significant and non-transitory increase in price

Any competition concerns could be addressed by less intrusive remedies

ComReg proposes an extensive set of remedies to address competition concerns on the fibre WLA market. We have assessed the proposed remedies and find that they are intrusive and could distort competition.

First, **many of ComReg's proposed remedies are not proportionate to the competition concern**. ComReg has proposed some of the most intrusive types of remedies despite no evidence that this is necessary to address competition concerns. ComReg's remedy proposals suffer from a degree of circularity as they are heavily based on Oxera's recommendations while Oxera, in turn, does not conduct any independent competition analysis, but bases its remedy assessment on ComReg's findings on the existence and nature of competition concerns.

Second, **prolonging the regulation of FTTC VUA through a price cap based on a bottom up long run incremental cost (BU-LRIC) model appears disproportionate**. BU-LRIC is the most intrusive form of regulation and is warranted only in circumstances where there are i) limited or no competitive constraints and significant concerns over excessive pricing and ii) no substantial demand or cost uncertainties and therefore a low risk of capping the prices at the wrong level. Neither of these conditions seem to apply to the Irish WLA market.

Third, **there is unequivocally no evidence to suggest that eir has sought to engage in a margin squeeze or other exclusionary conduct in the FTTH segment** where ComReg proposes to maintain a detailed (and burdensome) ex ante margin squeeze test. eir has reduced its FTTH wholesale prices, and the headroom between its wholesale and retail prices has been much larger than the current margin squeeze test permits. If anything, eir has become increasingly reliant on its wholesale customers, which does not support ComReg's and Oxera's concerns over foreclosure.

Fourth, ComReg proposes further detailed remedies to constrain eir's ability to reduce wholesale prices below pre-determined levels, or to do so without a lengthy regulatory process. Especially in areas where there is apparent infrastructure-based competition, **constraining eir's price reductions runs the risk of dampening competition between eir and its competitors**. The proposed approval process may be subjective and lengthy relative to how quickly eir may need to respond in negotiations with wholesale customers.

Report structure

Below, we elaborate these findings in greater detail. The remainder of the report is structured as follows:

- Chapter 1 summarises the main elements of ComReg's findings;
- Chapter 2 sets out our assessment of ComReg's analysis of the PIA market;
- Chapter 3 reviews ComReg's market definition and SMP analysis in the WLA market;
- Chapter 4 examines the proportionality of ComReg's proposed remedies on fibre WLA; and
- Chapter 5 concludes with our views on the risks of undue regulation.

CHAPTER 1

COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN RELATION TO PIA AND WLA

1.1 In this chapter, we briefly present the main findings of the two consultations and draft decisions published by the Commission for Communications Regulation (ComReg) in January 2023. Below, we summarise ComReg's provisional findings relating to the rationale for regulation, market definition, competition assessment and proposed remedies, on the markets for physical infrastructure access ('PIA'), and for wholesale local access ('WLA') and wholesale central access ('WCA'), respectively.

PIA: COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN A NATIONAL MARKET

1.2 In its PIA consultation and draft decision, ComReg sets out its analysis of the PIA market and presents a proposal to regulate the market to address the competition concerns that it believes could arise in the absence of regulation.

1.3 ComReg identifies three categories of potential competition concerns that could occur in the absence of regulation: i) exclusionary practices: where an operator with SMP forecloses access to its physical infrastructure, thus preventing or reducing competition in downstream markets; ii) leveraging: where a vertically-integrated operator with SMP exerts undue influence in downstream markets which distorts competition; and iii) exploitative practices: where an operator with SMP engages in engages in exploitative behaviours, such as excessive pricing.

1.4 ComReg proposes to designate a national market for PIA, including all 'telecoms-specific' physical infrastructure – ducts, poles, and associated facilities such as chambers – that is capable of housing wired telecoms networks.

1.5 The European Commission did not include PIA in its 2020 Recommendation on Relevant Markets which lists the markets that it considers susceptible to ex ante regulation. As such, ComReg is required to carry out the Three Criteria Test in accordance with Article 67(1) of the Code. The test sets out three criteria[2] that must be cumulatively satisfied for a relevant market to be deemed suitable for ex ante regulation.

[2] The three criteria are:

- The presence of high and non-transitory barriers to entry;
- A market structure which does not tend towards effective competition within the relevant time horizon; and
- The insufficiency of competition law alone to adequately address the market failure(s) concerned.

1.6 ComReg provisionally finds that all three criteria are satisfied in relation to PIA and thus that the market is deemed susceptible to ex ante regulation. Moreover, ComReg's competition assessment finds that eir is the only owner of a ubiquitous national telecoms-specific duct and pole network, which has capillarity and is not easily duplicated. ComReg acknowledges that alternative physical infrastructure providers, such as Virgin Media and ESB, are present in the market and are investing in the construction of new physical infrastructure but deems that they are not sufficiently close substitutes or capable of exercising a sufficient competitive constraint. Accordingly, ComReg provisionally finds that eir has SMP and could engage in anti-competitive behaviour.

1.7 Based on this finding, ComReg provisionally proposes a suite of regulatory remedies on eir, including access, non-discrimination, transparency, and pricing remedies, aimed at ensuring effective competition in downstream wholesale and retail telecoms markets.

1.8 Specifically, eir is required to provide access to the entirety of its pole (pole access) and duct network (duct access, sub-duct access and direct duct access). Together with access, eir is required to meet certain terms and conditions including requirements governing fairness, reasonableness, and timeliness of access. ComReg also proposes non-discrimination remedies in the provision of PIA to access seekers, thus requiring eir to provide the same systems and processes as eir provides to itself. Furthermore, ComReg proposes transparency remedies that require eir to publish a physical infrastructure rollout plan, information regarding performance and product development. Lastly, ComReg proposes price control obligations that mostly follow the existing price control for ducts and poles set out in the 2018 WLA market decision.

WLA: COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN THE 'COMMERCIAL AREA'

1.9 In its WLA and WCA consultation and draft decision, ComReg conducts a competition assessment in the wholesale local access (WLA) and the wholesale central access (WCA) broadband markets. According to ComReg, the rationale for regulating these markets, which are downstream markets to PIA, ultimately supporting the provision of retail broadband, is to "*promote long term sustainable competition by enabling efficient investment in fibre networks."* Mirroring ComReg's assessment of PIA, ComReg sets out that an operator with SMP could engage in exclusionary practices, leveraging and exploitative practices.

1.10 ComReg defines the following three relevant WLA markets in Ireland:

- a national current-generation WLA market ('CG WLA'), including local loop unbundling ('LLU'), sub-loop unbundling ('SLU'), and line share ('LS');
- an "intervention area" ('IA') next-generation WLA Market ('IA NG WLA') including WLA delivered via fibre optic cable networks, including virtual unbundled access ('VUA'), in the part of Ireland where commercial operators will not roll out networks;
- a "commercial area" next-generation ('NG') WLA market ('Commercial NG WLA') including VUA delivered over full or partial fibre optic cable networks in the part of Ireland falling outside the "intervention area".

1.11 ComReg finds in its competitive assessment that the CG WLA market and IA NG WLA market are characterised by a tendency towards effective competition over the period of the review. As such, ComReg proposes that no regulation need apply to these markets.

1.12 ComReg finds in relation to the Commercial NG WLA market, however, that there could be competition concerns. ComReg defines a set of focal products that includes WLA provided via Fibre to the Cabinet ('FTTC') and Fibre to the Home ('FTTH').[3]

1.13 ComReg considers that services provided via cable networks would be the closest substitute to these focal products[4]. However, ComReg concludes that cable does not sufficiently constrain fibre. First, ComReg assesses the direct constraints. While acknowledging that it is technically feasible to provide VUA over cable, ComReg concludes it is unlikely that such an offer will exist over the lifetime of this market review, noting that the existing cable network will soon start to be overlayed with fibre. Second, ComReg assesses the indirect constraints by investigating the retail demand response to a price increase in wholesale fibre. Although considering that cable is a substitute to fibre at the retail level, ComReg considers that retail substitutability is insufficient to impose an indirect constraint on wholesale fibre, based on evidence from a consumer survey.[5]

1.14 ComReg identifies that eir has SMP on the fibre WLA market. Accordingly, ComReg proposes to impose a set of regulatory obligations on eir in the Commercial NG WLA Market. These include access obligations, transparency obligations, non-discrimination obligations, statement of compliance obligations, price control and cost accounting obligations, and accounting separation obligations.

1.15 ComReg's provisional proposals for remedies draw on the analysis conducted by its economic adviser, Oxera Consulting LLP (Oxera).[6] Oxera's assessment, set out in two reports, focuses on i) the need for and design of price controls for NG WLA products, namely FTTC and FTTH; and, specifically, ii) the need for and design of an ex ante margin squeeze test for eir's FTTH products. Based on Oxera's analysis, ComReg provisionally proposes an array of price control regulatory remedies, see Table **1**.

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[3] The term 'FTTH' can be considered equivalent to the term Fibre to the Premises ('FTTP') for the purposes of this report, in keeping with the definition proposed by ComReg

[4] Although ComReg does not explicitly state that it considers cable as the closest substitute to fibre at the wholesale level, ComReg i) considers cable a substitute at the retail level and ii) starts with cable when assessing whether the wholesale market should be broadened to include other technologies. This is consistent with market definition practice where investigating broadening the candidate relevant market should start with considering including closest substitutes (cf. SMP Guidelines)

[5] Annex 2: Residential Market Research

[6] The reports hereinafter referred to as Oxera Part and Oxera Part 3

Table 1
Summary of ComReg's proposed price control regulatory remedies

PRODUCT	PROPOSED REMEDY
FTTH VUA rental	Pricing flexibility, ex ante margin squeeze test
FTTC VUA rental	Based on BU-LRIC model + CPI
Emulated FTTC-like service on the FTTH network	Pricing parity with FTTC VUA
Ancillary service and facilities	Cost orientation

Source: Copenhagen Economics

1.16 ComReg finds that ex ante regulation is not warranted in the WCA market, as, in the presence of WLA regulation, retail broadband competition is likely to be effective over the time of the review.

CHAPTER 2

PIA: SMP REGULATION OF EIR'S ENTIRE NETWORK MAY BE DISPROPORTIONATE

2.1 In this chapter, we assess ComReg's proposed approach to the regulation of PIA. ComReg finds that eir has SMP in a national market for physical infrastructure. We find that, while it is important to secure access to physical infrastructure, it is not clear that SMP regulation is the most proportionate approach in Ireland, and in relation to newbuild, specifically, ComReg's proposed approach is likely to distort competition.

2.2 First, we assess whether regulation may be necessary to support access to physical infrastructure. We find that **access to physical infrastructure is important to support downstream competition**, and that regulation may be necessary because physical infrastructure markets are generally characterised by high barriers to entry, meaning that competition alone may not be sufficient to ensure good outcomes.

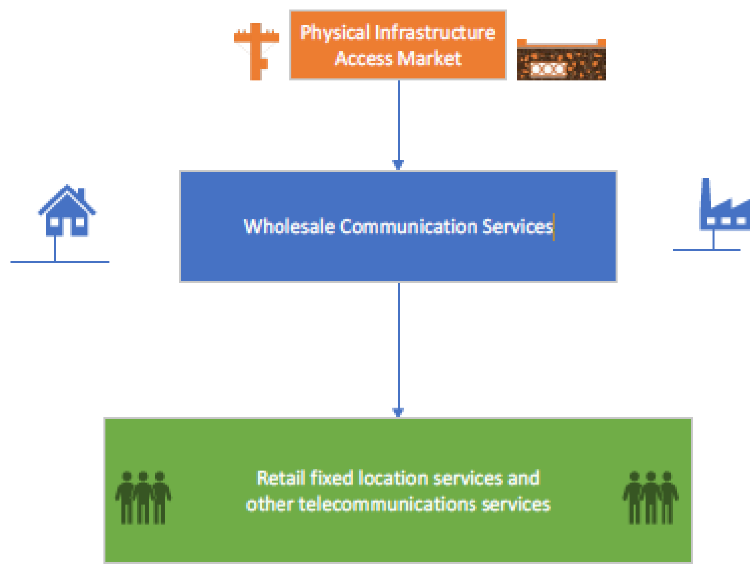
2.3 Second, we assess which type of regulation would be most suitable to ensure that access continues to be provided. We find that while SMP regulation, as proposed by ComReg, has been used in many EU countries to support PIA, **it is not clear that SMP regulation is the most proportionate approach** in Ireland. This is because there is already regulation in place which requires all physical infrastructure providers to grant access to their networks, including the Broadband Cost Reduction Directive (BCRD). Furthermore, there are other physical infrastructure providers in Ireland, and demand for access is very low, which mitigates the extent of any competition concern. ComReg should reconsider whether there is a need for additional regulation beyond the BCRD and other forms of symmetric regulation, in combination with the safeguard of competition law.

2.4 Third, we assess whether, if ComReg regardless decides to pursue with single SMP regulation, this regulation should apply to all parts of eir's physical infrastructure network. We find that **SMP regulation need not apply to eir's entire network**. ComReg's decision to define a single national market for PIA may mask some differences in competitive conditions, and it may not be necessary to regulate all of eir's physical infrastructure. Moreover, SMP regulation of newbuild, specifically, is likely to distort competition. This would be the case since eir's incentive to invest in newbuild would, as the only physical infrastructure provider subject to SMP regulation, be weakened relative to competing providers.

ACCESS TO PHYSICAL INFRASTRUCTURE IS IMPORTANT TO SUPPORT DOWNSTREAM COMPETITION

2.5 Physical infrastructure is the most upstream market in the fixed telecoms supply chain. Accordingly, the presence of any market failure at the most upstream level would affect competition in the downstream (wholesale and retail) markets, see Figure **1**.

Figure 1
Value Chain in Fixed Telecommunications Service



Source: ComReg PIA Consultation, Figure 1.

2.6 Barriers to entry are generally high on the physical infrastructure market because the deployment of physical infrastructure is associated with very high sunk costs. According to the European Commission, the costs of setting up physical infrastructure can represent up to 80 per cent of the total costs of deployment of new networks.[7] This means that there is a high risk that, in the absence of regulation, access to physical infrastructure could become a bottleneck, limiting competition in downstream markets.

2.7 Furthermore, the deployment of several networks entails unnecessary infrastructure duplication that could be inefficient: the presence of several parallel physical infrastructure network assets does not provide any economic value via increased differentiation since physical infrastructure is a largely homogenous input.

2.8 Regulation can thus be an important tool to avoid duplication, and to support access to physical infrastructure on fair and reasonable terms. The rationale for regulating access to existing physical infrastructure is summarised by the European Commission: *"[...] where civil engineering infrastructure exists and is reusable, effective access to such infrastructure may significantly facilitate the roll-out of very high capacity networks and encourage development of infrastructure-based competition to the benefit of end-users"*[8].

[7] (European Commission, 2020b), page 62
[8] (European Commission, 2020), paragraph 26

IT IS NOT CLEAR THAT SMP REGULATION IS THE MOST PROPORTIONATE APPROACH

2.9 ComReg finds in its consultation that the PIA market in Ireland satisfies the Three Criteria Test and that eir has SMP on this market. ComReg therefore proposes to impose access remedies on eir.

2.10 While high and non-transitory barriers to entry represent an important argument for regulatory intervention in the PIA market, SMP regulation specifically is warranted only if the suggested SMP remedies are proportionate to the competition concern and incremental to any existing regulation which addresses the same concern.

2.11 It is not clear that SMP regulation is the most proportionate approach in Ireland case since i) there is already regulation in place which secures access to physical infrastructure, ii) there are other physical infrastructure networks in Ireland, and iii) demand for access to physical infrastructure is very low.

There is already regulation in place which secures access to physical infrastructure

2.12 Although most NRAs have, according to BEREC[9], imposed SMP regulation to physical infrastructure, the European Commission did not include PIA in its most recent recommendation specifying the list of telecoms markets that it considers susceptible to ex ante regulation. This was in part because there are: *"significant differences in network topologies, availability of ubiquitous ducts and level of demand for access to ducts and poles across the Union"*.[10]

2.13 However, it was in part also because of existing regulatory safeguards addressing the same concern, such as the European Electronic Communications Code (the Code). Article 72 of the Code allows NRAs to impose access to civil engineering as a stand-alone remedy on any relevant wholesale market. Moreover, the Code, stresses the importance of considering the impositions of obligations set out in Article 72 as a proportionate means to promote competition in PIA market: *"Such obligation to provide access to civil engineering [...]* ***should be considered by national regulatory authorities before other access obligations*** *are imposed downstream, if proportionate and sufficient to promote competition in the benefit of the end-users."*[11]

2.14 Apart from via the Code, access to physical infrastructure, is also, in parallel with the SMP framework and independent of market power, supported via the BCRD. The European Commission clarifies the role and scope of the Directive as follows: *"According to the Directive, network operators (electronic communication, energy utilities, etc.) are to give access to their physical infrastructure (e.g. ducts, manholes, cabinets, poles) to electronic communication network operators intending to roll out high-speed broadband networks under fair and reasonable terms and conditions, including price."*[12]

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[9] (BEREC, 2019a), page 7
[10] (European Commission, 2020), paragraph 27
[11] (European Commission, 2020), paragraph 28 (our emphasis in bold)
[12] (European Commission, 2023)

2.15 Any regulator considering imposing additional regulation should therefore consider whether existing legislation is already sufficient to address any concerns. In the context of PIA specifically, as explained by BEREC: "*[…] the NRA will have to ascertain to what extent the existence of general legislation (namely the BCRD), as well as instruments other than SMP regulation and that might be in place (such as symmetric regulation regulating access to physical infrastructure),* ***may be sufficient on their own to prevent distortions of competition*** *at the retail level.*"[13] BEREC also explicitly notes that the Code could provide a sufficient safeguard: *"NRAs shall also examine whether the imposition of obligations on civil engineering alone in accordance with Article 72 would be a proportionate means to promote competition and the interests of end users."*[14]

2.16 It is not only in relation to physical infrastructure that the presence of alternative regulatory frameworks has reduced the need for SMP regulation. For example, both i) the wholesale market for international roaming and ii) the markets for call termination for fixed and mobile have been removed from the list of markets recommended for SMP regulation, following the introduction of regulation specifically aimed at addressing international roaming charges, and the Eurorate regulation, respectively. [15]

2.17 Indeed, while most NRAs have pursued with SMP regulation in relation to PIA, there are also eight NRAs[16] in Europe that chose not to impose SMP remedies to any physical infrastructure "*[either] because the [downstream] relevant market is deregulated, or because other remedies/legal instruments are deemed to be sufficient or more appropriate.*"[17] In Denmark, for example, duct access obligations on the SMP operator were withdrawn as the obligations from the BCRD were considered sufficient. Similarly, the Czech NRA did not impose access to physical infrastructure due to replication of remedies with BCRD obligations.[18] Similarly, the Luxembourgish NRA withdrew regulated access to ducts due to an observed lack of demand and because there were alternative ways of ensuring access via legislation.[19]

2.18 ComReg identifies that the BCRD has, in practice, been seldom used in Ireland so far. However, this does not provide evidence that the BCRD could not provide a sufficient safeguard against any anti-competitive conduct going forward. It could be that the BCRD has not until now had to play any major role in Ireland simply because i) commercial agreements have been possible and/or because SMP regulation has been in place and/or, ii) because demand for physical infrastructure in Ireland is in any case very low (see later section).

2.19 Apart from the BCRD and any other symmetric regulation that can be used to secure access, competition law also provides an existing safeguard against anti-competitive conduct by a dominant operator. In its analysis, as part of the Three Criteria Test, ComReg reaches the conclusion that competition law would be insufficient to address competition concerns on the PIA market.

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13 (BEREC, 2019b), page 24 (our emphasis in bold)
14 (BEREC, 2019b), page 6
15 (WIK Consult, 2018)
16 Namely, Austria, Czech Republic, Denmark, Finland, Croatia, Malta, the Netherlands and Romania.
17 (BEREC, 2019b), page 2
18 (BEREC, 2019a), page 13
19 https://ec.europa.eu/newsroom/dae/redirection/document/72442, footnote 198

2.20 However, it is unclear which, if any, substantial analysis ComReg develops to support this conclusion (e.g. because ComReg specifically considers market failures in relation to PIA in Ireland "extensive" and/or because "frequent and/or timely intervention" is indispensable).[20] Competition law could be considered a sufficient safeguard specifically in relation to PIA in Ireland because demand for access is very limited and because there is no evidence that eir would not continue to provide access on reasonable terms in the absence of regulation.

There are other physical infrastructure networks in Ireland

2.21 ComReg argues that alternative physical infrastructure present in Ireland cannot be considered close substitutes to eir's physical infrastructure network, which leads ComReg to the conclusion that eir holds SMP.

2.22 Apart from eir's network, there are at least two other physical infrastructure networks in Ireland which currently support the provision of wholesale telecoms services, competing with eir in downstream markets: Virgin Media and ESB (used by SIRO).

2.23 In relation to Virgin Media, ComReg argues that the Virgin Media network cannot be considered a relevant competitor on the physical infrastructure market as it lacks in capillarity and is non-contiguous in nature. However, it is not clear whether capillarity or contiguity would indeed be key features that should be crucial in relation to competition for on a physical infrastructure market. For instance, BEREC's guidance on how to treat cable networks in relation to PIA assessments does not mention capillarity or contiguity as critical features.[21]

2.24 In relation to ESB, ComReg argues that the ESB network cannot be considered a relevant competitor on the PIA market due to capacity limitations *"arising from the fact that ESB PI was not built to house anything other than electrical equipment"*.[22] However, this is inconsistent with the fact that telecoms operator SIRO has already made extensive use of ESB's physical infrastructure to reach more than 470k premises[23], and has announced its commitment to reach 770k[24]. In addition to this, SIRO claims that using ESB's network is an advantage to deploy new fibre network and discussed its benefits to homebuilders. Cian O'Mahony, SIRO Head of Operations and New Developments, recently declared that SIRO's "*unique proposition is that it uses the existing infrastructure*", concluding "*the key element to remember is that we sit inside the ESB assets so you don't need to dig up anything to put us in*".[25]

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[20] See *"Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable."* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H2245&rid=1

[21] *"In countries where cable operators are present, another issue that may be raised in an SMP assessment is the extent to which the physical infrastructure that was used by the cable operator for the purpose of deploying its own network may also be used for the purpose of deploying other types of networks (such as copper/fibre networks), and thus may effectively constrain, to some degree, the market power of the incumbent operator in the physical infrastructure market (or be argued to be in a position of joint dominance). In this regard, features such as coverage may become relevant for the purpose of assessing the competitive pressure that the physical infrastructure of the cable operator may exert."* (BEREC, 2019b), page 20

[22] ComReg PIA Consultation, paragraph 3.84

[23] According to the SIRO website, available at https://siro.ie/

[24] (O'Mahony, What's unique about Siro's offering to the construction industry?, 2023)

[25] (O'Mahony, What's unique about Siro's offering to the construction industry?, 2023)

2.25 Moreover, in a Presentation on the National Broadband Plan, ESB claims that its extensive network represents a "*business opportunity to use electricity network to bring fibre to homes and premises*".[26] ComReg also acknowledges that ESB has *"a nationally ubiquitous electrical network with capillarity"*.[27]

2.26 Even if capacity constraints mean that ESB's network cannot house any telecoms provider other than SIRO in the commercial area, this would not imply that the ESB network could not constitute a viable alternative to eir's physical infrastructure in the intervention area, where SIRO will not be installing any telecoms infrastructure. This is a particularly important distinction since NBI is by far eir's biggest access seeker in relation to physical infrastructure (see later section).

2.27 ComReg's stance on the exclusion of the ESB network also is not aligned with guidance provided in the BCRD regarding which types of networks can support telecoms infrastructure. It is explained that the BCRD *"applies not only to public communications network providers but to any owner of […] extensive and ubiquitous physical infrastructures suitable to host electronic communications network elements, **such as physical networks for the provision of electricity**, gas, water and sewage and drainage systems, heating and transport services."*[28] As elaborated by BEREC: *"The current BCRD (Art. 3(2)) foresees that **network operators of 'all' sectors** (according Art. 2(1)) have the obligation to meet all reasonable requests of ECN operators for access to its physical infrastructure"*.[29]

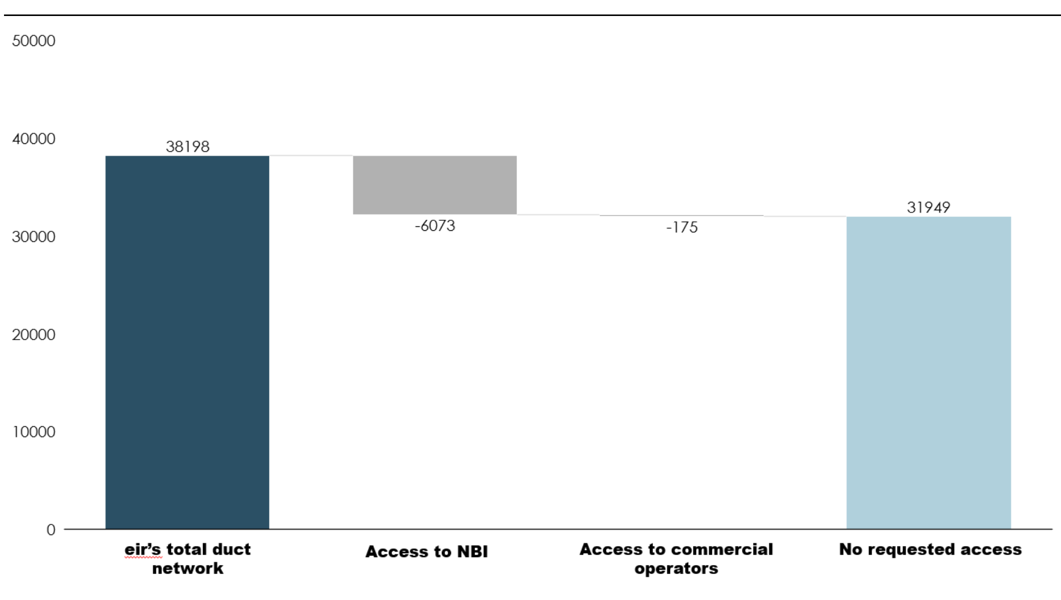
Demand for access to physical infrastructure is very low

2.28 Demand for access to physical infrastructure in Ireland is very low, which mitigates the extent of any competition concern.

2.29 According to eir's data, access to its duct network has been requested (and granted) for just 16 per cent of the total network, the vast majority of which is consumed by non-commercial operator NBI.[30] From May 2019 to February 2023, access was requested by third-party operators to 6,248km of ducts out of eir's total network of 38,000km. Of those 6,248km, 97 per cent was provided to the NBI, with commercial operators requesting access to less than 200km, cumulatively, see Figure **2**.

[26] (ESB, 2019), page 2
[27] ComReg PIA Consultation, paragraph 4.51
[28] (European Parliament and Council of the EU, 2014), paragraph 13 (our emphasis in bold)
[29] (BEREC, 2021), page 9 (our emphasis in bold)
[30] We refer here to standalone PIA, which is the product that ComReg proposes to regulate, rather than PIA as part of some broader wholesale input, e.g. WLA.

Figure 2
Requested access to eir's duct network
Kilometres of ducts



Source: eir data

2.30 ComReg summarises: *"[…] the volume of traded PI in the wholesale merchant market is trivial in comparison to that of self-supplied PI […]"* and confirms: "*The only SP which currently makes use of (and is expected to make use of) Eircom PIA at any level of scale is NBI."*[31]

2.31 The fact that there is only trivial demand for PIA suggests that eir has limited ability to influence downstream competition via anti-competitive behaviours in relation to PIA. This mitigates the extent of any competition concern beyond securing NBI's continued access to physical infrastructure, which would mostly or exclusively be in the intervention area (i.e., a targeted remedy could be sufficient to address competition concerns).

2.32 Furthermore, specifically in relation to NBI, it is not clear why there would be a material competition concern: eir should have no incentive not to provide access to NBI because NBI will only be rolling out its network in the intervention area and hence is not a direct retail competitor.

2.33 ComReg itself acknowledges that PIA regulation will not in practice have any significant impact on competition: "*Based on the evidence available, ComReg is of the view that, within the lifetime of this five-year market review period, other than for NBI,* ***regulation of the PIA market and its use by other SPs is unlikely to have a significant impact on competition*** *within the WLA and WCA (and related) markets."*[32]

[31] ComReg WLA Consultation, paragraph 6.15
[32] ComReg WLA Consultation, paragraph 6.15 (our emphasis in bold)

SMP REGULATION NEED NOT APPLY TO EIR'S ENTIRE NETWORK

2.34 Even if eir is deemed to hold SMP, this need not lead to the conclusion that eir should be subject to SMP regulation across all of its physical infrastructure. It could be sufficient to apply SMP regulation to those parts of the network that are the most difficult to replicate, e.g. ducts in the last mile, and/or those parts where there is a material competition concern, whilst avoiding SMP regulation in other parts of the network.

2.35 SMP regulation of newbuild, specifically, would distort competition because it would impact the different providers in an asymmetric manner. eir's incentives to invest in new physical infrastructure, would, as the only operator subject to SMP regulation, be reduced relative to other physical infrastructure providers.

A national market for PIA may mask differences in competitive conditions

2.36 Best practice in relation to market definition entails departing from the narrowest potential markets, focusing on the focal products with the greatest competition concern. In the competitive assessment of the PIA market, this approach would mean departing from narrow product and/or geographic markets, e.g. focusing only sub-ducts, or only on some part of the country. As explained by BEREC, the market for PIA need not, along the geographic dimension for instance, be national: *"[…] if there is no credible alternative presence to that of the incumbent operator in the whole national territory, it may be concluded that the market is national. […] The conclusion may, however, be different in the event that the NRA identifies some geographic areas where alternative operators supplying telecommunications physical infrastructure are capable of providing wholesale access services that are fully equivalent to the type of access provided by the incumbent operator."*[33]

2.37 However, ComReg simply departs from a national market encompassing all types of PIA, and based on this starting point reaches the conclusion that there is no network quite like eir's. Taking this point of departure may mask differences in competitive conditions. For example, by taking the approach of defining a single national market for PIA, ComReg overlooks potential differences in competitive conditions between the intervention area and the commercial area. As anticipated above, ESB's network could potentially constitute a viable alternative to eir's physical infrastructure in at least the intervention area, where SIRO will not roll out its network, and where the ESB network could thus have more capacity. In any case, since NBI is the only operator that relies on PIA, it could be sufficient to apply a remedy which addresses this specific concern, which would be limited to the intervention area.

33 (BEREC, 2019b), page 19

2.38 Regardless of the definition of the relevant market, ComReg does not appear to have thoroughly considered the option of imposing differentiated remedies that would apply to less than the entirety of eir's physical infrastructure network nor has it considered to carry out its competition assessment distinguishing between different parts of the network (e.g., backhaul network[34]).

Asymmetric regulation of newbuild would distort competition

2.39 In its assessment, ComReg acknowledges that other operators have entered and are investing in the physical infrastructure market, but states that, in its view, the amount of newbuild will not be significant: "*PI entry and expansion plans [...] do not indicate that there will be any significant investment in the construction of new PI to support fixed telecoms in the medium term.*"[35]

2.40 This statement does not fully reflect the results of ComReg's own survey, with five out of eight respondents saying that there will be some newbuild, and the remaining three out of eight saying that the amount of newbuild will be 'significant'.[36]

2.41 As further evidence that there could be a meaningful amount of newbuild during the upcoming regulatory period, we note that the total size of eir's duct and poles networks have increased by 1.7 [37] and 1.1 per cent, respectively, from 2021 to 2022, suggesting a potential expansion of 8.5 per cent for ducts and 5.5 per cent for poles, over the five-year regulatory period, if growth continues at the same rate.

2.42 SMP regulation of newbuild, specifically, would distort competition by undermining eir's incentive to invest in newbuild relative to competitors, see **Box** 1.

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34 In France, for instance, the SMP operator Orange must provide non-discriminatory access to its infrastructure, "*except if the infrastructure is used to deploy backhaul networks, where it is sufficient to ensure that the wholesale conditions are comparable to those provided by Orange for its own operations*", (Cullen International, 2020), page 8

35 ComReg PIA Consultation, paragraph 4.11

36 Copenhagen Economics based on ComReg PIA Consultation, paragraph A3.90 – A3.92

37 Copenhagen Economics based on eir's data

Box 1 Example of Physical Infrastructure Access in newbuild areas

For the sake of illustration, consider a situation in which a developer is building a new housing estate and laying ducts for telecoms (say, fibre access) networks. The developer would typically run a competitive tender and choose the operator (or other infrastructure provider) with the best offer to build and maintain the physical infrastructure underlying the fibre network. Consider a situation where there are two bidders: eir and an alternative operator (e.g., ESB/SIRO). Expected returns would be:

	EIR	ALTERNATIVE OPERATORS
ROI via self-supply	Yes	Yes
ROI via the provision of access	Yes, at regulated SMP rate	Yes, at non-regulated rate
Total ROI	**Constrained by SMP regulation**	**Unconstrained by SMP regulation**

The expected returns from investing in physical infrastructure would thus differ depending on whether the owner is subject to SMP regulation. eir's returns (post physical infrastructure deployment) would be capped by regulation. This means that the net present value of eir's investment would be constrained, while the competitor would not face a similar constraint and could generate higher returns over the lifetime of the physical infrastructure investment. This would, in principle, place eir's competitor in an advantageous position: in anticipation of higher returns after network deployment, it would not need to bid as aggressively to win.

The presence of asymmetric regulation of newbuild would thus:
- distort competition for new ducts,
- reduce the likelihood that fair and reasonable access to newbuild is guaranteed since it would be more likely that the non-SMP operator would win.

2.43 Symmetric regulation, such as via the BCRD (i.e., regulation that applies generally to a whole category of operators, regardless of market power), of newbuild areas would, contrary to SMP regulation, ensure that all operators have access to any physical infrastructure under fair and reasonable terms, hence promoting investment and preventing distortion of competition at the retail level. This would alleviate any competition concerns in newbuild areas (including those where physical infrastructure is not eir's) and ensure a level playing field in the competition for deploying physical infrastructure and fibre to newbuild areas, thereby addressing the issue set out in Box 1.

2.44 WIK Consult, a specialised telecoms consultancy, stresses the potential benefits of symmetric regulation, especially on in-building wiring, to encourage and speed up the deployment of high-capacity networks. In their report on "best practice for passive infrastructure access" they write that: "*Experience suggests symmetric in-building wiring provisions coupled with duct access from the SMP operator, where this exists, is likely to be most relevant and useful in the deployment of VHC broadband.*"[38]

[38] (WIK Consult, 2017), page 6

2.45 Experience from other NRAs also shows how symmetric regulation has been successful in promoting infrastructure competition and fast deployment of next generation access (NGA) deployment – mostly in relation to in-building wiring. France, Spain and Portugal all have legislation that predates the 2014 Broadband Cost Reduction Directive[39] and opted for symmetric regulation on in-building wiring provisions, see **Box** 2.

[39] (European Parliament and Council of the EU, 2014)

Box 2 Evidence of symmetric regulation of physical infrastructure from Portugal, France and Spain

PORTUGAL

Portugal applies the strictest symmetric access regulation to physical infrastructure. All information concerning ducts (e.g., who is to be addressed in case of a request for access to ducts and poles, the timeframe for access and usage rights, procedures and renewal conditions contractual terms, prices, technical instructions, penalties, and other relevant aspects for the provision of access) are integrated into a central information system (SIC), launched by Portuguese NRA ANACOM in January 2016.

The symmetric access regulation has been beneficial for high-speed broadband roll-out, as described by ITU:

"*The symmetric access regulation and detailed technical standards for Portuguese buildings had a significant impact on the Portuguese market. On the one hand, due to transparent pricing and standardised in-house equipment, investment was encouraged, and uncertainty reduced. The risk posed by the investor's lack of knowledge on whether the inhouse wiring will be capable of transmitting the desired QoS parameters, was taken out of the equation. Furthermore, it encouraged providers to expand their in-house-cooperation to outside plant deployment as well. This resulted in reciprocal access deals (e.g., between Vodafone and Portugal Telecom) as well as substantial co-investment, making the country one of the leading countries in Europe regarding its FTTB/FTTH connectivity.*"[40]

FRANCE

France adopts a complementary approach, employing asymmetric and symmetric tools to regulate access to physical infrastructure. Arcep's regulation for NGA network is based on two complementary pillars:

- Asymmetric regulation on existing infrastructure (copper LL + ducts and poles + associated facilities).
- Symmetric regulation of fibre termination:
  - Access and co-investment obligation in the last "drop"
  - Aims to preserve competition dynamics for new networks, expected to be deployed by a large number of private or public initiative operators (Art. 12 FD & 5 AD) (EECC art.61(3) and 61(1))[41]

SPAIN

Spain was the first country to impose symmetric regulation on in-building wiring in 2009. The General Law on Telecommunications establishes that "*newly created urban projects must provide for the installation of civil works infrastructure to facilitate the deployment of public electronic communications networks, including passive network elements and equipment, which must be made available to operators on equal, transparent and non-discriminatory basis.*"[42]
In practice: "*the first operator deploying the fibre local access segment within a building (i.e. the segment of an NGA network that connects end-user premises to the first distribution point) must make it available to third parties at reasonable prices.*"[43]

2.46 Apart from the other benefits mentioned, symmetric regulation of newbuild could also stimulate co-operation across providers and promote co-investment, which could in turn accelerate network roll-out. In this regard, the experience of Portugal is exemplary: the use of symmetric access regulation has enhanced transparency and thus in turn promoted co-investment and reciprocal access deals, making the country a leader in FTTH connectivity (see Box 2).

[40] (ITU, 2020), page 19
[41] (Arcep, 2019), page 12
[42] (ETNO, 2021), page 21
[43] (BEREC, 2019a), page 5

CHAPTER 3

WLA: EVIDENCE IS NOT CONSISTENT WITH EIR HAVING SMP IN THE ENTIRE COMMERCIAL AREA

3.1 In this chapter, we assess ComReg's proposed approach to the regulation of fibre wholesale local access (WLA). ComReg finds that eir has SMP in the market for fibre WLA in a part of Ireland defined as the 'commercial area', covering approximately 80 per cent of premises in the country. We have reviewed ComReg's analysis and the supporting evidence. We find that the evidence is not consistent with the finding that eir has SMP in the entire commercial area.

3.2 First, we explore the evidence in relation to retail market shares and wholesale pricing. We find that **market outcomes are not consistent with eir having SMP in the entire commercial area**. eir's own retail market share is relatively modest and declining, having gone from 33 per cent in 2018 to 27 per cent in 2022, and the majority of high-speed retail volumes derive from wholesale networks other than eir's. eir should have an incentive to continue providing access on commercial terms as eir is reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. eir has also reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market, which is not consistent with an SMP operator acting independently of competition.

3.3 Second, we scrutinise the analysis that ComReg develops to conclude that wholesale fibre does not compete with other technologies. ComReg's SSNIP[44] test to assess indirect constraints has several important flaws. We find that, upon further inspection, the survey **evidence suggests that the pricing of fibre WLA is constrained**. A correct application of the SSNIP test, using ComReg's own evidence, shows that the pricing of fibre WLA is in fact indirectly constrained. This means that the relevant market should be broadened and could reasonably include cable, as has been the case in several European countries. Regardless of how the relevant market is defined, the results of the SSNIP test show that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is not consistent with ComReg's conclusion that eir holds SMP in the entire commercial area.

3.4 Third, we assess the extent of network overlap within the commercial area. We find that **eir's network has extensive overlap with rival networks within the commercial area**. Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming that rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap is due to increase to 84 per cent by 2026. Recent case precedent from the European Commission suggests that markets with such high levels of parallel coverage are unlikely to be characterised by the presence of an SMP operator. At the very least, the evidence regarding overlap, along with other evidence showing differences in the developments of eir's wholesale volumes in different areas, suggests that competitive conditions are not homogenous within the commercial area.

[44] Small but significant and non-transitory increase in price

3.5 Fourth, we assess the extent of any residual competition concerns in those parts of the commercial area where eir does not overlap with rival networks. We find that **eir may not have the ability and incentive to exercise market power even where there is no overlap**. eir does not currently price differentiate its FTTH pricing between different geographic areas. In fact, competitive pressure flows the other way: when eir has reduced its wholesale prices in response to competitive pressure in areas with overlap, this has resulted in lower wholesale pricing nationwide, also in those areas where eir does not directly overlap with a rival network. [text redacted]

MARKET OUTCOMES ARE NOT CONSISTENT WITH EIR HAVING SMP IN THE ENTIRE COMMERICIAL AREA

3.6 In the following, we assess whether the evidence of market outcomes is consistent with the notion that eir holds SMP at the wholesale level and, therefore, supports the need for continued regulation. We explore market outcomes in relation to retail market shares, eir's wholesale volumes, and eir's wholesale pricing.

3.7 We find that market outcomes are not consistent with eir having SMP across the entire commercial area. First, eir's own retail market share is relatively modest and declining, and the majority of high-speed retail volumes derive from networks other than eir's. Second, we expect eir to have an incentive to continue providing access on commercial terms, as eir is increasingly reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. Third, eir has reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market.

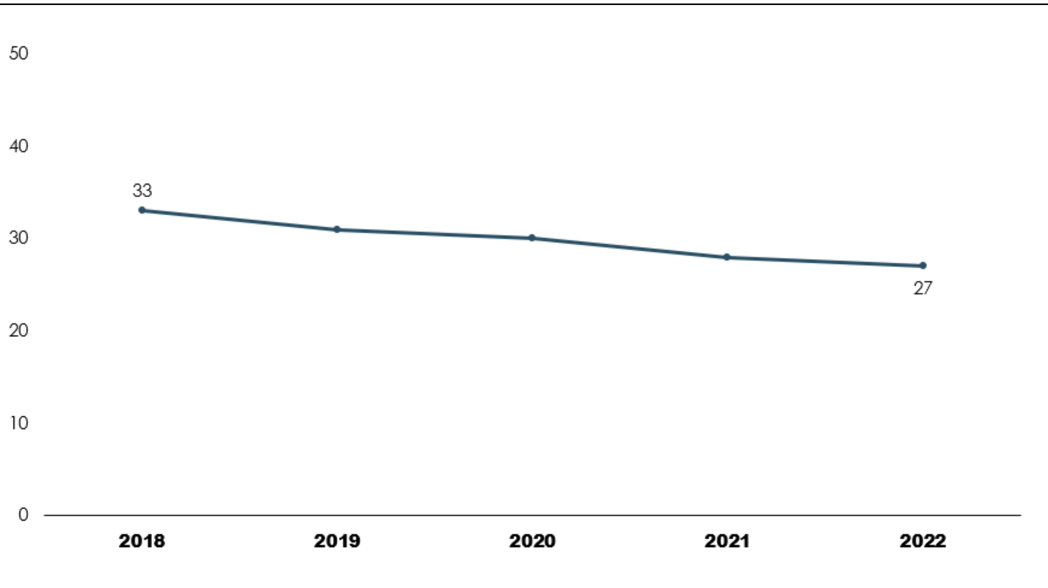
3.8 We explain these findings in greater detail below.

eir's retail market share is declining

3.9 Evidence of market outcomes on the retail market can help inform an assessment of SMP in the WLA market. eir's market power on the wholesale level would be limited if a substantial share of retail volumes derives from networks other than eir's. Vertically integrated providers that self-supply network inputs, such as Virgin Media, can also exert an indirect constraint on eir's ability to increase prices (we return to an assessment of the strength of these constraints below). Furthermore, rival operators may provide retail services over the networks of other wholesale suppliers, notably SIRO's FTTH network. Either way, retail market shares that are independent of eir's network are indicative of competitive constraints on eir's wholesale pricing.

3.10 eir's fixed retail broadband market share is relatively modest and has been declining in recent years. ComReg's data shows that eir's market share has declined from 33 per cent in 2018 to 27 per cent in 2022, see **Figure 3**.

Figure 3
eir's fixed retail broadband market share has been declining
Per cent

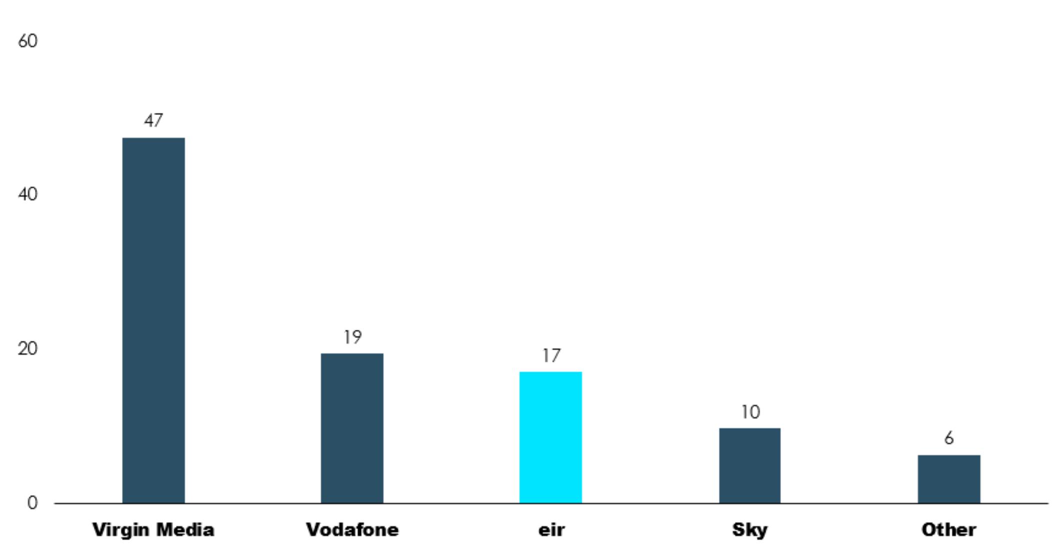


Note: The fixed retail broadband market includes broadband provided over copper (DSL), FTTC, FTTH, DOCSIS 3.1 cable, FWA and Satellite
Source: Copenhagen Economics based on Figure 6 in ComReg WLA Consultation.

3.11 eir's retail market share is even smaller when considering only the high-speed segment of the market. When considering retail market shares on a segment for fixed[45] internet faster than 100 Mbps, we find that Virgin Media is the largest retail provider in this segment, followed by Vodafone. eir is only the third largest provider in this segment, see **Figure 4**.

[45] The inclusion of mobile broadband would further erode eir's market share

Figure 4
eir is only the third largest player in the high-speed retail broadband market
Share of total number of active broadband subscriber lines, in per cent



Note: We use data from ComReg's Quarterly Key Data Report for Q2 2022 to arrive at figures for a high-speed retail broadband market. We use data from Table 2 and 3 to determine how many of Virgin Media's cable-based subscriber lines deliver speeds of at least 100Mbps. We assume that 100 per cent of the FTTH network delivers speeds of at least 100 Mbps and assume that all FTTH providers are part of this high-speed retail broadband market. We assume that 97.5 per cent of Virgin Media's cable network is capable of delivering high-speed broadband, based on Virgin Media's own data.

Source: Copenhagen Economics based on ComReg's Quarterly Key Data Report for Q2 2022, eir data and the Virgin Media website.

3.12 Analogous to the above, eir's market share on the FTTH segment has also been declining in recent years, as explained by ComReg: *"When retail broadband market shares are assigned based on FTTP subscriptions only (which ComReg started recording at a granular level in Q1 2019), the most notable change is the decline in Eircom's retail market share (from 47 per cent in Q1 2019 to 31 per cent in Q2 2022 – although the FTTP base at the start was small) [...]"*[46]

3.13 When combining the volumes of Virgin Media with volumes supported by SIRO's network (including via Vodafone), it is apparent that the majority of volumes on the high-speed retail market derive from networks other than eir's.

3.14 Overall, evidence of the state and development of market shares is not consistent with the notion that eir would have exploited its alleged SMP to the detriment of rival operators. eir's diminished role is most pronounced in the important and growing high-speed segment, where competitors significantly rely on own or alternative networks other than eir's.

[46] ComReg WLA Consultation, paragraph 5.231

Growing reliance on wholesale customers limits eir's incentives to foreclose competitors

3.15 Evidence of the structure of retail market can inform an assessment of eir's incentive to continue providing access on a commercial basis should ComReg scale back some or all of the SMP remedies. Incumbent operators can have sound reasons to provide access on commercial terms insofar as this enables them to expand and 'fill the network' with customers their retail arm otherwise would not attract. **The incentive to attract and retain wholesale customers is most pronounced in the presence of alternative infrastructures**. This is because any attempt to foreclose could result in diversion of access seekers to other wholesale providers.

3.16 More specifically, raising wholesale prices would be profitable for eir only if eir's retail arm would be able to capture a sufficiently large share of end users to offset the decrease in wholesale profits. This would be unlikely if access seekers could, along with end users, migrate to an alternative infrastructure provider such as SIRO or Virgin Media.[47] The more eir's revenues are derived from wholesale customers active in the retail market, the greater is eir's incentive to retain these customers on its network.[48] As articulated by Oxera in its report for Liberty Global:

"*Incumbent operators currently providing regulated access have built up a profitable wholesale business over the years, and already incurred fixed costs in setting up various wholesale access products and supporting services such as wholesale billing and support functions. There are many circumstances in which these operators will have strong incentives to continue providing wholesale access on a commercial basis in order to protect their existing wholesale access revenue stream and investments. Stopping provision of these wholesale access services runs the risk of losing a source of profit to a rival infrastructure operator*."[49]

3.17 There is no evidence to indicate that eir is attempting, or has attempted, to foreclose its downstream competitors. On the contrary, the evidence indicates that eir has engaged its access seekers and is increasingly reliant on their demand. [text redacted], see Figure **5**.

Figure 5
[text redacted]
Number of premises passed and connections sold, in thousands

[figure redacted]

Note: We map eir's wholesale sales data for December 2022 to the latest figure for eir's FTTH footprint.
Source: Copenhagen Economics based on eir data and eir's website.

[47] Currently such diversion would take place on the retail level; going forward also on the wholesale level if and when Virgin Media offers wholesale access

[48] Economic research by Ordover and Schaffer (2007) explores the conditions under which the provision of access makes economic sense.

[49] Oxera (2017), p. 36.

3.18 This shows that **eir is to a significant extent reliant on access seekers' demand**. ComReg's adviser Oxera also notes that eir is reliant on its access seekers: "*[...] a significant share of Eircom's wholesale FTTH lines are sold to access seekers (such that Eircom is not focused solely on self-supply).*"[50] Oxera also acknowledges that eir has made no attempt to foreclose access seekers at present.[51]

3.19 ComReg's evidence also shows that eir's position in the wholesale market has been significantly weakened since SIRO entered the market, with SIRO accruing a market share between 30 per cent and 40 per cent[52] in the period between Q1 2019 and Q2 2022, primarily at the expense of eir.[53]

3.20 **SIRO is thus exerting an increasingly strong direct constraint on eir, incentivising eir to retain (rather than foreclose) access seekers**. [text redacted][54] of its FTTH connections from eir. Vodafone is also a part-owner of SIRO[55], eir's largest fibre-based wholesale competitor. eir's incentives to increase its wholesale prices would be limited if its largest access seeker Vodafone could migrate volumes to another wholesale network (SIRO and/or Virgin Media, which is already contracted to provide access to Vodafone).[56]

3.21 Similarly, eir's second largest access seeker, Sky, relies on eir's network for only [text redacted] of its FTTH retail volumes.[57] Virgin Media, eir's biggest competitor in the retail market, uses its own cable and FTTH networks.

3.22 **eir is likely to face even more direct wholesale competition in the FTTH market over the upcoming regulatory period**. Both SIRO and Virgin Media are currently in the process of rolling out FTTH networks. SIRO provides WLA to 20 different access seekers, including Vodafone and Sky. Virgin Media is already contracted to provide wholesale access to Vodafone, and will likely seek to secure more wholesale customers going forward.

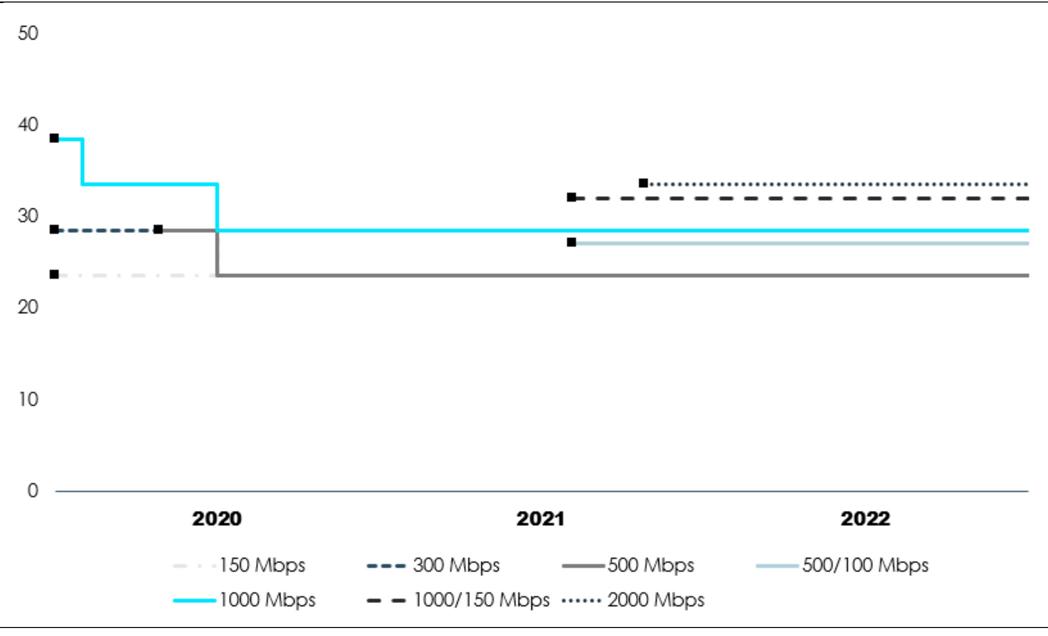
3.23 Overall, given eir's diminished retail market shares, the limited uptake on its FTTH network and the likelihood of increasing infrastructure-based competition, eir likely has a commercial incentive to retain its wholesale customers rather than foreclose them.

eir has reduced its wholesale prices in recent years

3.24 eir has not increased the price of any its wholesale FTTH products over the last three years.[58] On the contrary, eir has reduced the price of several of its FTTH wholesale products since 2020, see **Figure 6**.

[50] Oxera Part 3, paragraph 5.17
[51] Oxera Part 3, paragraph 5.17
[52] ComReg WLA Consultation, footnote 432
[53] ComReg WLA Consultation, paragraph 5.235; ComReg WLA Consultation, footnotes 430 and 431
[54] [text redacted]
[55] ComReg WLA Consultation, paragraph 3.31
[56] (Liberty Global, 2022)
[57] [text redacted]
[58] Except for negligible price increases of less than 1 per cent (well below inflation) on a few of the bitstream (standalone) services in July 2021. eir's FTTH prices have therefore declined in real terms

Figure 6
FTTH VUA Rental Charges (Standalone)
In € per month



Note: Coinciding lines indicate that different products were priced at the same level.
Source: Copenhagen Economics based on eir data

3.25 During 2020, the price of the 1000 Mbps VUA (standalone) service was substantially reduced from €38.5 to €28.5 per month. The prices of both the 300 and 500 Mbps VUA (standalone) products were also reduced in 2020. Similarly, the connection/migration charge has decreased from €170 in 2020 to zero in 2022.[59]

3.26 **According to eir, these price reductions are responses to competitive pressure**. The timing of the price reductions also coincides with the rollout of SIRO's rival FTTH network and with the decline that eir experienced in its wholesale market share from 2019 to 2022.[60] eir's wholesale pricing does not seem consistent with that of an SMP operator, which can act independently of its rivals and customers.

[59] We understand that eir's connection/migration charge is due to increase again from April 2023 – but also that eir is reviewing its pricing and could consider lowering it once more

[60] ComReg WLA Consultation, paragraph 5.235

EVIDENCE SHOWS THAT THE PRICING OF FIBRE WLA IS CONSTRAINED

3.27 In the following, we scrutinise the SSNIP test that ComReg uses to define the relevant market, which ultimately supports ComReg's conclusion that eir has SMP in the commercial area. We find that ComReg's SSNIP test has several important flaws and that a corrected SSNIP test leads to the conclusion that the relevant product market should be broader. The relevant market could reasonably have been expanded to include cable, as has been the case in many other European markets. Regardless, the results indicate that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is inconsistent with ComReg's finding of SMP in the entire commercial area.

ComReg's SSNIP test has several important flaws

ComReg answers the wrong question

3.28 ComReg correctly uses a SSNIP test to determine the extent of the relevant market, seeking to account in particular for indirect constraints. The SSNIP is a key instrument in market definition as it provides information on demand-side substitutability over the focal products/services and helps to determine whether competitive pressure would be sufficient to protect against anti-competitive conduct.

3.29 The key question that the SSNIP test attempts to answer is whether a hypothetical monopolist would be able to profitably apply a SSNIP on the focal product. As explained by the European Commission in the guidelines on market analysis and the assessment of significant market power (SMP Guidelines):[61]

- "*Under this test* [SSNIP test], *an NRA should ask what would happen if there was a small but significant and non-transitory increase in the price of a given product or service* (...)*."*[62]

- *"[...] the key issue is to determine whether the sales lost by the operators would be sufficient to offset their increased profits, which would otherwise be made following the price increase"*[63]

3.30 The answer to this question is critical for the outcome of the market definition. If a small but significant non-transitory increase in prices (by 5-10 per cent) is profitable, the focal products/services constitute a single product market (a market worth monopolising). If the price increase is not profitable, the market definition exercise should progress by broadening the candidate market by adding the next closest substitute, see **Box** 3.

[61] (European Commission, 2018)
[62] (European Commission, 2018), paragraph 29
[63] (European Commission, 2018), paragraph 30

Box 3 The SSNIP test and critical loss analysis in assessing indirect constraints

Defining a wholesale market involves assessing indirect constraints driven by substitutability on the downstream (retail) markets. The need to consider indirect constraints when defining a wholesale market is provided by the SMP Guidelines:

> "*When analysing the market boundaries and market power within (a) corresponding relevant wholesale market(s) to determine whether it is/they are effectively competitive, direct and indirect competitive constraints should be taken into account […]*"[64]

Downstream substitutability can be such that it renders a SSNIP at the wholesale level unprofitable. This can be the case when a wholesale price increase is passed on (partially or totally) to retail prices and enough end-users react by switching to an alternative provider on a different network. The significance of this effect is also stressed by literature: "*indirect constraints are sometimes more powerful than direct constraints*", "*[…] in particular when downstream competition is intense.*"[65]

The critical loss analysis (CLA) framework can be used to assess the indirect constraints. The CLA is a standard tool used in market definition. It tests whether the actual loss resulting from a SSNIP would exceed the loss above which the SSNIP is rendered unprofitable. Where the actual loss exceeds the critical loss, the candidate market should be broadened.[66]

ComReg employs a CLA to measure the indirect constraints stemming from retail demand substitutability. In this context, three main factors affect the result of the CLA analysis: i) dilution (the proportion of the wholesale price as a share of the retail price), ii) incremental margin (the proportion of wholesale revenues which does not go towards covering incremental costs), and iii) retail price elasticity of demand – the relative change in demand of a product in response to a relative change in the price of that product.

In its CLA, ComReg derives the critical loss using data on WLA prices and costs, assuming a full pass-through of the wholesale price increase to retail. ComReg then uses consumer surveys to identify the expected demand response – based on consumers' answers to the question of what they would do if retail broadband prices were to increase by €4 (for bundle customers) and by €2 (for standalone customers).

Source: Copenhagen Economics

3.31 Although ComReg is correct in using a SSNIP test to define the market, ComReg misapplies the SSNIP test and fails to answer the key question. Instead of assessing whether a SSNIP would be profitable overall, ComReg instead focuses on a partial effect only, by investigating merely whether the number of end-users that would switch to a specific alternative technology would be sufficient alone to render the SSNIP unprofitable. This entails a bias by underappreciating the full extent of demand-side substitutability constraints.

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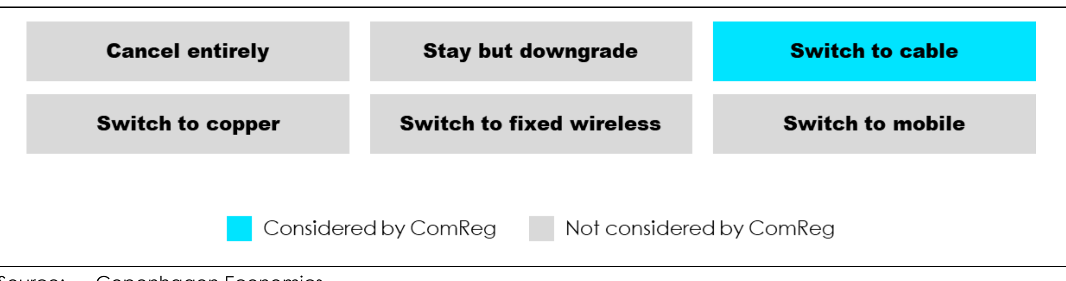
[64] (European Commission, 2018), paragraph 22
[65] (Inderst & Valletti, Indirect versus Direct Constraints in Markets with Vertical Integration, 2009)
[66] (European Commission, 2018), paragraph 30

3.32 ComReg states directly that its assessment seeks to answer not whether a SSNIP would be profitable but whether "*retail broadband provided over a CATV network should be included in the WLA markets on the basis of the indirect retail constraint it is capable of generating. That is, in response to a 5 per cent to 10 per cent SSNIP* (...) *would a sufficient number* (...) *customers switch to CATV-based retail services such that it would render the SSNIP unprofitable?*".[67]

3.33 ComReg's application of the SSNIP therefore distinctly departs from the established framework. Indeed, as the SMP Guidelines clarify specifically: "*It is not necessary that all consumers switch to a competing product;* [in assessing demand side substitutability] *it suffices that enough or sufficient switching takes place so that a relative price increase is not profitable*".[68]

3.34 By focusing exclusively on the share of consumers that respond to the price increase by switching to a specific technology, ComReg's approach thus underestimates the full demand response to the SSNIP, see **Figure 7**.

Figure 7
Consumers considered by ComReg vs. consumers that could/would contribute to rendering a price increase unprofitable



Source: Copenhagen Economics

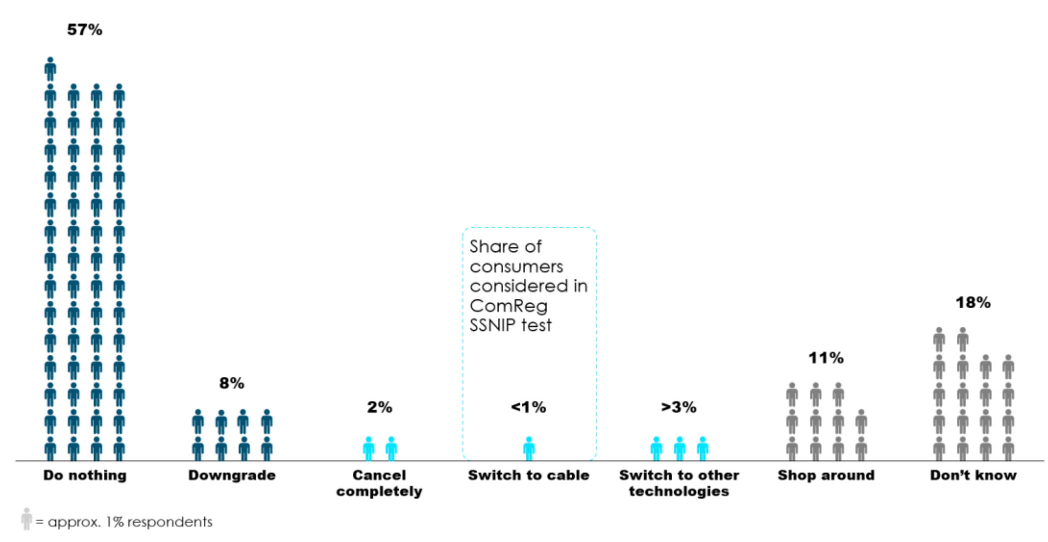
ComReg fails to consider all of the demand response to a price increase

3.35 Apart from answering the wrong question, ComReg misapplies its own survey results by ignoring several categories of survey respondents, including those who respond that they would "cancel" their subscription in response to a price increase, those who "don't know", and, most crucially, those who say that they would "shop around". While answers such as "shop around" and "don't know" pose challenges to how they can be accounted for in the application of the SSNIP, simply disregarding them entirely, as ComReg has done, results in an incomplete exercise that fails to appropriately estimate the full demand response.

3.36 Answering the fundamental question of whether a SSNIP is profitable involves assessing the full demand response to the price increase – i.e., accounting for the sum of all end-users' reactions that would decrease the profitability of the price increase. ComReg's approach to the SSNIP test, focusing solely on the share of consumers that would switch to cable, underestimates the full demand response to a retail price increase, see Figure **8**.

[67] ComReg WLA Consultation, paragraph 5.170
[68] (European Commission, 2018), footnote 24

Figure 8
ComReg analysis (underestimate of full demand response to a price increase)
Action taken by consumers as response to a €4 price increase in broadband prices (in per cent of respondents)

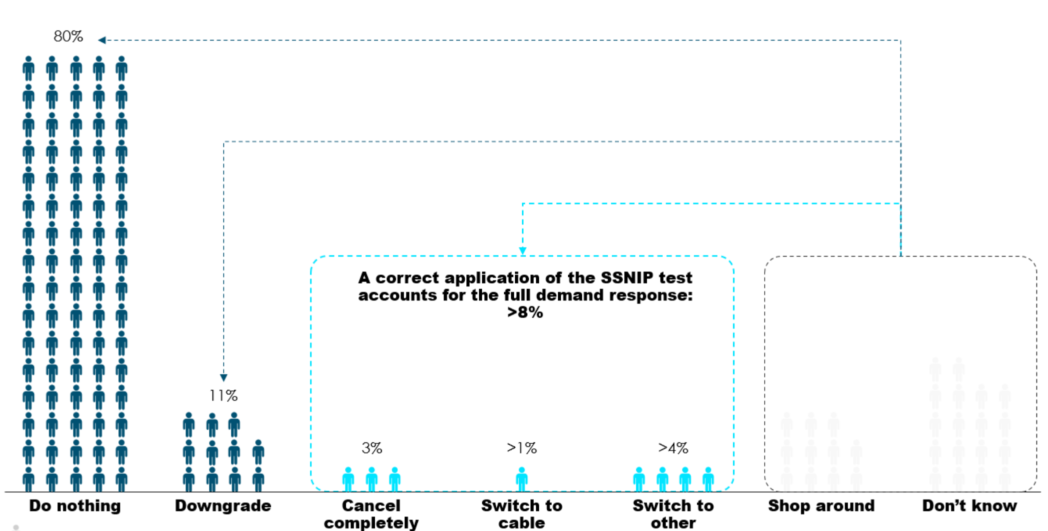


Note: We adopt the conservative assumption that consumers whose response to the price increase is "stay but downgrade" would not affect the hypothetical monopolist's profitability – although in practice, lower-speed products would often be associated with lower margins.

Source: Copenhagen Economics based on ComReg WLA Consultation and ComReg's WLA WCA Residential Market Research

3.37 An appropriate estimate of the full demand response to a price increase should account for i) all consumers that switch or cancel and ii) the portion of "shop around" and "don't know" respondents that could reasonably be expected to cancel and switch, see Figure **9**.

Figure 9
Corrected estimate of the full demand response to a price increase (lower bound)
Action taken by consumers as response to a €4 price increase in broadband prices (in per centage of respondents)



Note: We adopt the conservative assumption that consumers whose response to the price increase is "stay but downgrade" would not affect the hypothetical monopolist's profitability – although in practice, lower-speed products would often be associated with lower margins.
Source: Copenhagen Economics based on ComReg WLA Consultation and ComReg's WLA WCA Residential Market Research (see slide no. 55)

3.38 In this illustration, based on ComReg's total results for residential bundle consumers, we depict a lower bound estimate for the full demand response to a SSNIP in which "shop around" and "don't know" respondents are allocated to the remaining categories according to the relative likelihoods among other respondents (i.e., assuming these consumers would behave in the same way as the other respondents, on average).

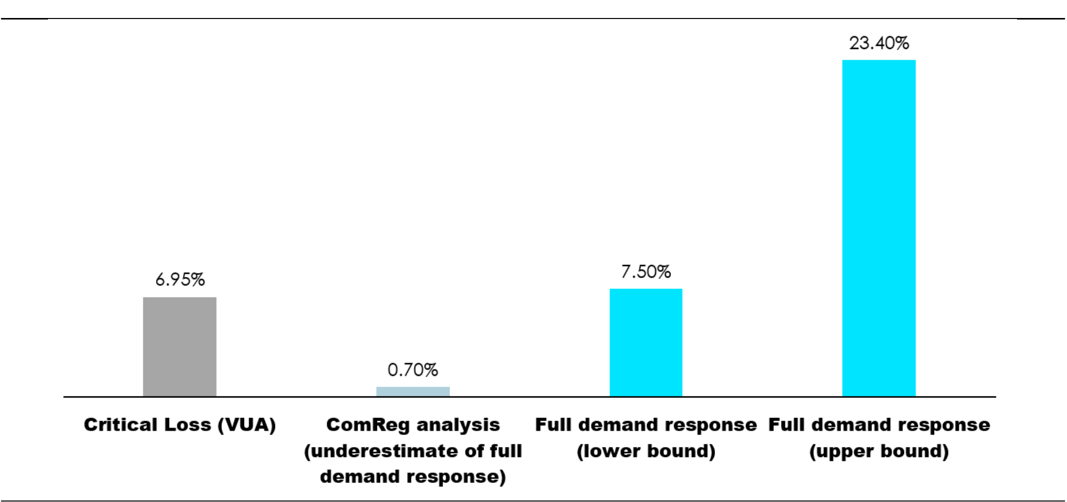
A correct application of the SSNIP test shows that the pricing of fibre WLA is indirectly constrained

3.39 Based on information regarding costs and prices, ComReg estimates the critical loss of a 10 per cent SSNIP on the wholesale VUA product to be 7 per cent for residential customers and 6.70 per cent for business customers, giving a 6.95 per cent critical loss on average.[69] When assessing whether the indirect constraints warrant broadening the market, ComReg compares this number with the share of consumers that are likely to switch to cable specifically (0.7 per cent)[70] as a result of a price increase. ComReg concludes that the low share of respondents that would switch to cable specifically is not enough to render the price increase unprofitable.

[69] Weighted average calculated by CE, based on the share of standalone vs bundle subscribers within each segment (residential and business) and the share of each segment in the total number of broadband subscriptions. See the Appendix for detail on the methodology we followed.
[70] ComReg WLA Consultation, paragraph 5.175

3.40 When including the full demand response to the SSNIP, we find, however, using ComReg's own evidence, that it would in fact be unprofitable for the hypothetical monopolist to increase its price, even with relatively conservative assumptions, see **Figure 10**.

Figure 10
A corrected SSNIP test shows that a price increase in fibre WLA would be unprofitable
Share of consumers lost by the HM as a result of the price increase (actual loss) vs critical loss



Note: See the Appendix, for detail on the methodology.
Source: Copenhagen Economics

3.41 We find that, when accounting for the full demand response, the actual loss exceeds the critical loss, in both lower and upper bound scenarios for the full demand response.[71] In both the lower and upper bound scenarios, we apply a full and corrected SSNIP analysis, where we:

- Use the responses only for those who purchase fibre-based broadband, i.e. only those respondents that would actually experience a retail price change due to a wholesale fibre WLA SSNIP.
- Exclude those respondents who report that their reaction to a price increase would be to switch to another fibre provider, on the basis that, despite switching, these consumers would still be served by a supplier that relies on the hypothetical monopolist's network.[72]
- Allocate "don't know" respondents according to the average respondent, on the basis that this response in not informative for the purpose of determining the actual loss. This approach is compatible with existing case practice in other countries.[73]
- Adjust the share of users that would "cancel" or "switch" downwards proportionally to the price difference between the price increase used in the survey questions for bundle customers (€4) and the expected retail price increase due to a 10 per cent SSNIP at wholesale level (€3.4 for VUA and €1.06 for LLU products, respectively).

[71] See the Appendix for details on the methodology.
[72] In relation to this point, the SSNIP test used in relation to market definition deviates clearly from the thought experiment of whether a specific fibre WLA operator, such as eir, could exercise market power. Nevertheless, for the purpose of the market definition exercise, it is important that customers who would switch retail providers but remain within the candidate relevant market (e.g., switch from eir to SIRO) are not deemed to decrease profitability.
[73] (Competition and Markets Authority, 2018), paragraph 4.23.

- Assume unchanged profitability for those consumers who would "stay but downgrade", on the basis that the effect of downgrading at the retail level on the hypothetical monopolist's profits at the wholesale level are unclear – although in practice, lower-speed products would often be associated with lower margins. (i.e., this is likely a conservative assumption)
- Use the full national survey sample despite the fact that this includes respondents in the intervention area, who would probably be less likely to respond to a retail price increase by switching than those in the commercial area (which is the market of interest for this exercise) since, as ComReg acknowledges, consumers in this area are less likely to have alternative providers.[74] (i.e., this is a conservative assumption)

3.42 In the more conservative "lower bound" scenario, "shop around" respondents are assumed to stay, cancel, or switch with the same relative propensity as the average respondents – i.e., the majority end up staying with the service and tolerating the price increase.[75] This scenario likely underestimates the actual demand response as "shop around" respondents would presumably in fact be more likely to cancel or switch. In the "upper bound" scenario, all "shop around" respondents either switch or cancel. This scenario likely overestimates the actual demand response to a price increase (as it portrays a highly elastic demand), as it is likely that at least some of the "shop around" respondents would, in practice, stay despite the price increase.

3.43 Even in the conservative scenario (the lower bound), the actual loss suffered by the hypothetical monopolist is greater than the critical loss computed by ComReg.[76] This means that our corrected SSNIP finds that the additional profits from higher margins on non-reactive customers would not cover the loss of consumers who cancel/switch, rendering the price increase unprofitable. In other words, the hypothetical monopolist of wholesale fibre would be unable to profitably exercise any market power due to indirect constraints.

ComReg should broaden the relative market

3.44 The results of the corrected SSNIP test show that fibre WLA is constrained by demand-side substitutability. This should lead ComReg to conclude that the relevant market should be broadened to include other technologies, such as cable.

3.45 ComReg's relevant market includes only FTTC and FTTH and not cable – despite the fact that FTTX technologies differ appreciably in the broadband speeds that they support, the most salient product characteristic from the perspective of end users.[77] Most notably, cable and FTTH are capable of supporting download speeds of 1 Gbps whilst FTTC is not, see Figure **11**.

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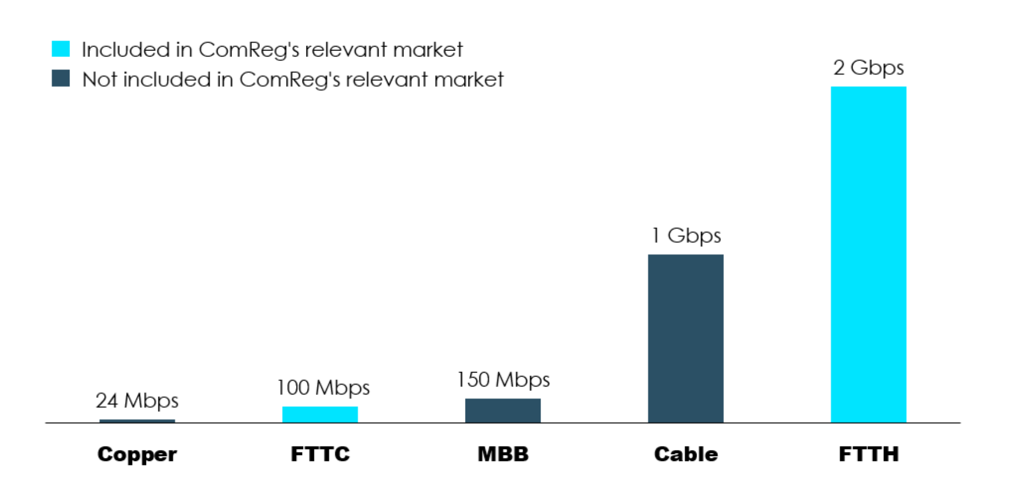
[74] ComReg "*considers it highly likely that many of the premises within the NBP IA are copper-only premises and, pending NBI rollout, do not have alternative FTTx networks available to them*" (ComReg WLA Consultation, paragraph 5.88). The survey data also shows directly that the most rural respondents (those in region 1), who would most closely approximate respondents in the intervention area, are less likely to respond to a retail price increase by cancelling or switching, see Annex 2: Residential Market Research, slide 26.

[75] This depicts the lower bound of the full demand response, as it is reasonable to believe that "shop around" respondents are more likely to switch than the average – i.e., this scenario is relatively conservative.

[76] See Appendix, Table 8.

[77] ComReg WLA Consultation, para. 3.64.

Figure 11
The relevant WLA product market defined by ComReg includes FTTH and FTTC
Maximum download speeds (Mbps/Gbps)



Source: ComReg WLA consultation, Table 4

3.46 Broadening the market would be in line with the approaches of many other regulators in Europe that have concluded that wholesale fibre is constrained by cable, see Table **2**.

Table 2
Many regulators have included cable in the same relevant market as fibre at the wholesale level

COUNTRY	CONCLUSION ON MARKET DEFINITION	ANALYSIS	WHOLESALE CABLE AVAILABLE?
UK	Cable (retail) in the same relevant market with WLA and WCA	Quantitative SSNIP-test. Evaluation of key parameters, incl. margin, dilution, etc.	No
Finland	Cable in the same relevant market with WCA	Descriptive/qualitative evidence of product characteristics and take-up	No
The Netherlands	Cable in the same relevant market with WLA and WCA	Direct constraints based on product characteristics; quantitative SSNIP to assess indirect constraints	Limited; no regulation after court ruling in 2020
Denmark	Cable included in the market for high-capacity networks at both the retail and wholesale level	Qualitative; based on product characteristics and customer choices at the retail level and their implications to the wholesale level	Yes
Spain	Cable in the same relevant market at the WCA level	Qualitative; takes into account significant investments in NGA networks and the increasing importance of FTTH	No

Source: Copenhagen Economics based on regulatory decisions: Ofcom (2018); Viestintävirasto (2018); ACM (2018); European Commission (2020a); European Commission (2019); DBA (2021); CNMC (2021).

3.47 Regulators have generally based their market definitions on an analysis of indirect constraints stemming from retail-level competition. Direct substitutability on the wholesale level has generally not played a decisive role (or has not played any role) in regulators' decisions to include cable in the relevant wholesale market.[78]

3.48 For example, Ofcom, the UK regulator, includes (retail) cable in the relevant product market for wholesale local access (WLA) and wholesale central access (WCA). Ofcom notes that a SSNIP by a hypothetical monopolist of copper or fibre connections would be unprofitable, owing to retail-level substitution towards cable-based connections: "[...] *we consider that a hypothetical monopolist of copper/fibre connections, either vertically integrated or wholesale-only, is unlikely to be able to profitably impose a SSNIP above the competitive level due to substitution to retail packages over cable. We therefore conclude that cable is a sufficiently close substitute to retail services over copper/fibre connections, and expand our focal product to include cable.*"[79]

[78] Cable-based wholesale offers have not been available in most EU countries.
[79] (Ofcom, 2018), paragraphs 3.86-3.87.

3.49 Similarly, the Dutch regulator, Autoriteit Consument & Markt (ACM), also noted that the competitive constraint exerted by retail cable on both wholesale and retail fibre to conclude that cable belongs in the same relevant market*: "ACM concludes that access to cable networks also belongs to the relevant market because (i) the available capacity of cable networks will increase in the upcoming regulatory period, (ii) comparable retail services can be offered based on access to cable networks, and (iii) indirect price pressure is exerted by retail services over cable on retail services over copper and fiberoptic networks."*[80] ACM's product market definition includes both central and local access and therefore the indirect constraint from the retail market constrains the pricing of WLA (not just WCA).

3.50 The Danish regulator, the **Danish Business Authority** (**DBA; Erhvervsstyrelsen** in Danish), also concluded that cable is part of the relevant markets for high-capacity networks. The DBA included cable-based broadband in the same relevant market at both the retail and wholesale levels. The DBA cited similar functionalities from the end-user's perspective for including cable in the same relevant product market at the retail level. It then cites the retail market definition as the reason for also including cable in the wholesale market: "*The Danish Business Authority considers that the division made in the retail market should be transferred to the wholesale market. This is because demand in the retail market is directly reflected in the wholesale market as far as the infrastructure used is concerned."*[81]

3.51 These examples demonstrate that in circumstances where alternative infrastructures have been available to consumers, regulators have often reached market definitions that ensure an alignment between the retail and wholesale markets. Insofar as cable and fibre-based wholesale products are substitutable and serve the same retail broadband market, they should *prima facie* be part of the same wholesale access market.

3.52 Apart from cable, ComReg should also recognise that the survey evidence indicates that other technologies also pose an indirect constraint on wholesale fibre. Specifically, some of the respondents who indicate that they would switch in response to a retail price increase say that they would go to copper, mobile, FWA or satellite alternatives.[82] Indeed, mobile broadband subscriptions, for example, account for 18 per cent of the total retail broadband market in Ireland.[83] Regardless of whether these technologies are deemed to be part of the same relevant market at retail or wholesale level, the competitive constraint that they exercise on wholesale fibre should also be accounted for in relation to the evaluation of market power and remedies.

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[80] (ACM, 2018), page 3. We note that this decision was later overturned on appeal by a Dutch court, although this ruling was made based on the evidence being insufficient to support the regulator's finding of joint SMP, not because the market definition was deemed to be incorrect

[81] (DBA, 2021), page 50

[82] ComReg's WLA WCA Residential Market Research, slide 60

[83] ComReg's Quarterly Key Data Report for Q2 2022

ComReg relies too heavily on static structural indicators

3.53 In defining the geographic market, ComReg establishes a set of criteria for assessing sufficient differences in competitive conditions within the NG WLA Market. These criteria include conditions on the number of operators present capable of providing NG WLA. ComReg considers that for "*for conditions of competition between geographic areas to be appreciably distinguishable, at least three Network Operators should be present*".[84]

3.54 Structural indicators, such as counting the number of operators present in a certain geographic area, can be useful in informing an assessment of prevailing competitive conditions. However, considering such indicators in isolation, especially in the presence of other relevant evidence, can lead to an incomplete analysis on an operator's ability to behave independently of its customers and competitors.

3.55 Available evidence on the competitive dynamics within the commercial area suggests that competition does not require the presence of three operators in Ireland.

3.56 First, the results of the corrected SSNIP test show that any fibre operator would be constrained if/where it overlaps with just one cable operator (i.e., that two next-generation networks, such as eir and Virgin Media, would be enough to generate competition).[85] Furthermore, while the corrected SSNIP test does not directly shed light on whether the presence of two competing fibre operators (such as eir and SIRO) would be sufficient to generate competition, logic would dictate that the competition between two fibre operators would be at least as great as between an fibre operator and a cable operator (which is already enough to constrain market power) – and indeed this is supported by evidence regarding eir's wholesale volumes, see Figure **15**.

3.57 Second, as we show below, data on eir's FTTX volumes is consistent with eir facing constraints where overlap with one network exists. [text redacted], see Figure 15. Further, eir has reduced its FTTH wholesale prices on commercial grounds, which is not consistent with eir having SMP in the entire commercial area.

3.58 ComReg therefore relies too heavily on static structural indicators, at the cost of disregarding relevant evidence of effective competitive constrains on eir's FTTX WLA products within the commercial area. The risks of overemphasizing structural considerations at the cost of disregarding other relevant elements were also rightly highlighted by ComReg's advisers Oxera in 2018 in a report for Liberty Global:

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84 ComReg WLA Consultation, paragraph A.8.39

85 Because the actual loss comfortably exceeds the critical loss on the upper bound, and because the diversion specifically to cable is minimal, the corrected SSNIP in fact suggests that a fibre operator would be constrained even where it does not overlap with cable, simply because retail users could switch to other alternatives, such as copper or mobile, or because they might cancel their broadband subscription entirely

"*The requirement for ex ante analysis is not in itself a reason to put more emphasis on structural elements, as an analysis focused on structural features will inevitably be incomplete. Structural market features on their own cannot provide strong evidence on whether competition between oligopolists will be effective*" further noting that in some situations "[...] *markets with just two operators competing with differentiated but substitutable products, and different cost structures, and facing significant competitive constraints from external forces* (...) *can produce significantly more competitive outcomes than markets with many operators* [...]"[86]

3.59 Also from a static perspective, ComReg's three-operator criterion appears to establish a high threshold when considering the reality of network overlap across Europe. According to BEREC, in most European countries the area covered by three next-generation networks remains below 25 per cent, and below 10 per cent in 10 countries.[87]

3.60 In Ireland specifically, the three-operator criteria is unlikely to be fulfilled in the near future because Vodafone is a major anchor tenant on the Virgin Media network and 50 per cent owner in SIRO. This suggests that Vodafone would have no interest in developing SIRO's network where the Virgin Media network is already present. This need not imply that effective wholesale competition could never materialise in Ireland.

EIR'S NETWORK HAS EXTENSIVE OVERLAP WITH RIVAL NETWORKS WITHIN THE COMMERCIAL AREA

3.61 In the following, we show that there is already substantial overlap between eir's and rivals' networks within the commercial area, and that this overlap is expected to increase during the regulatory period. We also show that a recent case precedent from the European Commission indicates that the current level of overlap may not be consistent with a finding of SMP, any increase notwithstanding.

eir's overlap with other next-generation networks is set to increase from 64 to 84 per cent by 2026

3.62 ComReg's own data suggests that SIRO's FTTH and Virgin Media's cable network has substantial overlap with eir's FTTX network. eir overlaps with a rival network in approximately 64 per cent of the commercial area, see Figure **12**.[88]

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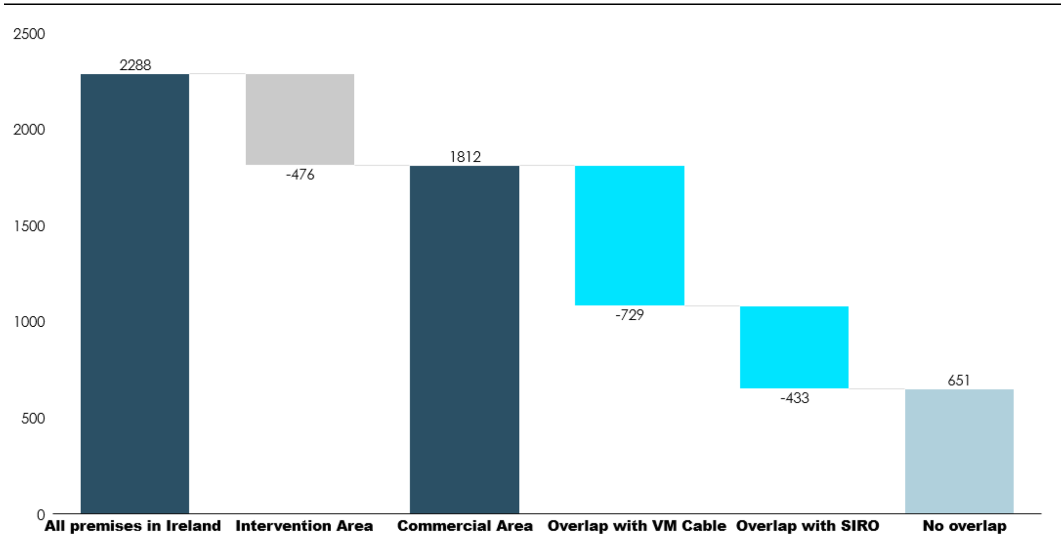
86 (Oxera, 2018), page 4

87 (BEREC, 2022), page 3

88 The numbers used in Figure **12** are derived from ComReg WLA Consultation. In particular, the figures for the total number of premises, intervention area, commercial area and SIRO's coverage are derived from Table 35. The coverage for Virgin Media is deduced from paragraphs 4.227 and 6.139

Figure 12
eir already has substantial overlap with SIRO and Virgin Media
Number of premises, in thousands



Note: eir has complete coverage in the commercial area. We assume that there is no overlap between SIRO's FTTH and Virgin Media's cable network because ComReg states that overlap is limited in paragraph 4.222 and Table A8.4. SIRO's partnership with Virgin Media's retail arm further suggests that there is no overlap between the two networks. We use figures for Q2, 2022 because this allows for a consistent comparison.

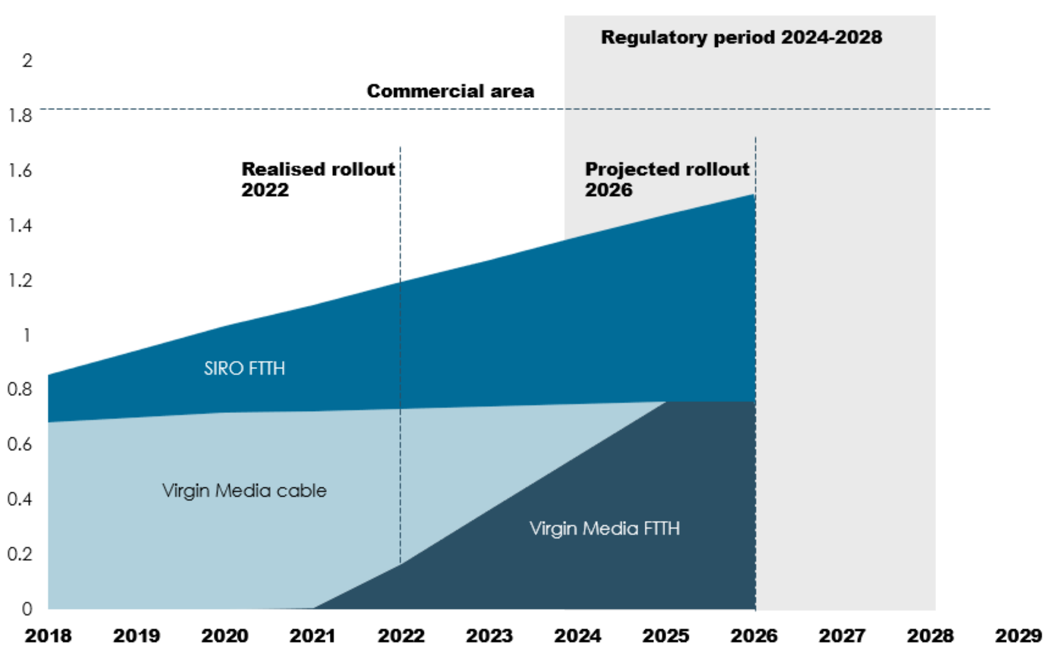
Source: Copenhagen Economics based on ComReg WLA Consultation.

3.63 eir is thus the only FTTX or cable provider in just 36 per cent of the commercial area.[89] We note that the numbers shown here are for Q2 2022, since when SIRO has further expanded its reach.

3.64 Both SIRO and Virgin Media are also currently in the process of expanding or upgrading their network coverage. On a forward-looking basis, eir will overlap with either SIRO or Virgin Media FTTH in 84 per cent of the commercial area by 2026, see **Figure 13**.

[89] This figure is derived by dividing the number of premises served by eir only, around 651k, by the total number of premises in the commercial area, around 1.8 million.

Figure 13
eir will overlap with a rival FTTH network in 84 per cent of the commercial area by 2026
Number of premises passed, in millions



Note: We use data from the Virgin Media website, the SIRO website, Liberty Global Fixed Income Quarterly Press Releases and web articles to plot SIRO and Virgin Media's network from 2018 to 2022. We linearly interpolate for SIRO and Virgin Media for 2019. We linearly interpolate between realised rollout in 2022 and stated targets in 2025 and 2026. All figures have been scaled to the commercial area using ComReg's WLA Consultation. We also assume that the size of the commercial area does not change over time.
Source: Copenhagen Economics based on the SIRO website, Virgin Media website Liberty Global Fixed Income Quarterly Press Releases, ComReg WLA Consultation and Silicon Republic

3.65 ComReg considers that there is not sufficient certainty regarding Virgin Media and SIRO's planned rollout to support a conclusion that these networks will likely constrain eir during the regulatory period.[90] ComReg also believes, as part of the Three Criteria Test, that current and planned rollout is not indicative of a trend towards effective competition.

3.66 ComReg cites instances of delays, targets that were missed and eventually revised downwards to argue that SIRO's rollout is characterised by timing uncertainty. ComReg also notes that Vodafone is Virgin Media's only wholesale FTTH customer thus far, and that there is a lack of rollout data which limits the scope of further uptake from access seekers.

[90] There appears be an inconsistency between ComReg's view that Virgin Media's cable network will not exercise a direct competitive constraint on fibre-based products during the regulatory period because of Virgin Media's plans to upgrade its cable network to FTTH (ComReg WLA Consultation, paragraph 5.97) whilst ComReg also believes that "*it is not possible or appropriate to take VMI FTTP rollout into account on a forward-looking basis in its geographic market assessment or its competition assessment […]*" (ComReg WLA Consultation, paragraph 5.72).

3.67 However, as is apparent from Figure **13**, the projected rollout of eir's rivals does not seem implausible given their historical pace of rollout. eir's rivals would merely need to approximately maintain the speed of rollout and upgrades that they have demonstrated over the past 3-4 years in order to achieve their stated ambitions:

- Virgin Media's FTTH footprint increased from 9k premises in the fourth quarter of 2021 to 220k premises in the fourth quarter of 2022, and its owners have a stated ambition of "*FTTH upgrade accelerating in 2023"*.[91]

- SIRO's footprint increased from 175k premises in 2018[92] to 320k premises in 2020[93] to 470k premises at the end of 2022. Hence, SIRO increased its footprint by almost 300k premises in four years. SIRO has stated that its FTTH network aims to reach 770k premises. SIRO's current pace of expansion indicates that this target can be achieved by 2026. Furthermore, SIRO has secured significant funding for its expansion effort. SIRO announced it has procured additional funding worth €620m, including €170m from the European Investment Bank. This supplements the €450m that has already been invested.[94] Moreover, SIRO's partnership with Virgin Media[95] and its existing relationships with Vodafone and Sky, amongst 20 retail partners, indicate its importance as a provider of wholesale broadband access.[96]

Recent case precedent suggests that such a high level of overlap may be inconsistent with a finding of SMP

3.68 The European Commission has, in relatively recent comments to The Danish Business Authority (DBA), indicated that an overlap in excess of approximately 40-60 per cent (between just two networks, FTTH and cable) could be inconsistent with a finding of SMP. The DBA demarcated 21 different geographic submarkets and proceeded to analyse them separately. The European Commission subsequently expressed serious doubts regarding the DBA's finding of SMP in five submarkets. The DBA subsequently withdrew its notification concerning SMP findings in four of these five submarkets. The DBA ultimately found SMP on only one market with overlap in excess of 40 per cent[97], and on no markets with overlap in excess of 60 per cent, see Figure **14**.[98]

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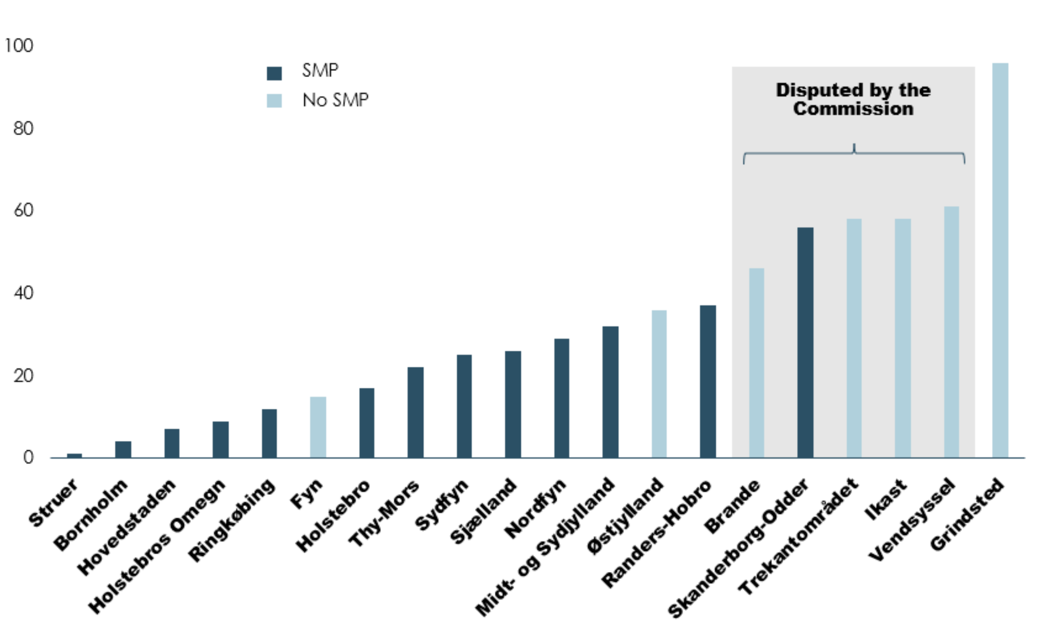
91 (Liberty Global, 2023)
92 (Kennedy, 2018)
93 SIRO website, (O'Connor, 2020) (Burke-Kennedy, 2021)
94 (Burke-Kennedy, 2021)
95 (SIRO, 2022)
96 ComReg WLA Consultation, paragraph 3.31
97 This was Skanderborg-Odder where the finding of SMP was ultimately upheld despite an initial expression of serious doubts from the Commission. However, the context to this SMP finding was an increasing market share for the SMP designated operator, along with a substantial fibre rollout also attributable to the SMP-designated operator.
98 No overlap figures were available for Langeland. The DBA deemed Langeland as an "immature" market with low high-capacity coverage. Consequently, Figure **14** contains overlap information for 20 out of the 21 different submarkets in Denmark

Figure 14
Danish markets with high levels of overlap were less likely to be associated with a finding of SMP
Overlap in per cent



Note: The dark blue bars indicate markets wherein the DBA ultimately deemed a wholesale operator has SMP, following input from the Commission. The light blue bars indicate markets wherein the DBA concluded no wholesale operator has SMP. The light grey background indicates markets wherein the European Commission expressed serious doubts regarding the DBA's initial findings of SMP in all five markets. The DBA subsequently withdrew its SMP findings in four of these five markets, the only exception being the Skanderborg-Odder market. The European Commission eventually withdrew its serious doubts in relation to this market following a response from BEREC siding with the DBA's finding of SMP.
Source: Copenhagen Economics based on the Danish Business Authority

3.69 The 40 per cent and 60 per cent overlap figures may provide soft guidance when assessing whether a market is characterised by the presence of an operator with SMP. In light of the Danish decision and the subsequent intervention by the European Commission, a BEREC draft report states the following: *"DBA has concluded on the basis of the phase II investigation, that parallel coverage is a significant parameter that should be considered capable of altering the significance of other SMP parameters. The EC pointed to two thresholds in relation hereto – 40 percent parallel coverage being significant, and 60 percent being very significant."*[99]

Competitive conditions are not homogenous within the commercial area

3.70 ComReg defines the commercial area as a single geographic relevant market. A relevant market should be characterised by relatively uniform competitive conditions.

[99] (BEREC, 2022), page 16

3.71 In this section, we explain why, based on our analysis, competitive conditions are not homogenous within the commercial area. Specifically, it is apparent that eir meets overlap from either Virgin Media and/or SIRO's network in some but not all parts of the commercial area, and that this has a material impact on competitive dynamics. Accordingly, ComReg could have considered either defining separate geographic markets within the commercial area, to reflect differences in competitive conditions, and/or imposing geographically differentiated remedies.

3.72 First, barriers to entry are not uniform throughout the commercial area. The presence of SIRO and Virgin Media in large parts of the commercial area, and their impending network upgrade and enhancement plans, clearly demonstrates that it is possible to overcome barriers to entry in at least some parts of the commercial area.

3.73 Indeed, ComReg itself acknowledges that there are differences in barriers to entry within the commercial area: "*[....] it is likely to be the case that* ***the Commercial NG WLA Market is characterised by the presence of variable barriers to entry and/or expansion****, but that these barriers are being gradually overcome by certain Network Operators in certain geographic areas.*"[100] The presence of "variable" barriers to entry, along with the fact that these barriers have been and are being overcome by some operators, suggests that the criterion of "*high and non-transitory structural, legal, or regulatory barriers to entry*"[101], which is a necessary criterion for ex ante regulation to be imposed as part of the Three Criteria Test, is not universally satisfied within the commercial area.

3.74 Second, data regarding eir's wholesale volumes clearly demonstrates that eir is faced with varying levels of competition within the commercial area. [text redacted], see Figure **15**.

Figure 15
[text redacted]
Wholesale FTTX access volumes, indexed to 2020 = 100

[figure redacted]

Note: eir's self-supply has been excluded from this figure.
Source: Copenhagen Economics based on eir data.

3.75 [text redacted][102] [text redacted].[103]

[100] ComReg WLA Consultation, paragraph 6.129. (our emphasis in bold). See also paragraph 6.122: ""*SIRO has, to a reasonable degree, overcome barriers to entry in certain geographic areas, having rolled out to 460,000 premises as of October 2022…*"
[101] ComReg WLA Consultation, paragraph 3.14
[102] Average growth in retail FTTX volumes was 19 per cent from 2020 to 2022. ComReg WLA Consultation, figure 4
[103] [text redacted]

3.76 ComReg also implicitly recognises that eir faces different competitive constraints in different areas within the commercial area by stating eir has greater incentives to innovate in areas where it is constrained by SIRO.[104] ComReg also notes that eir's national market share is uninformative regarding regional competitive dynamics: "*[eir's national market share] likely masks non-trivial geographic differences at local level arising from the presence or absence of SIRO or NBI*."[105] As discussed in paragraph 3.19, ComReg also recognises that eir's position in the wholesale market has weakened considerably after SIRO's entry.

3.77 The European Commission has highlighted the importance of adequately accounting for differences in competitive dynamics along the geographic dimension, and assessing whether a potential SMP operator faces differing competitive constraints: "*When delineating the exact geographic boundaries of a relevant market, account has to be taken of the scope of the potential SMP operator's network and whether that potential SMP operator acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others.*"[106]

3.78 BEREC reports that the most frequently cited reason for NRAs to define sub-national geographic markets was regional differences in coverage of rival fibre or cable networks. This was the case in nine different countries: *"The main reason is in nine countries geographical differences in coverage of alternative networks (e.g. cable or fibre) […]"*[107]

3.79 Several regulators have defined sub-national markets based on differences in competitive conditions. Three relatively recent examples include Denmark, Sweden and Spain:

- Precedent from **Denmark** indicates that the competition from other providers in regional areas should be reflected in the geographic market definition. Differences in the market share of the incumbent, TDC, across the country and the presence of network overlap in some areas ultimately led the DBA to conclude that conditions were not sufficiently homogenous to arrive at a national market.[108] Whilst the European Commission expressed doubts regarding the designation of SMP in five different submarkets, the Commission did not dispute the geographic market definition itself. This example is notable as it reflects a country with a broadly comparable size to Ireland where, after detailed analysis, the national regulator and the European Commission accepted a much higher number of geographic markets, compared to what ComReg proposes for Ireland.

- The European Commission's assessment of the geographic market definition in **Sweden** also indicates a need to reflect regional differences in competitive dynamics. The Swedish regulator, **PTS**, concluded that the relevant market for WLA was national in scope. The Commission, however, delivered a letter of serious doubts which explicitly underlined that a market in which competition conditions are heterogenous cannot constitute a single geographic market. The Commission considered that PTS had not adequately accounted for the variance in the rollout of fibre networks in Sweden, typically at municipal level[109] and ultimately vetoed PTS' decision

[104] ComReg WLA Consultation, paragraph 8.44
[105] ComReg WLA Consultation, paragraph 5.227
[106] (European Commission, 2018)
[107] (BEREC, 2022), page 9.
[108] (DBA, 2021), page 71.
[109] (European Commission, 2019), page 13.

on these grounds.[110]

- The **Spanish** market is characterised by very high levels of FTTH rollout and uptake. However, CNMC noted that the incentives to invest are not equal throughout Spain, reflected in variable barriers to entry on a national basis. The regulator, the Comisión Nacional de los Mercados y la Competencia (**CNMC**), accordingly defined geographic markets at municipality level, dividing the 8k+ municipalities in Spain into two categories: a "competitive" zone and a "non-competitive zone".[111] The competitive zone, accounting for approximately 70 per cent of the country, is characterized by a higher degree of competition in infrastructure based on NGA[112] networks.

EIR MAY NOT HAVE THE ABILITY AND INCENTIVE TO EXERCISE MARKET POWER EVEN WHERE THERE IS NO OVERLAP

3.80 eir's increasingly large overlap with SIRO and Virgin Media in the commercial area already limits eir's market power in the overlapping areas. However, eir may have limited ability or incentive to exercise market power even in the areas where there is no network overlap.

3.81 First, we find that eir does not currently differentiate its FTTH pricing between geographic areas. This indicates an absence of either the ability or incentive to do so today. It also means that low wholesale prices in some areas benefit access seekers in all areas. The absence of a geographically differentiated wholesale pricing strategy may be attributable to geographically uniform retail prices and/or increasing infrastructure competition in the commercial area and/or a lack of precise information on the magnitude of overlap at exchange level.

3.82 Second, [text redacted].

eir does not currently price differentiate between geographic areas

3.83 eir does not currently differentiate its FTTH wholesale prices between geographic areas. For instance, eir's VUA FTTH retail prices, as depicted in Figure **6** above, are not specific to a certain geographic area. Hence, any decrease in prices in response to competition in some areas has also benefited access seekers in other areas. The fact that eir does not practice geographically differentiated FTTH wholesale pricing today is indicative of an absence of either the ability or incentive to do so.

3.84 There could be at least three reasons that explain why eir is unable or unwilling to exercise any local market power via geographically differentiated wholesale prices.

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[110] (European Commission, 2020c)
[111] (CNMC, 2021)
[112] Mostly fibre-optic but includes cable.

3.85 First, **eir's ability to exercise market power via geographically differentiated wholesale prices is constrained by the fact that it sets geographically uniform retail prices**. The fact that eir charges geographically uniform prices at retail level flows through to the wholesale level via a margin squeeze constraint. Thus, even if/where eir in principle has an incentive to increase its wholesale prices on a local exchange where it faces a low level of local wholesale competition, it still faces a cap on wholesale pricing set relative to a retail price determined by national retail competition.

3.86 Second, **eir's ability to establish geographically differentiated prices is also weakened by increasing infrastructure competition in the commercial area, where alternative networks are undergoing meaningful expansion**.[113] Increasing wholesale prices in areas where static competition is currently less pronounced could reinforce incentives for alternative operators to deploy networks in those areas. This incentive could be particularly strong considering that barriers to expansion have been overcome in a significant part of the commercial area.[114]

3.87 Even if such a strategy yielded short-term gains, competition from alternative overlapping networks would likely force eir to reduce prices to competitive levels that would erode any marginal short-term gains. Evidence shows that where overlap exists, eir faces several effective competitive constraints. [text redacted] The prospect of foregoing actual and prospective revenues provides a strong incentive to avoid engaging in geographically differentiated prices to exercise any short-term market power.

3.88 Third, **eir's ability to exercise market power via geographically differentiated wholesale prices may be constrained by the fact that it is not straightforward to simply categorise exchange areas into those areas where there is overlap and those where there is not**. As ComReg notes in relation to a separate topic, when considering whether to impose a specific obligation on eir's rural FTTH network, conditions even within exchange areas cannot necessarily be considered homogenous.[115] Furthermore, there is no public data regarding the extent of overlap by exchange area. While eir can piece together some information regarding where its FTTX network overlaps with either SIRO's fibre network or Virgin Media' cable network, this data is imperfect and perhaps not sufficient for the purpose of informing pricing decisions.

[text redacted]

3.89 [text redacted]

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[113] ComReg also acknowledges the trend of increasing infrastructure competition within the commercial area through SIRO's and Virgin Media's FTTH rollout

[114] ComReg also recognises that in part of the commercial area barriers to entry have been overcome "*to a reasonable degree*" (see paragraph 6.122 of the draft decision), further noting that "*Some operators have already built networks and incurred sunk costs*" (see paragraph 6.70 of the draft decision) and that *"despite the high entry barriers associated with building a WLA network at scale, there is some evidence of entry by other operators on a commercial basis"*, further underlining that main entry barriers have been overcome

[115] ComReg WLA Consultation, paragraph 9.277: *"There are however practical difficulties in implementing such an approach. In particular, the Rural FTTH footprint is spread across c.900 exchange areas ('EA(s)') and no EA is entirely within the Rural FTTH footprint. This means that the Rural FTTH footprint does not align with Eircom's EAs and the majority of EAs will include premises that are in Eircom's IFN (that are currently passed with a viable FTTC service), premises that are in the Rural FTTH footprint (c.85 per cent of which cannot receive a viable FTTC service) and premises that are in the NBP IA (that will depend on the NBP to receive NGA broadband)."*

3.90 [text redacted][116] [text redacted]

[116] [text redacted]

CHAPTER 4

WLA: ANY COMPETITION CONCERNS COULD BE ADDRESSED BY LESS INTRUSIVE REMEDIES

4.1 In this chapter, we assess whether the regulatory obligations proposed by ComReg are proportionate and sound from an economic perspective. We review the reasoning behind ComReg's proposed remedies, which have been developed with economic advisor Oxera, and assess their proportionality and effectiveness in addressing any competition concerns. **We find that the proposed remedies are intrusive and potentially conducive to distortions to competition**.

4.2 First, we explain why regulatory remedies need to be tailored to address the nature and gravity of any competition concerns. We find that ComReg proposes an array of detailed and – by international standards – intrusive remedies. We also find that ComReg's remedy proposals suffer from a degree of circularity, since they are heavily based on Oxera's recommendations. Oxera, in turn, does not conduct an independent competition analysis, but bases its remedy assessment on ComReg's findings on the existence and nature of competition concerns.

4.3 Second, we assess the case for prolonging the regulation of FTTC VUA through a price cap based on a bottom up long run incremental cost (BU-LRIC) model. A price cap based on BU-LRIC is the most intrusive form of regulation and is warranted only in circumstances where there are i) limited or no competitive constraints and significant concerns over excessive pricing and ii) no substantial demand or cost uncertainties and therefore a low risk of capping the prices at the wrong level. As we elaborate below, neither of these conditions seem to apply to the Irish WLA market.

4.4 Third, we find that there is unequivocally no evidence to suggest that eir has sought to engage in a margin squeeze or other exclusionary conduct in the FTTH segment where ComReg proposes to maintain a detailed (and burdensome) ex ante margin squeeze test. eir has reduced its FTTH wholesale prices, and the headroom between its wholesale and retail prices has been comfortably larger than the current margin squeeze test permits. If anything, eir has become increasingly reliant on its wholesale customers, which does not support ComReg's and Oxera's concerns over foreclosure.

4.5 Fourth, ComReg proposes further detailed remedies to constrain eir's ability to reduce prices below pre-determined levels, or to do so without a lengthy regulatory process. Especially in areas where there is apparent infrastructure-based competition in the wholesale market, constraining eir's pricing runs the risk of dampening competition between eir and its competitors. The proposed approval process may be subjective and lengthy relative to how quickly eir may need to respond in negotiations with wholesale customers.

THE DESIGN OF REMEDIES SHOULD CORRESPOND TO THE DEGREE OF COMPETITION CONCERNS

4.6 The design of remedies imposed on an SMP operator needs to strike the right balance between ComReg's objectives of i) promoting competition and ii) promoting investments in very high-capacity networks (VHCNs).[117] Even if SMP is identified, any remedies can be tailored to reflect the levels of competition in the market. Where remedies are needed, they ought to address the **nature** of competition concerns in question and be commensurate with the **gravity** of competition concerns identified.

4.7 To ensure that regulation does not have unintended consequences e.g., by diluting the SMP operator's and/or access seekers' incentives to investment, the imposed remedies should not go beyond to what is necessary to preserve competition where there are insurmountable barriers to entry. Oxera discusses the economic properties of the different approaches to regulate eir but provides limited guidance on how the regulatory options map with different degrees of market power or the theories of harm.

4.8 First, the design of remedies should build on evidence of the **nature of competition concerns**:

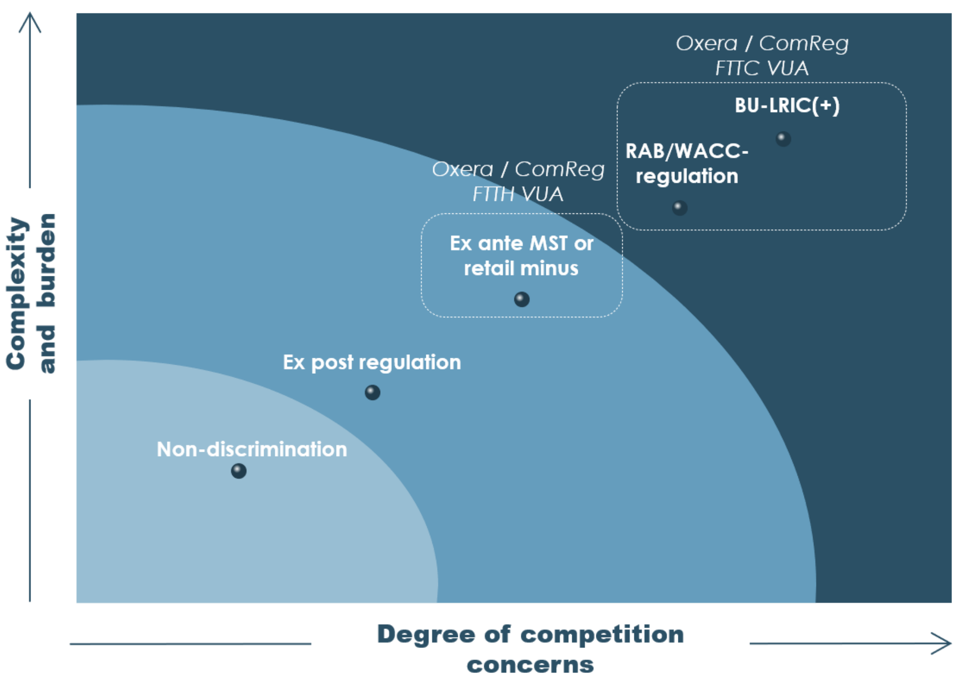
- Cost orientation is warranted if and only if there is evidence to suggest that absent price regulation eir would charge **excessive prices** and generate returns that are substantially and persistently above competitive levels (namely, the weighted average cost of capital, WACC).
- An ex ante margin squeeze test (or conceptually similar *retail minus*) can be appropriate if eir has an **incentive and ability to foreclose** competitors.

4.9 Second, further to an assessment of the nature and extent of competition concerns, the design of remedies should reflect the cost and volume risk of the service in question. The greater the **uncertainty over demand and cost of investment**, the more complicated it is for the regulator to prescribe pricing *ex ante,* and the higher the risk of unintended consequences (e.g., underinvestment).

4.10 Remedies designed to address more severe competition concerns also come with higher complexity and regulatory burden (even if the relationship is not necessarily linear), see Figure **16**.

[117] Article 3 of the European Electronic Communications Code (European Parliament and Council of the EU) provides that national regulatory authorities should pursue, among others, the objective of promoting connectivity and access to, and take-up of, very high-capacity networks, through reasonable measures which are necessary and proportionate for achieving it. ComReg acknowledges this objective in its draft decision, see, e.g., paragraphs 9.194 and 9.195.

Figure 16
Stylised illustration of regulatory options



Note: The design of different types of remedies varies both in terms of their intrusiveness and complexity. Thus, the positioning of regulatory options depicted in the figure should be interpreted as illustrative.
Source: Copenhagen Economics

4.11 The remedies proposed by ComReg are appropriate in circumstances where there are serious concerns over excessive pricing (FTTC VUA) and anti-competitive foreclosure (FTTH VUA). The types of remedies and (as discussed below) ComReg's way of implementing them necessitate accurate information about the prospect of competition absent regulation and come with substantial data requirements about costs and volumes.

WLA remedy design should build on remedies imposed on PIA

4.12 ComReg has not sufficiently accounted for the presence of PIA regulation when considering the rationale for WLA regulation (or vice-versa). If access to PIA is already secured via SMP regulation (and/or via other regulatory frameworks, such as the BCRD), then this would reduce the competition concern on the WLA market since PIA regulation should address the highest barriers to entry on the WLA market and reduce the need for stringent remedies. Conversely, if PIA regulation does not secure low barriers to entry in relation to WLA, it is unclear what would be the rationale for PIA regulation. As BEREC sets out:

"*Before imposing specific access obligations, NRAs shall analyse whether other forms of access to wholesale inputs, either on the same or a related wholesale market, would be sufficient to address the identified competition problem in pursuit of the interests of end users.*"[118]

4.13 ComReg's regulatory objective is to support retail competition and avoid unnecessary duplication of network assets. Even if ComReg finds SMP on different layers of the supply chain, the intrusiveness of remedies should reflect the varying asset replicability and consequent market power. There is no need to impose multiple sets of regulation if narrower interventions would be sufficient to address competition concerns.

Remedies can be designed to reflect geographic variations in competition concerns

4.14 ComReg has provisionally defined the commercial area to exhibit sufficiently homogeneous competitive conditions not to warrant distinct geographic markets within the commercial (non-NBI) area (see Chapter 1). Further to a broad market definition, ComReg has not taken differences in competitive conditions into account in the design of remedies.

4.15 In principle, the well-established economic framework for market definition (i.e. hypothetical monopolist test described in Chapter 3) should suffice to identify areas that exhibit distinct competitive conditions. In practice, however, the limited demand-side substitutability between locations means that the assessment of homogeneity in competitive conditions is not based on a critical loss analysis but rather on the presence or prospect of competitors in any given area.

4.16 Irrespective of market definition, regulators can take geographical variations into account at the stage of remedy design, as established by BEREC: "*The second approach consists of defining one market, analysing it and then differentiating remedies to take into account geographical differences*".[119] From an economic perspective, there is no material difference on whether the differences are considered as part of market definition or remedy design, as long as the resulting remedies are reflective of different degrees of competition.

Regulators in other EU countries have adopted more lenient approaches to NGA regulation

4.17 NRAs in other European countries have taken more lenient approaches towards regulating the market for next generation wholesale products relative to the approach proposed by ComReg. Below we summarise examples for four different countries demonstrating that less prescriptive approaches can be deployed towards remedies in the market for next generation wholesale products.

[118] (BEREC, 2019a)
[119] (BEREC, 2014), paragraph 162

4.18 In **the Netherlands**, the ACM accepted voluntary commitments from KPN and Glaspoort in lieu of imposing its own suite of remedies. KPN and Glaspoort offered a voluntary commitment to keep wholesale access prices low by indexing them to inflation, and even accommodated for the current high inflationary environment. The ACM accepted these commitments and made them binding for the forthcoming eight-year period. [text redacted].[120]

4.19 In **the UK**, Ofcom has not imposed any ex ante margin squeeze requirements on VULA products. Instead, Ofcom imposed a cost-based charge on BT's 40/10 VULA product, capable of delivering speeds of up to 40Mbps. It has only imposed a general remedy of "fair and reasonable" charges on VULA products capable of delivering higher speed broadband. Ofcom notes consumer substitutability between high-speed and low-speed broadband and the need to balance investment incentives in this regard: *"[…] our general access remedies include a fair and reasonable charges obligation that applies where no charge control or basis of charges obligation is in force, and will therefore apply to all VULA services other than the charge-controlled VULA 40/10 service. We interpret this condition as a requirement not to impose a margin squeeze, providing further protection against the risk of distorted competition."*[121] Ofcom stated that continuing the imposition of an ex ante margin squeeze test would not be proportionate and any "*residual risk*" of BT imposing a margin squeeze is addressed by general access remedies.[122]

4.20 In **Denmark**, the DBA also accepted voluntary commitments in seven different geographic markets where an operator was deemed to possess SMP, and made these commitments binding. This included the Skanderborg-Odder market, where BEREC eventually sided with the DBA's finding of SMP. In all other markets where no voluntary commitment was offered, the DBA's remedies did not include an ex ante margin squeeze test or a cost-based price control. Rather, they only entailed general remedies that did not extend further than requiring "fair", "non-discriminatory" and/or "transparent" pricing.[123]

4.21 In **Finland**, Traficom found in 2018 that Elisa, amongst other regional operators, held SMP in several geographic WLA markets. Given the alleged severity of competition concerns, Traficom imposed a cost orientation (price cap) remedy based on an LRIC+ model. Following Elisa's complaint, the Finnish Supreme Administrative Court, repealed price cap remedies for fibre access and the whole SMP decision concerning wholesale access in Helsinki and Tampere regions, i.e. cities where Elisa is active. Central to the Court's ruling was that the competitive conditions in the aforementioned differed from other regions, and that the presence and prospect of alternative networks was not adequately considered.[124]

4.22 We note that regulatory approaches vary and there are also examples of more stringent regulations than those witnessed in the four example countries above. The examples nevertheless demonstrate that where there is evidence of infrastructure-based competition nationally or sub-nationally, an incumbent operator may not have an SMP, or there may be a case for less intrusive remedies.

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[120] [text redacted]

[121] (Ofcom, 2018), paragraph 9.106.

[122] Ofcom states that its approach to any disputes in the context of higher bandwidth products would be to allow a LRIC retail margin by reference to an equally efficient operator.

[123] (DBA, 2023)

[124] (Designation as a company with considerable market power, 2020).

Oxera bases its assessment on ComReg's questionable findings of SMP

4.23 The choice of remedies as proposed by ComReg (summarised in Chapter 1 above) suffers from a degree of circularity. ComReg bases its remedy proposals on the recommendations of its economic adviser Oxera who, in turn, draws heavily on ComReg's findings on the existence and gravity of SMP.

4.24 Oxera has advised ComReg in the design of remedies for products with respect to which ComReg has deemed that eir holds SMP. Oxera has set out options for regulatory approaches and has generally drawn on well-established regulatory pricing models applied in the telecoms and other regulated industries. The economic framework underlying Oxera's assessment is reasonable.

4.25 Oxera's assessment and consequent recommendations are, however, largely premised on ComReg's competition analysis. While Oxera considers the role of competitive constraints on the retail and wholesale levels throughout its assessments, **Oxera has not conducted an independent assessment of the competitive constraints**. Rather, Oxera repeatedly draws on ComReg's conclusions on the finding of SMP and lack of effective pricing constraints. As Oxera defines its task:

"*[Oxera's] recommendations should take into account ComReg's concerns that, absent regulation, Eircom as the SMP operator would have the incentive and ability to set excessive wholesale prices and/or engage in exclusionary behaviours through low, or loyalty-enhancing, wholesale pricing and/or impose a price squeeze, leading to negative outcomes for consumers.*"[125]

4.26 Oxera's findings are highly dependent on ComReg's (not Oxera's own) premise and limited consideration given to the evidence of competitive constraints. Consequently, as we explain below, many of Oxera's recommendations appear disproportionate and inconsistent with the evidence of market developments.

LESS INTRUSIVE REGULATION OF FTTC VUA COULD BE SUFFICIENT TO ADDRESS COMPETITION CONCERNS

4.27 ComReg provisionally proposes that eir's FTTC VUA products will be subject to "*pricing continuation*". This means setting the price based on a BU LRIC cost model, adjusted for inflation over the review period (2024-2029), see **Box 4**.

[125] Oxera Part 1, paragraph 1.8.

Box 4 FTTC VUA Price control

- FTTC VUA prices are currently oriented to BU-LRAIC+ costs (cost-oriented price control).
- ComReg proposes to apply a price cap of 'CPI-0' annually to FTTC VUA prices post 30 June 2024.
- ComReg proposes to rely on existing cost models to determine future FTTC VUA prices. This price cap will be determined based on existing cost models to determine future FTTC VUA prices.
- These models primarily use a *Bottom-Up* (BU) approach. ComReg acknowledges limitations of existing models (e.g., it assumes that the hypothetical efficient operator continues to rely on FTTC to provide broadband when in fact FTTC is in decline). However, ComReg considers that updating the BU cost models to reflect the current demand trends would undermine regulatory consistency.

Source: Copenhagen Economics

Proposal to continue BU-LRIC is not reflective of competitive conditions

4.28 Oxera does not assess eir's ability or incentives to increase prices. Rather, Oxera bases its findings on ComReg's conclusions on SMP and an alleged lack of competitive constraints. As evidence of eir's likely pricing behaviour, both ComReg and Oxera refer to price increases introduced after the 2013 Market Review, when eir was not subject to price controls of cost-orientation.

4.29 We understand that the price increases in 2016 were disputed and considered as evidence of eir's market power.

4.30 Aside from whether the price increases around seven years ago were reflective of costs or market power, ComReg or Oxera do not consider **external pricing constraints** in the current market environment. These constraints are manifested through the direct pricing constraints exerted on FTTC VUA by SIRO and (especially going forward) by Virgin Media; and the indirect pricing constraints exerted already by cable-based broadband. In particular, the role of SIRO is already manifestly different compared to 2016 and is set to strengthen over the regulatory period (see Chapter 3).

4.31 The presence of competitive constraints has implications for the design of appropriate remedies and justification of a stringent cost orientation remedy akin to BU-LRIC.

4.32 First, **evidence shows that eir has reduced its wholesale prices in recent years in the face of increasing competition.** As shown in Figure 6 above, in the last three years eir has reduced the price of many of its FTTH wholesale services in response to competitive pressure. The timing of these price reductions is consistent with increasing competition from SIRO's FTTH network and coincides with the decline of eir's wholesale market share.

4.33 Second, **there is no evidence to suggest that eir would charge excessive prices.** The rationale for capping prices is to prevent excessive pricing. While eir has (for the reasons outlined above) increased its FTTC wholesale prices seven years ago, its incentives for doing so today appear limited in the face of increased competition from alternative infrastructures. We identify at least four reasons why eir may lack the ability and/or incentive to charge excessive prices, currently not adequately reflected in Oxera's (or ComReg's) analysis:

- eir sets geographically uniform prices at the retail level. Insofar as eir is subject to a margin squeeze constraint, this limits eir's ability to exercise market power via geographically differentiated wholesale prices. Even in areas where eir faces less pronounced local wholesale competition, wholesale prices are constrained relative to the retail price that is determined by national (not local) competition, thereby constraining eir's ability to charge excessive prices.

- Increasing wholesale prices can further strengthen alternative operators' networks deployment in areas where eir would, in a static sense, have the strongest incentives to hypothetically increase prices. Such a constraint erodes incentives eir might have to charge higher prices in areas with less pronounced competition.

- eir's ability to exercise market power via geographically differentiated wholesale prices may be constrained by a lack of precise actionable information on overlap at exchange level which could inform eir's pricing decisions.

- [text redacted][126] [text redacted]

4.34 Third, **regulatory costing and asset valuation approaches designed for monopoly regulation are not well-suited for products facing competition**. Cost orientation remedies seek to establish prices that are reflective of competitive conditions. This involves ensuring that prices reflect efficiently incurred costs and valuing regulated assets at values corresponding with modern equivalent assets (MEA).[127] We agree with the principle that BU-LRIC+ with MEA provides appropriate build-or-buy signals promoting efficient entry and maintaining incentives to invest. However, given the presence of competitive constraints, and the fact that other operators have already invested in networks (and are committed to invest substantially more), it is not clear whether such a rationale makes economic sense.

4.35 We note that Oxera recognised this when advising ComReg on NGA pricing in 2013: "*[--] cost-plus regulation is unlikely to be meaningful, given the conceptual and practical difficulties associated with asset valuation of networks that are, to some extent, subject to competitive constraint in the retail market.*"[128] While this consideration is absent in Oxera's most recent advice, it would seem relevant in the face of (if anything) greater competitive constraints than those that prevailed around 10 years ago.

4.36 Fourth, **Oxera's assessment of internal pricing constraints appears questionable**. Oxera finds that eir's FTTH pricing is constrained by its FTTC pricing – i.e., eir cannot increase FTTH prices due to a constraint it faces from regulated lower-end FTTC prices (referred to as "anchor"):

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126 [text redacted]

127 ComReg and Oxera refer to a hypothetical efficient operator (HEO) principle. See ComReg WLA Consultation, paragraphs 9.214-9.262 and Oxera Part 1, paragraph 4.33.

128 (Oxera, 2013), page ii

"*under the assumption that FTTC and FTTH services are part of the same relevant economic market (…) any attempts by Eircom to increase FTTH VUA prices will be unprofitable, given the availability of a cheaper price-capped alternative.*"[129]

4.37 However, the evidence referred to by Oxera itself suggests that i) the FTTH segment is likely to face significant competition and ii) any incentives to increase FTTC prices would be diluted by retail and wholesale customers migrating to FTTH, which is offered by alternative providers in large parts of the Commercial NG WLA. Oxera correctly acknowledges the ongoing and increasing switching from FTTC and FTTH and competitive constraints between them: Oxera notes that the "*[…] number [of subscribers who obtain broadband over FTTC] may be expected to decline over the course of the market review (on the basis that Eircom is continuing to roll out FTTH over its FTTC network)[…]*"[130] and that increasing FTTC prices would "*encourage migration [to FTTH].*"[131] Insofar as the FTTH segment is competitive and there is no evidence of market power at the retail or wholesale level, eir is unlikely to have any significant unilateral market power in the FTTC segment.[132]

BU-LRIC can be problematic in the presence of volume risks

4.38 Oxera correctly labels cost-based price controls as "*intrusive*" and notes that they are best suited when "*take up and other volume risks; cost risks; competition risks*" have crystalised.[133] Oxera further acknowledges that: *"a balance must be struck between price controls that set a cap on the SMP operator to prevent excessive pricing (a focus on allocative efficiency) and overly tight controls on the SMP operator that courage discourage investment by the SMP operator and by independent competitors […]*"[134]

4.39 ComReg (and Oxera) recognises these factors with respect to FTTH VUA products and does not recommend ex ante price caps for FTTH VUA. ComReg nevertheless proposes a (in Oxera's words) "*tight*" form of price control on FTTC VUA, i.e., bottom-up LRIC based price cap (BU-LRIC). ComReg proposes to implement the remedy as an inflation-adjusted "continuation" of the current BU-LRIC based price.

4.40 In our view, irrespective of whether ComReg builds a new model or relies on an existing one, **determining prices for a 2024 - 2028 necessitates a sound understanding of costs and volumes over the next five years**. Without such an understanding, there is a pronounced risk of (in Oxera's words) "*capping the prices too tightly / at the wrong level*".[135]

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129 Oxera Part 1, paragraph 4.30
130 Oxera Part 1, paragraph 4.14
131 Oxera Part 1, paragraph 4.15
132 We note that there ComReg and Oxera are of the view that FTTC and FTTH belong to the same relevant market (i.e. a price increase of one leads to customers switching to another)
133 Oxera, Part 1, paragraphs 3.09 and 4.99
134 Oxera, Part 1, paragraph 3.109
135 Oxera Part 1, paragraph 4.73

4.41 FTTH volumes are uncertain due to uncertainties relating to consumers' willingness to pay for and uptake of VHCNs. **FTTC volumes, in turn, are largely determined by the take up of FTTH-based subscriptions, since the pace of decline in FTTC volumes is driven by consumers migrating to FTTH**. The two types of services are therefore intrinsically linked, and insofar as FTTH uptake is uncertain (as ComReg recognises it is), the same uncertainty applies to FTTC volumes.

4.42 Further to the inherent uncertainty over consumers' willingness to pay for (and switch to) FTTH, the rapid growth of alternative VHCN networks (in particular, SIRO and Virgin Media) add to the uncertainty over eir volumes. While we have not had reviewed the regulatory model and its volume and costs assumptions, the current transformative changes in the market cast serious doubts on whether and how eir's volumes could be projected with any reasonable accuracy.

4.43 Overall, the evidence of competitive constraints and demand uncertainty suggests that continuing cost-based price cap regulation is unlikely to be proportionate. Oxera's reasoning for not recommending cost-based price controls for FTTH apply to FTTC, too, given the interplay between the two types of wholesale products.

There are less intrusive ways to ensure that eir does not charge excessive prices

4.44 Oxera sets out the main characteristics of different alternatives to price regulation. These include: anchor pricing, "retail minus" – which is economically similar to an ex ante margin squeeze test (MST) – and regulatory asset base (RAB) regulation.[136]

4.45 Oxera's reasoning to discount any less intrusive approaches to regulation is, however, unclear. For example, Oxera appears to position RAB regulation strictly in the form in which it is commonly applied in regulation of natural monopolies and (in our view correctly) notes that in "*Irish WLA market, however, Eircom is expected to face direct competition from SIRO in some areas, as well as indirect competitive constraints from Virgin Media*."[137] This recognition of the implications of competition is not, however, reflected in Oxera's recommendation to largely prolong the use of existing remedies, including a BU-LRIC based price cap on FTTC VUA.

4.46 If, notwithstanding increasing competition and demand uncertainty, ComReg remains concerned over excessive FTTC VUA prices, ComReg could consider less intrusive remedies.

4.47 First, [text redacted]

4.48 Second, if considered necessary, ComReg could monitor eir's returns generated through its SMP products and intervene if eir's returns were to exceed levels deemed as excessive. Intervening only if there is evidence of excessive returns allows for a greater pricing flexibility, which would be conducive to an orderly, market-based migration to FTTH.

4.49 Any safeguard mechanism to trigger an intervention in the event of excessive returns should honour **the 'fair bet' principle**, a concept also supported by Oxera, see **Box 5**.

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[136] We return to the possible case for MST below in the context of ComReg's proposals for FTTH VUA

[137] Oxera Part 1, paragraph 4.84

Box 5 The fair bet principle

The regulated company (and its investors) face uncertainty when undertaking a risky investment in, say, FTTX networks. 'The 'fair bet' principle departs from the notion that a regulated company needs to be able to earn returns commensurate with the risk it faces at the time of the investment. The 'fair bet' means that the realised returns are not capped below what was expected at the time of the investment, nor are any returns above the expected returns clawed back mid-way through the lifetime of the investment.

The honouring of the 'fair bet' principle entails an understanding of the distribution of cash flows at the time an investment takes place and an ex ante cost of capital. The fair bet principle can, in principle, be embedded in the design of a forward-looking price cap. Where the regulator is concerned about cost recovery and investments, it may choose to monitor returns retrospectively. Returns that substantially and persistently exceed the cost of capital could be considered "excessive".

Source: Copenhagen Economics. See for example: Oxera (2017), Does Ofcom's approach in the WLA market review honour the fair bet principle?

4.50 Given the competition and volume risks characterising eir's fibre products, coupled with eir's voluntary commitments, the fair bet principle could be honoured less intrusively without the need for continuing the BU-LRIC based prices into the upcoming five-year regulatory period.

4.51 Overall, the proposed BU-LRIC-based "price continuation" is questionable from an economic perspective in the circumstances that eir is subject to over the next regulatory period. Monitoring of eir's proposed undertakings and, if necessary, any of eir's returns, would likely suffice to address ComReg's concerns.

COMREG DOES NOT PROVIDE EVIDENCE TO SUPPORT AN EX ANTE MARGIN SQUEEZE TEST FOR FTTH

4.52 eir has been subject to an ex ante margin squeeze test (MST) with respect to wholesale FTTH bitstream to FTTH VUA, its bundled offers and standalone FTTH.[138] ComReg proposes to alter the bundles MST and to focus on FTTH, to include standalone FTTH in the proposed MST, and to remove the existing wholesale FTTH Bitstream to wholesale FTTH VUA MST.[139] ComReg's (and Oxera's) finding is premised on the notion that an MST will "*mitigate the risk of margin squeeze, leverage and foreclosure.*"[140]

4.53 ComReg's (and Oxera's) theory of harm – that eir would engage in exclusionary practices without ex ante remedies – lacks any empirical foundation, as is explained in the followingo.

[138] ComReg WLA Consultation, paragraph 1.24

[139] Specifically, ComReg proposes an MST for 'eir's flagship' products that consist of the highest volume FTTH retail offerings which together account for at least 75 per cent of total FTTH retail product volumes, see ComReg WLA Consultation, paragraph 9.379

[140] ComReg WLA Consultation, paragraph 9.220

4.54 First, eir has not engaged in margin squeeze during the ongoing regulatory period. **The headroom between its retail and wholesale prices has been larger than that allowed by the MST.** For example, [text redacted], see Figure **17**.

Figure 17
[text redacted]
NGA Portfolio ATC Margins (in €)

[figure redacted]

Note: [text redacted]
Source: Copenhagen Economics (based on data provided by eir)

4.55 Both ComReg and Oxera acknowledge that eir's headroom is *"above the level that would indicate a desire to squeeze margins to the minimum allowed amount."*[141] This is not indicative of eir "making the most of" existing regulatory constraints with an attempt to foreclose downstream rivals but strongly suggests that the risk of margin squeeze is low, undermining the economic case for an MST.

4.56 **eir relies significantly on wholesale customers**. [text redacted][142] This is indicative of eir's incentive to "fill" the FTTX network and recover the associated fixed costs through its own retail customers *and* those of access seekers. It is well documented that, when faced with competitive pressure from alternative infrastructures, an incumbent operator can have strong incentives to provide access.[143] This is particularly true if the alternative infrastructures are set to provide wholesale access rather than just inputs to their own retail arm (see Chapter 3).[144]

4.57 ComReg acknowledges this by noting that "*In circumstances where there are alternative network infrastructure providers present, the incentive of the SMP operator to engage in a margin squeeze at the wholesale and retail level may be weakened.*"[145] While ComReg (in our view correctly) recognises that both wholesale and retail level competition can undermine eir's incentives and ability to engage in margin squeeze, ComReg does not believe that these constraints are effective enough.

141 ComReg WLA Consultation, paragraph 9.433
142 [text redacted]
143 (Oxera, 2017)
144 (Ordover & Shaffer, 2007)
145 ComReg WLA Consultation, paragraph 9.400

4.58 ComReg's reasoning is based on the alleged lack of direct and indirect pricing constraints, which, in the light of our assessment (Chapter 3) appears questionable. For example, the evidence informing ComReg's market definition is indicative of direct pricing constraints at the retail level and indirect constraints between retail and wholesale products. This is also inconsistent with ComReg's own views on the mechanism through which end-users switching to alternative providers would constrain eir from engaging in margin squeeze. Indeed, ComReg itself sets out that the lower retail prices resulting from a margin squeeze could trigger a price reduction by other end-to-end networks, and retail customers currently subscribed to eir or its wholesale customers could divert to other networks.[146] ComReg nevertheless concludes on such constraints being insufficient without providing any clear evidence of the strength (or lack of) these constraints.

4.59 Furthermore, according to Oxera, the growth of access seekers' market shares and lack of evidence of attempts to engage in a margin squeeze do not suffice to rule out competition concerns. Rather, Oxera opines that eir's incentives to squeeze may vary over time and that "*once Eircom has developed sufficient volumes on its network (in particular, after significant volumes of customers have migrated from FTTC to FTTH), it have the incentive to engage in a margin squeeze to foreclose access seekers, with their customers and expand its market shares*".[147]

4.60 **Oxera's reasoning appears speculative and not consistent with standard theories of harm concerning incentives to foreclose**. From an economic perspective, an incumbent would be expected to engage in foreclosure (e.g., through margin squeeze) at the early stages of market development. The incentive to foreclose competitors and grow a customer base are expectedly strongest when the market (or in this case the FTTH segment) is growing, less so (as Oxera claims) when the market has already matured.[148] This – in our view more plausible – theory of harm does not appear to hold in the Irish FTTH segment with no evidence of attempts to foreclose competitors.

4.61 Overall, the available evidence unambiguously shows that eir does not seek to foreclose competitors from the FTTH market. There is therefore no reasonable justification to impose an MST.

An undue MST creates regulatory burden and may be distortive

4.62 ComReg's and Oxera's conclusion on the need for an MST does not account for the risk of distortive effects of unwarranted regulation. Without evidence of a margin squeeze Oxera views that "*the consequence of errors from choosing not to impose an MST and later observing a squeeze compared to imposing and MST and finding it may not have been necessary would suggest that, on balance, it would be proportionate to impose margin squeeze obligations, given the risks of not doing so.*"[149]

4.63 Further to the fact that a similar logic could be a justification for any remedies on any market under any circumstances, no matter how competitive, Oxera's and ComReg's reasoning downplays the consequences of unwarranted regulation.

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[146] ComReg WLA Consultation, paragraphs 9.400-9.405
[147] Oxera Part 3, paragraphs 1.17 and 5.31
[148] (Inderst & Valletti, Incentives for input foreclosure, 2011)
[149] Oxera Part 3, paragraph 5.38

4.64 First, the design of the proposed test is in many ways lenient and allows eir to price its products flexibly.[150] In particular, the level of aggregation (portfolio-based approach) and efficiency assumption (equally efficient operator, EEO) are consistent competition law principles and not restrictive.[151] That said, **it is not clear why LRIC+ or average total costs (ATC) is required as the cost standard for bundled products**. ComReg suggests this approach is more consistent with its regulatory objectives (including the promotion of entry) and that "*multi-product firms cannot be foreclosed across the portfolio of products in the long run*".[152]

4.65 However, given the lack of any evidence to indicate that eir would be close to engaging in a margin squeeze or distortionary cross-subsidisation between products, it would seem reasonable to employ a cost standard that allows eir to price both bundles and stand-alone products as flexibly as possible, as long as eir's pricing remains compliant with competition law. Promotion of entry, while an important regulatory objective in nascent markets, should be given lesser weight in the design of an MST when entrants have already gained scale. More clarity on the rationale for ATC is needed, given the relatively high market shares already achieved by access seekers. Market conditions may not warrant a stringent ATC standard which limits eir's ability to price flexibly across stand-alone and bundled FTTH products. Oxera appears to recognise the lack of any concerns over such cross-subsidisation.[153]

4.66 Second, unlike suggested by Oxera, **the proposed MST comes with non-negligible regulatory burden**. The test composed of several assumptions requires constant monitoring and data requirements that may impede or slow the launch of new retail or wholesale products. For example, eir will need to demonstrate that any new offers or price plans are net present value (NPV) positive based on assumptions and a discount rate (WACC) prescribed by ComReg (summarised in Table 52 in ComReg's consultation). This is a non-trivial modelling exercise likely complicating eir's decision-making and constraining its ability to respond to competition. Further, the focus on (in ComReg's terms) "flagship" products involves significant reporting requirements. The flagship products need to be determined on a quarterly basis with the submission by eir of its quarterly monitoring statements and modified monitoring statements.[154] In the absence of any evidence to support the imposition of an MST, adding such significant regulatory costs does not seem proportionate.

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[150] See e.g., ComReg WLA Consultation paragraphs 9.209-9.241, and Oxera Part 1, paragraph 4.10

[151] ComReg (as any NRA) can, in certain circumstances, introduce an MST that is less lenient than the test that competition authorities would apply, given ComReg's statutory duty to promote competition.

[152] ComReg WLA Consultation, paragraph 9.484

[153] On the one hand, Oxera notes *that "there is no evidence to suggest that there may be concerns that Eircom could cross-subsidised the recovery of common costs between standalone and bundled FTTH products to foreclose […]"* and, on the other, that the recommended option *"limits Eircom's ability cross-subsidise across standalone and bundled FTTH products."*

[154] See ComReg WLA Consultation, paragraph 9.518: in determining which of eir's FTTH retail offerings should be considered as "flagship products", it is proposed that eir identifies the highest volume FTTH retail offerings, which together account for at least 75 per cent of eir's total retail FTTH volumes. Furthermore, paragraph 9.517 holds: *"In addition, the flagships must include the highest volume standalone FTTH retail offering and the highest volume bundled FTTH retail offering if not identified as part of the 75%."*

COMREG'S PROPOSALS TO RESTRAIN EIR'S ABILITY TO REDUCE PRICES CAN DISTORT COMPETITION

4.67 ComReg proposes continued forms of restrictions on eir's ability to reduce prices and offer discounts. ComReg proposes to relax the prevailing ban of discounts for FTTH VUA.[155] The proposed approach would mean that such offers are subject to case-by-case approval by ComReg and to be permitted "*only where ComReg is satisfied that the promotion or discount is consistent with the promotion of network competition and encouraging investment […]*"[156] **ComReg further notes that since 2018, it has not received any applications from eir seeking approval of a discount for FTTC VUA or FTTH VUA.**[157] ComReg states that network investments and upgrades of rival operators could lead to "*more aggressive price competition in the WLA market*".[158] Finally, ComReg identifies risks of distortionary effects in geographically deaveraged prices and considers it necessary to maintain a pre-approval mechanism for any sub-national discounts. Box 6 summarises ComReg's proposals.

[155] In its 2018 decision, ComReg imposed a ban on wholesale promotions and discounts for WLA or WCA services. However, it noted that it may permit reductions in wholesale VUA prices in cases where the price reduction met a number of criteria and did not fall below a level consistent with eir's full deployment costs in the specific geographic area.

[156] ComReg WLA Consultation, paragraph 1.23

[157] ComReg WLA Consultation, paragraph 9.326

[158] ComReg WLA Consultation, paragraph 9.326

Box 6 Summary of proposed price controls restricting eir's ability to reduce prices

- **Pre-approval requirement for lowering regulated FTTC VUA prices**
  Under ComReg's proposal it is possible for eir to reduce its wholesale FTTC VUA price below the regulated price. In such cases approval requires that eir demonstrates that it is losing market share "*as the result of price competition and that the proposed price reduction is necessary to allow it to compete with the prices from other operators*".
  If seeking to lower FTTC VUA prices in specific geographic areas, ComReg requires eir to demonstrate that i) "*it is not in the position to compete on the basis of applicable prices, providing evidence of loss of market share in the geographic area concerned*" and ii) the proposed reduction is not less than the higher of either an alternative operator's VUA price or eir's full deployment costs for VUA in the geographic area concerned based on a BU-LRAIC+ model.

- **Price floor on FTTH VUA**
  ComReg proposes that the FTTC VUA price acts as price floor for FTTH VUA. In principle, eir will be allowed to price FTTH VUA below FFTC VUA in a specific geographic area. Such situations can occur only under what ComReg identifies as "*exceptional circumstances*", when eir demonstrates that lower FTTH VUA prices are necessary to allow eir to compete with rival operators. ComReg's approval requires eir to show that: i) it is not in a position to compete based on applicable prices; and that ii) the proposed reduction is not less than the higher of either an alternative operator's VUA price or eir's full deployment costs for VUA in the geographic area concerned based on a BU-LRAIC+ model.

- **Pre-approval requirement on FTTH promotions and discounts**
  ComReg's proposal allows for promotions or discounts in FTTH VUA. However, eir is required to obtain ComReg's prior approval. ComReg will assess promotions and discounts on a case-by-case basis and focus on ensuring that these will "*not have a detrimental impact on actual or potential economically efficient alternative investment in very high capacity networks*". ComReg proposes "*that Eircom should not be allowed to introduce wholesale geographically differentiated promotions and discounts that target specific areas*", except in "*exceptional circumstances*". While ComReg does not provide additional detail on what type of circumstances these may be, geographic differentiation is one of the dimensions ComReg will look at when assessing the approval requests.

- **Pre-notification and publication requirements for price reductions and discounts**
  Besides being required to obtain ComReg's prior approval, eir is also required to give access seekers advance notice of wholesale price reductions and discounts. Under ComReg's proposal, lowering prices will take eir at least three or seven months. Access seekers must be notified at least two months in advance (in some cases, six months in advance) of any price reductions.

Source: Copenhagen Economics based on ComReg WLA Consultation

4.68 We assess the economic rationale for such restrictions and how they might impact on eir's ability to compete effectively.

ComReg does not sufficiently substantiate the need for restrictions

4.69 ComReg's theory of harm appears to be that eir would engage in below-cost pricing with an intention to make competitors' entry unprofitable and unattractive, and to then increase prices when competitors are foreclosed. While ComReg's price floors involve significant detailed cost modelling, ComReg (or Oxera) has not provided evidence to suggest that eir would foreclose its rivals through below-cost discounting. The pre-requisites for such foreclosure are that i) eir is **dominant** in the WLA market, ii) eir has an **incentive** to engage in sustained discounting in order to make it unprofitable for competitors to enter the market, and iii) eir has an **ability** to offer discounts only to increase its prices after its competitors have exited the market. ComReg's evidence on each of these conditions seems questionable:

- **Competitive constraints in overlap areas diluting market power**: ComReg's itself alludes to "*aggressive price competition in the WLA market*" which is inconsistent with eir holding a dominant position especially in areas where competing networks are present and where ComReg's theory of harm is of most relevance (as explained in detail in Chapter 3).

- **Incentives to meet competition, not to foreclose rivals**: [text redacted]; eir's FTTC VUA price is already more than €18.[159] Operators compete predominantly on price and eir has an apparent incentive to meet competition. Restraining eir's ability to doing so would dampen competition (we return to this below).

- **Ability to engage in below-cost pricing limited in wholesale market**: ComReg or Oxera do not explain whether eir could under any conceivable circumstances engage in below-cost pricing just to foreclose rivals and remain profitable in the long term. **eir's main rivals, SIRO and Virgin Media, have already invested or committed to investing in FTTH networks**. Even if eir was (for the sake of argument) successful in attracting wholesale customers in the next regulatory period at the expense of its rivals due to below-cost pricing, SIRO (in particular) and Virgin Media will have incurred the sunk cost of deploying networks and will have an incentive to fill them at competitive prices irrespective of eir's costs.

4.70 Thus, ComReg's proposals to prescribe the terms for eir's ability to meet competition are not based on evidence of eir seeking to foreclose competitors through below-cost pricing, or eir having an incentive and ability to do so.

Overly prescriptive restrictions on price reductions can dampen competition

4.71 ComReg acknowledges that limitations on promotions and discounts skew competition in favour of eir's rivals but dismisses the magnitude of such effects. ComReg recognizes that "*the fact that rival operators are themselves able to offer wholesale promotions and discounts may leave Eircom at an unfair commercial disadvantage or limit price competition to the detriment of Access Seekers in downstream markets and ultimately end-users*".[160]

[159] Information provided by eir.
[160] ComReg WLA Consultation, paragraph 9.349

4.72 However, ComReg disqualifies how these restrictions on eir's pricing freedom dampen competition. ComReg asserts that "*discounts does not appear to have hampered Eircom's ability to compete for FTTH subscribers*".[161] ComReg however fails to provide a counterfactual on how competition would have developed if eir had the ability to use promotions and discounts at the wholesale level. Considering that eir faces competitive constraints especially in areas where other network operators are present (as shown previously), promotions and discounts could have conceivably been an effective pricing instrument to compete in the wholesale market. We cannot rule out the possibility that pricing restrictions may have led to less competitive outcomes than would have otherwise occurred, especially in areas where other operators are already present.

4.73 The proposed prescriptive price floors coupled with a minimum three-month assessment phase and two-month notification period would undermine eir's ability to explore suitable price points in a nascent market and runs the risk of dampening competition between eir and (in particular) SIRO.

4.74 First, **the FTTH segment is growing rapidly but still faced with demand uncertainty.** This means that operators are testing customers' willingness to pay for FTTH services and finding appropriate price levels. Evidence of eir's commercially driven price changes illustrates this (see Chapter 3). Both ComReg and Oxera recognise the demand uncertainty surrounding FTTH but this recognition does not seem to be reflected in the proposed approach to regulating price reductions.

4.75 Second, **eir's restricted ability to price below the prescribed FTTC VUA based price floor will not encourage rival operators to price more than marginally below eir's allowed wholesale price.** There is already evidence of direct wholesale competition between (especially) SIRO and eir. [text redacted] This is consistent with economic theory: in circumstances where operators compete on price (we understand that FTTH VUA is a relatively homogenous product) even small price reductions can suffice to win customers from an incumbent that cannot meet competition without regulatory approval.

4.76 Third, **the proposed prohibition of geographically targeted discounts lacks economic foundation**. ComReg proposes that eir should not be allowed to introduce wholesale geographically differentiated promotions and discounts that target specific areas.[162] ComReg acknowledges that non-urban CAPEX per FTTH connection will likely be higher than in urban areas[163] but bases its proposal on practical difficulties. By restraining eir's ability to respond to the varying competitive conditions ComReg would provide SIRO and Virgin Media with a significant competitive advantage. We note that ComReg's provisional conclusion is not consistent with Oxera's recommendation. Consistent with our view, Oxera recommends that any geographically targeted discounts should be permitted insofar as they are reflective of costs.[164]

4.77 Fourth, **ComReg's proposed timeframe further obstructs eir's ability to compete**. Under ComReg's proposal, lowering prices will take eir at least three or seven months. Accordingly, access seekers must be notified at least two months or six months in advance of any price reductions, see **Box 7**.

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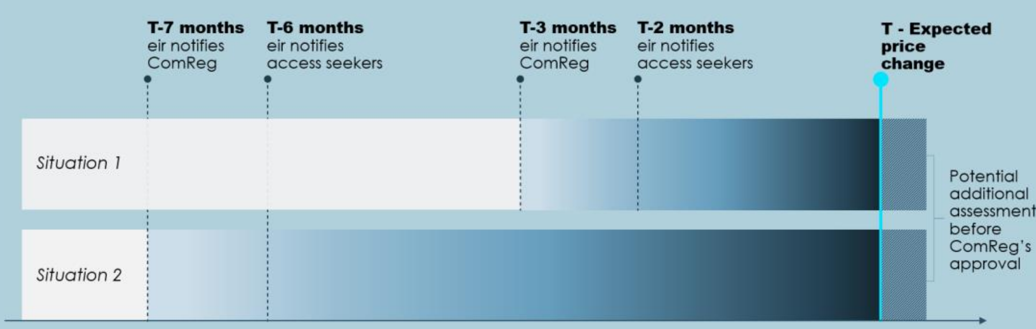
[161] ComReg WLA Consultation, paragraph 9.350
[162] ComReg WLA Consultation, paragraph 9.372
[163] ComReg WLA Consultation, paragraph 9.367
[164] Oxera Part 1, 5.40

Box 7 Relevant timeframe for wholesale price reductions, promotions and discounts

Under ComReg's proposal, eir is required to seek approval and inform access seekers of wholesale promotions and discounts in FTTH and price reductions in FTTC VUA or FTTH VUA (below price floor). According to the timeframe applicable to these requirements, eir is required to notify:

- ComReg (including the submission of a pricing statement of compliance):
    - at least three months in advance
    - one month in advance of notification to Access Seekers
- Access seekers
    - two months in advance
    - six months in advance if pricing changes require access seekers to prepare IT systems or source and purchase new equipment to access the service.



Note: Situation 1 depicts the relevant timeframe for changes requiring a two-month notice period to access seekers and Situation 2 depicts the relevant timeframe for changes requiring a six-month notice period to access seekers.

Source: Copenhagen Economics

4.78 This lengthy process leaves eir at a significant competitive disadvantage relative to its wholesale competitors when competing for access seekers.

4.79 First, **this provides eir's competitors the ability to marginally undercut eir**. Transparent price controls gives eir's competitors accurate information about eir's (lack of) freedom to set prices. As a result, eir's wholesale competitors can identify the price points at which they can (marginally) undercut eir.

4.80 Second, **lengthy approval times will impede eir to timely engage in the competitive process via lower prices**. In a competitive process, eir would seek to compete with lower prices to those of its competitors. A (at least) three-month approval process and the resulting uncertainty on the ability to provide the desired price renders this scenario unlikely. ComReg's proposal largely undermines the fairness of the competitive process, leaving eir's competitors with information and time related advantages in any negotiation.

4.81 ComReg underestimates the level of existing competition hence misjudging the flexibility eir needs to be active in the competitive process. ComReg recognises that allowing eir price flexibility ultimately benefits wholesale customers and end-users, stating that "*providing Eircom with the necessary flexibility to compete fairly could be to the benefit of Eircom's wholesale customers and ultimately end-users in the form of lower prices*".[165] ComReg further notes that this particularly true where "*network platform expansion or technology upgrades by rival operators could lead to more aggressive price competition in the WLA market*".[166] However, when setting the remedies ComReg fails to acknowledge several of its own findings. In particular, ComReg fails to consider that i) there is already significant (and increasing) network overlap within the commercial area and that ii) eir is constrained in WLA in the commercial area.

Discounts can be used to share investment risks

4.82 Temporary or longer-term reductions in prices are features of a competitive market. In the context of ComReg's objectives to foster investments in fibre access networks, volume-based discounts can have an additional benefit through sharing the fixed-costs of network investment. The European Commission sets out that permitting pricing flexibility in the form of discounts "*would allow SMP operators and access seekers to share some of the investment risk by differentiating wholesale access prices according to the access seekers' level of commitment. This could result in lower prices for long-term agreements with volume guarantees, which could reflect access seekers taking on some of the risks associated with uncertain demand.*"[167]

4.83 ComReg acknowledges these principles. While ComReg does not propose an outright ban on volume-based discounts, **more clarity appears needed on the circumstances under which such discounts could be anti-competitive**. These circumstances are discussed in the Oxera report and drawn upon in ComReg's consultation (e.g. loyalty-enhancing or exclusive agreements). They are, in their current form, generic and theoretical and as such unlikely to provide eir with sufficient certainty before entering into a lengthy approval process.

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[165] ComReg WLA Consultation, paragraph 9.326
[166] ComReg WLA Consultation, paragraph 9.326
[167] (European Commission, 2013), paragraph 49

CHAPTER 5

CONCLUDING REMARKS: UNDUE REGULATION RUNS THE RISK OF DISTORTIONS

5.1 In this report, we have set out how the upcoming regulatory period is likely to be characterised by intensifying infrastructure-based competition with both SIRO and Virgin Media constraining eir directly in the wholesale market and indirectly via the retail markets. The available evidence from the ongoing regulatory period indicates that eir is already faced with increasing competition. We did not find evidence to suggest that eir would have sought to foreclose its downstream competitors, crowd out competitive investment or charge excessive prices. On the contrary, in the WLA market, eir has enabled access seekers to gain significant ground in the FTTH segment and has offered steady (in real terms declining) pricing of its FTTC rentals. In the PIA market, volumes have remained very low and there is no evidence of any material competition concerns.

5.2 In this market context, any access regulation should be targeted and proportionate to the gravity of any competition problems identified. Where the evidence does not support a finding of SMP, or an imposition of stringent remedies, ComReg ought to weigh the benefits of prolonged regulation against the corresponding costs. While ComReg is taking steps to phase out some of the remedies currently in place, we find that ComReg has not fully assessed the likely adverse effects of some of the proposed remedies that continue to dictate eir's pricing and – consequently – its ability to compete and invest. In particular:

5.3 **Symmetric access to physical infrastructure**: It is unclear why eir remains as the only provider of PIA that is subject to strict cost orientation remedies. Duplication of costs associated with physical infrastructure with limited room for differentiation is not efficient and, therefore, guaranteeing third-party access on reasonable terms appears reasonable. That said, with substantial self-supply by SIRO and Virgin Media, and with widespread physical infrastructure deployed by ESB, we find that ComReg's objectives could be achieved through other, more symmetric, approaches to regulation, such as the BCRD, which already requires all physical infrastructure providers to grant access, regardless of market power. ComReg's proposed approach to designate eir as the only operator subject to SMP regulation will, with respect to newbuild sites, specifically, run the risk of undermining eir's investment incentives and distorting competition.

5.4 **Orderly migration to FTTH**: Central to ComReg's objectives is to provide a regulatory framework that incentivises deployment and uptake of fibre-based broadband. While this is recognised by ComReg and its economic adviser, it is unclear to us why ComReg regardless proposes a set of caps and floors to dictate eir's prices, restrictions on geographic differentiation, and lengthy approval periods for price cuts. Orderly migration to FTTH could be achieved through further flexibility, e.g. voluntary wholesale access commitments, non-discriminatory access terms and monitoring of prices and returns to safeguard against any risk of excessive prices.

5.5 **Vibrant VUA wholesale competition**: In the light of evidence of price reductions in response to SIRO's presence and an increasing share of access seekers relying on alternative networks, restrictions to eir's ability to compete on prices will dampen competition. Insofar as eir's prices are effectively bound by strict and published regulatory-mandated price floors, competitors are unlikely to compete as fiercely as they could. There is a strong case for ComReg to reconsider its approach to the currently proposed approval process, which, if implemented, needs to enable swift responses to competitors' prices.

5.6 Ex ante regulation inevitably involves a degree of judgement and careful balancing between different regulatory objectives. The well-established aim of the regulatory framework is to gradually scale back regulation as competition in the markets develops.[168] The European Commission makes clear that *"NRAs should therefore choose the least intrusive way of addressing potential harm to effective competition in the identified market."*[169]

5.7 There is clear evidence of competition in the market today. It is also evident that the level of competition will increase during the upcoming regulatory period, due to the expansions and upgrades of other networks. Despite this, ComReg reaches the conclusion that extensive and intrusive regulation is required and that for WLA this ought to apply across the entire commercial area. When exercising judgement in these markets, it is important that ComReg takes a forward-looking approach to market definition, to the presence of competitive constraints and the design of remedies. Given the evidence of recent and upcoming market developments, we believe that there is a strong case for revisiting the case for, the scope of, and the degree of intervention required.

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168 (European Commission, 2020), paragraph 3
169 (European Commission, 2020b), page 10

REFERENCES

ACM. (2018). *Market Analysis Wholesale Fixed Access.*

ACM. (2022, August 26). *ACM sets lower access rates for KPN and Glaspoort to stimulate competition for fast internet.* Retrieved from ACM: https://www.acm.nl/nl/publicaties/acm-stelt-lagere-toegangstarieven-kpn-en-glaspoort-vast-om-concurrentie-voor-snel-internet-te-stimuleren

Arcep. (2019). New Code, new challenges for the Gigabit society A French eye on the issue. *WIK Conference.*

BEREC. (2014). *Common Position on geographical aspects of market analysis.*

BEREC. (2019a). *BEREC Report on Access to physical infrastructure in the context of market analyses.*

BEREC. (2019b). *Public Consultation BEREC Report on Access to physical infrastructure in the context of market analysis.*

BEREC. (2021). *BEREC Opinion on the Revision of the Broadband Cost Reduction Directive.*

BEREC. (2022). *Report on competition amongst multiple operators of NGA networks in the same geographical region.*

Burke-Kennedy, E. (2021, October 28). *Siro announces €620m investment to upgrade broadband network.* Retrieved from The Irish Times: https://www.irishtimes.com/business/technology/siro-announces-620m-investment-to-upgrade-broadband-network-1.4712850

CNMC. (2021). *RESOLUTION APPROVING THE DEFINITION AND ANALYSIS OF THE MARKETS FOR LOCAL WHOLESALE ACCESS PROVIDED AT A FIXED LOCATION...* Madrid.

Competition and Markets Authority. (2018). Good practice in the design and presentation of customer survey evidence in merger cases.

ComReg. (2020). *ComReg Document No 20/101: Regulated Wholesale Fixed Access Charges, Review of the Access Network Model and Specification of the Price Control for Public Switched Telephone Network Wholesale Line Rental - Consultation and Draft Decision.*

ComReg. (2021). *ComReg Document No 21/130s: Regulated Wholesale Fixed Access, Review of the Access Network Model, Annex 1 - Non-Confidential Submissions to Consultation 20/101 and Consultation 20/81.*

ComReg. (2022). *Irish Communications Market Summary: Quarterly Key Data Report Data as of Q2 2022.*

ComReg. (2023). *Market Review Wholesale Local Access (WLA) provided at a fixed location Wholesale Central Access (WCA) provided at a fixed location.*

ComReg. (2023). *Physical Infrastructure Access (PIA) Market Review.*

Cullen International. (2020). *Wholesale broadband access regulation in France, Germany, The Netherlands, Portugal and Spain.*

DBA. (2021). *Market analysis of wholesale markets for network access to high-capacity infrastructure at a fixed location (M3HC).*

DBA. (2023). *Overview of wholesale broadband decisions 2021/22 - updated January 2023.* Retrieved from Erhvervsstyrelsen.

Designation as a company with considerable market power, 1781/3/18 2667/3/18 (Finnish Supreme Administrative Court November 12, 2020).

eir. (2023, February 22). *Ireland now one of best countries in Europe for broadband as eir fibre passes 1 million homes.* Retrieved from eir: https://www.eir.ie/pressroom/Ireland-now-one-of-best-countries-in-Europe-for-broadband-as-eir-fibre-passes-1-million-homes/

ESB. (2019). *ESB Presentation on National Broadband Plan June 2019.*

ETNO. (2021). *Broadband Cost Reduction Directive Review.* Discussion Paper.

European Commission. (n.d.). COMMISSION STAFF WORKING DOCUMENT - EXPLANATORY NOTE.

European Commission. (2013). *Commission Recommenation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.*

European Commission. (2018). *COMMISSION STAFF WORKING DOCUMENT accompanying the document COMMUNICATION FROM THE COMMISSION Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and service.*

European Commission. (2018). *Communication from the Commission: Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services.*

European Commission. (2019). *Case SE/2019/2216: Wholesale local access to fibre networks, Commission's serious doubts.*

European Commission. (2020). *Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establ.* Official Journal of the European Union.

European Commission. (2020b). *COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE Accompanying the document COMMISSION RECOMMENDATION on relevant product service markets within the electronic communications sector.*

European Commission. (2020c, February 10). *Commission blocks Swedish regulation of fibre networks, requesting detailed analysis of geographic markets.* Retrieved from European Commission: https://digital-strategy.ec.europa.eu/en/news/commission-blocks-swedish-regulation-fibre-networks-requesting-detailed-analysis-geographic-markets

European Commission. (2023). *EU proposes new rules for Gigabit connectivity.* Retrieved from https://digital-strategy.ec.europa.eu/en/policies/eu-rules-reduce-cost-high-speed-broadband-deployment

European Parliament and Council of the EU. (2014). *DIRECTIVE 2014/61/EU of the European Parliament and of the council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.* Official Journal of the European Union.

European Parliament and Council of the EU. (n.d.). *Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.* Official Journal of the European Union.

Inderst, R., & Valletti, T. (2009). Indirect versus Direct Constraints in Markets with Vertical Integration. *Scandinavian Journal of Economics*, 527-546.

Inderst, R., & Valletti, T. (2011). *Incentives for input foreclosure.* European Economic Review.

ITU. (2020). *Infrastructure sharing and co-deployment in Europe: good practices based on collaborative regulation.*

Kennedy, J. (2018, August 7). *Siro passes 175,000 premises with fibre-to-the-home broadband.* Retrieved from Silicon Republic: https://www.siliconrepublic.com/comms/siro-fibre-home-network-roll-out

Liberty Global. (2021, November 3). *Investor News and Events.* Retrieved from Liberty Global: https://www.libertyglobal.com/wp-content/uploads/2021/11/Fixed-Income-Q3-2021-Release.pdf

Liberty Global. (2022, February 17). *Investor News and Events.* Retrieved from Liberty Global: https://www.libertyglobal.com/wp-content/uploads/2022/02/UPC-Fixed-Income-Q4-2021-Release.pdf

Liberty Global. (2022, October 27). *Virign Media Ireland Announces Wholesale Deal With Vodafone.* Retrieved from https://www.libertyglobal.com/virgin-media-ireland-announces-wholesale-deal-with-vodafone/

Liberty Global. (2023, February 23). *Investor Call Q4 2022.* Retrieved from Liberty Global: https://www.libertyglobal.com/wp-content/uploads/2023/02/LG-Q4-2022-Investor-Call-Presentation.pdf

Liberty Global. (2023, February 22). *Investor News and Events.* Retrieved from Liberty Global: https://www.libertyglobal.com/wp-content/uploads/2023/02/Virgin-Media-Ireland-Fixed-Income-Q4-2022-Release.pdf

McGowran, L. (2022, September 19). *Siro completes 10-gigabit network upgrade for Irish enterprises*. Retrieved from Silicon Republic: https://www.siliconrepublic.com/comms/siro-10-gigabit-fibre-network-ireland-enterprises

O'Mahony, C. (2023, February 22). What's unique about Siro's offering to the construction industry? iProperty Radio. Retrieved from https://www.youtube.com/watch?v=vQgsEKbdrUU&list=PL5hAEpymn6vkbVuF7WGx5ULPpFYYolFpp

O'Mahony, C. (2023, February 22). What's unique about Siro's offering to the construction industry? iPropertyRadio. Retrieved from https://www.youtube.com/watch?v=vQgsEKbdrUU&list=PL5hAEpymn6vkbVuF7WGx5ULPpFYYolFpp

O'Connor, S. (2020, April 23). *FTTH Council Europe Unveils 2020 Fibre Market Panorama and European Ranking*. Retrieved from SIRO: https://siro.ie/news-and-insights/ftth-market-panorama-2020/

Ofcom. (2018). *Wholesale Local Access Market Review Statement: Volume 1*.

Ordover, J., & Shaffer, G. (2007). Wholesale access in multi-firm markets: When is it profitable to supply a competitor? *International Journal of Industrial Organisation*.

Oxera. (2013). *eircom's next generation access products, Pricing Principles and Methodologies, Final report prepared for Commission for Communications Regulation*.

Oxera. (2017). *Regulating oligopolies in electronic communications markets Discussion paper prepared for Liberty Global*.

Oxera. (2018). *Regulating oligoplies in electronic communications markets: supplementary discussion paper*.

Oxera. (2022). *Oxera report Part 1: Prepared for Commission for Communications Regulation*.

Oxera. (2022). *Oxera report: Part 3 Prepared for Commission for Communications Regulation*.

REDC. (2023). *WLA WCA Residential Market Research*.

REDC. (2023). *WLA WCA SME Market Research*.

SIRO. (2022, August 18). *Virgin Media Expands Market Reach Adding 450,000 Premises Nationwide in SIRO Network Deal*. Retrieved from SIRO: https://siro.ie/news-and-insights/virgin-media-expands-market-reach-on-the-siro-network/

SIRO. (n.d.). *SIRO Towns*. Retrieved from SIRO.

Valleti, T. M. (1999). *Switching costs in vertically related markets*.

Viestintävirasto. (2018). *Päätös huomattavasta markkinavoimasta (English: Decision on significant market power in the local loop and bitstream markets)*.

Virgin Media. (2020, August 20). *Virgin Media switches on 1 Gigabit Broadband network covering almost 1 Million homes across Ireland, available immediately from today*. Retrieved from Virgin Media: https://www.virginmedia.ie/about-us/press/2020/virgin-media-becomes-irelands-largest-gigabit-broadband-provider/

WIK Consult. (2017). *Best practice for passive infrastructure access*.

WIK Consult. (2018). *Future electronic communications product and service markets subject to ex-ante regulation. Recommendation on relevant markets*. Appendix A.

APPENDIX A

CORRECTED SSNIP TEST METHODOLOGY

5.8 In this appendix, we describe the methodology that we adopted in performing a corrected SSNIP test to properly account for the full demand response to a wholesale price increase. We briefly describe the reasoning behind each relevant methodological choice and present intermediate results where relevant.

5.9 Based on ComReg's data[170], most centrally the residential and SME customer surveys regarding how different users would respond to price increases, we determine the estimated actual loss suffered by the hypothetical fibre WLA monopolist as a result of a 10 per cent wholesale price increase.

5.10 According to the sequential calculations performed as part of this exercise, this chapter is organized as follows:

1. Allocation of consumers that "don't know".
2. Allocation of consumers that "shop around".
3. Excluding consumers that switch to other fibre .
4. Computing the average across residential and SME respondents.
5. Scaling the survey results to the expected retail price increase due to a wholesale SSNIP.
6. Computing the average across bundle and standalone respondents.

ALLOCATION OF CONSUMERS THAT "DON'T KNOW"

5.11 The main objective of CE's corrected SSNIP is to account for the full demand response to a price increase. While a share of consumers responded that they did not know how they would react to a hypothetical price increase, how they would actually react to this price increase must be considered in the SSNIP test.[171]

5.12 We consider that on average "don't know" respondents will react to a price increase in the same way as the remaining survey respondents. This is an adequate approach as their answer seems insufficient to determine whether these consumers have higher or lower price sensitivity or likelihood of switching.

5.13 "Don't know" consumers were therefore allocated to the remaining response categories i) do nothing, ii) stay and downgrade, iii) cancel completely, iv) cancel but switch broadband only, v) cancel but switch all, and vi) shop around, according to their relative weight.[172]

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[170] Annex 2: Residential Market Research, and Annex 3: SME Market Research.

[171] Answering the survey question "*Which of the following would best describe what you and your household would be most likely to do in response to this hypothetical €4 price increase of your broadband service?*" (see Annex 2: Residential Market Research, slide 64).

[172] We did not allocate any "don't know" respondents to the very small additional response category labelled "something else".

5.14 This exercise was performed for bundle and for standalone consumers, both in the residential and the SME segment. For residential consumers, the starting point was the set of results for fibre consumers response to a price increase, presented in slides 55 and 64 of the residential survey results.[173] For SME consumers, the starting point was the set of results for fibre consumers response to a price increase, presented in slides 47 and 53 of business consumers survey results.[174] The results of this exercise are presented in Table 3.

Table 3
Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after allocating "don't know" respondents

ACTION TAKEN IN PRICE INCREASE	RESIDENTIAL BUNDLE	RESIDENTIAL STANDALONE	SME BUNDLE	SME STANDALONE
Do nothing	63.5	52.1	62.0	71.2
Stay and downgrade	8.2	2.5	2.0	0.0
Cancel completely	0.0	2.5	2.0	0.0
Cancel but switch broadband only	2.4	6.2	13.0	8.3
Cancel but switch all	2.4	3.7	3.0	8.3
Shop around	23.5	31.0	17.0	11.3
Something else	0.0	1.0	0.0	2.0

Source: Copenhagen Economics

ALLOCATION OF CONSUMERS THAT "SHOP AROUND"

5.15 Accounting for the full demand response to a price increase involves considering the actions of consumers who answered that they would react to a price increase by shopping around.

5.16 It is reasonable to consider that these consumers' responses signal that they are more price sensitive than the average. However, since the available evidence is insufficient to determine how much more sensitive these consumers are, we create two scenarios.

5.17 In the *first* scenario, we allocate "shop around" consumers assuming they respond to a price increase in the same way as the average consumer. This is a conservative scenario that assumes that "shop around" consumers are just as likely to switch or cancel as the average respondent. This scenario thus establishes a lower bound for the full demand response to a SSNIP. Shop around consumers are allocated to the response categories (i) do nothing, (ii) stay and downgrade, (iii) cancel completely, (iv) cancel but switch broadband only, (v) cancel but switch all, according to each category relative weight.[175]

[173] Annex 2: Residential Market Research
[174] Annex 3: SME Market Research
[175] As with the reallocation of "don't know" respondents, we do not reallocate any "shop around" respondents to the very small additional response category labelled "something else".

5.18 In the *second* scenario, we allocate "shop around" consumers assuming they all either switch or cancel – i.e., all "shop around" are allocated to the response categories (i) cancel completely, (ii) cancel but switch broadband only, and (iii) cancel but switch all, according to these categories' relative weights. Thus, this scenario depicts an upper bound for the full demand response to a price increase.

EXCLUDING CONSUMERS THAT SWITCH TO OTHER FIBRE PROVIDERS

5.19 Part of the fibre consumers that switch providers are expected to remain supported by a fibre network, which would also be controlled by the hypothetical monopolist. A conservative approach to determining the full demand response to a price increase involves estimating the share of switching consumers that, despite switching retail providers, remain on the hypothetical monopolist's fibre network.

5.20 Since the published data does not provide detail on the share of fibre consumers switching to other providers supported in fibre network, CE computed a proxy based on ComReg's data – slides 60 and 69 for residential consumers and slide 49 for SME consumers.

5.21 First, we exclude respondents that answered "*Broadband service provided over a Fibre supplier*". to the question "*Which type of broadband service would you be most likely to switch to?*", then recalculate the relative weight of each remaining response category[176]. This is adequate because switching to a "*Broadband service provided over a Fibre supplier*" would not be a valid response to fibre customers for whom the answer category "*continue with the same type of service offered by a different service provider*" was one of the possible responses. In the case of SME respondents, we further recalculate the relative weight of each response by excluding respondents that answered "*don't know*".

5.22 The resulting weight for the option "Same type of service offered by a different provider" is a proxy for the share of switching fibre consumers that would switch to other fibre-based retail services. We apply this share to the two categories "cancel but switch all" and "cancel but switch broadband only" to create a new category "Switch to another fibre provider".

5.23 This step was performed after the allocation of consumers that "shop around" for both scenarios (lower bound and upper bound). Revised results for the actions taken by fibre consumers respondents as a response to a price increase are presented in Table **4** and Table **5**.

[176] In the case of SME customers, the recalculated weight was performed also excluding the category "*don't know*" (besides the category "*Broadband service provided by a Fibre supplier*".

Table 4
Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after excluding fibre consumers that switch but remain in fibre networks – lower bound

ACTION TAKEN IN PRICE INCREASE	RESIDENTIAL BUNDLE	RESIDENTIAL STANDALONE	SME BUNDLE	SME STANDALONE
Do nothing	83.1	76.2	74.9	80.4
Stay and downgrade	10.8	3.6	2.4	0.0
Switch to another fibre provider	0.4	2.0	14.4	0.0
Cancel completely	0.0	3.6	2.4	0.0
Cancel but switch broadband only	2.9	7.8	4.0	9.3
Cancel but switch all	2.9	4.7	0.9	9.3
Something else	0.0	1.0	0.0	2.0

Source: Copenhagen Economics

Table 5
Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after excluding fibre consumers that switch but remain in fibre networks – upper bound

ACTION TAKEN IN PRICE INCREASE	RESIDENTIAL BUNDLE	RESIDENTIAL STANDALONE	SME BUNDLE	SME STANDALONE
Do nothing	63.5	52.1	62.0	71.2
Stay and downgrade	8.2	2.5	2.0	0.0
Switch to another fibre provider	1.7	4.8	23.2	8.5
Cancel completely	0.0	8.7	3.9	0.0
Cancel but switch broadband only	13.3	18.7	6.4	9.7
Cancel but switch all	13.3	11.2	1.5	9.7
Something else	0.0	1.0	0.0	2.0

Source: Copenhagen Economics

COMPUTING THE AVERAGE ACROSS RESIDENTIAL AND SME RESPONDENTS

5.24 We compute the weighted average response of overall bundle consumers and overall standalone consumers, for each scenario, based on the relative weights of residential and business broadband subscriptions. According to ComReg, in 2022 Q3, the residential segment accounted for 95.8 per cent (443,756) of the total number of FTTH broadband subscriber lines. Business subscribers accounted for the remaining 4.2 per cent (19,497).[177] Table **6** presents the results of this procedure, for both types of products.

Table 6
Average full demand response from bundle consumers and from standalone consumers in both scenarios (lower bound and upper bound)

ACTION TAKEN IN PRICE INCREASE	BUNDLE (LOWER BOUND)	BUNDLE (UPPER BOUND)	STANDALONE (LOWER BOUND)	STANDALONE (UPPER BOUND)
Do nothing	81.6	77.0	63.3	55.5
Stay and downgrade	9.3	3.0	7.1	2.0
Switch to another fibre provider	2.9	1.7	5.5	5.5
Cancel completely	0.4	3.0	0.7	7.1
Cancel but switch broadband only	3.1	8.1	12.1	17.1
Cancel but switch all	2.5	5.5	11.2	10.9
Something else	0.0	1.2	0.0	1.2

Source: Copenhagen Economics

SCALING THE SURVEY RESULTS TO THE EXPECTED RETAIL PRICE INCREASE DUE TO A WHOLESALE SSNIP

5.25 ComReg determines that a 10 per cent SSNIP of fibre WLA products would result in an effective retail price increase of €3.40 and €1.06 and for VUA and LLU products respectively. However, ComReg's surveys investigate how (i) bundle consumers react to a €4 price increase, and how (ii) standalone consumers react to a €2 price increase.

[177] Based on ComReg's data on Residential & Business Subscriber Lines x Platform, Quarterly Key Data Report.

5.26 To correct for the possible overestimation of demand response to a SSNIP, we adjusted the survey results downwards in the proportion of the price differences when survey data was based on a hypothetical price increase above the expected price increase in retail assuming a full pass-through. In summary, we adjusted:

- the average overall response from bundle customers so that we applied only 85 per cent (corresponding to the price ratio 3.4/4) of the overall demand response, when performing the critical loss analysis considering a 10 per cent SSNIP on VUA products.
- the average overall response from bundle customers so that we applied only 27 per cent (corresponding to the price ratio 1.06/4) and the average overall response from standalone customers so that we applied only 53 per cent (corresponding to the price ratio of 1.05/2), when performing the critical loss analysis considering a 10 per cent SSNIP on LLU products.
- we conservatively applied no adjustment to the average overall response of standalone customers in response to a SSNIP when performing the critical loss analysis considering a 10 per cent SSNIP on VUA products, where the survey response indicates the likely reaction to a €2 price increase, even though the price increase due to a 10 per cent SSNIP on VUA products at wholesale level would lead to a €3.4 price increase at retail level.

5.27 These adjustments were performed over the expected actual loss resulting from the consumers' response to a 10 per cent SSNIP (see Table **6**) comprising the responses (i) cancel completely, (ii) cancel but switch broadband only and (iii) cancel but switch all. Table 7 presents the results of this adjustment applied over the average overall demand response.

Table 7
Price-adjusted actual losses for overall bundle consumers and overall standalone consumers in response to a 10 per cent SSNIP in fibre WLA (VUA and LLU)

PRICE-ADJUSTED ACTUAL LOSSES IN RESPONSE TO A 10 PER CENT SSNIP IN FIBRE WLA	BUNDLE (LOWER BOUND)	BUNDLE (UPPER BOUND)	STANDALONE (LOWER BOUND)	STANDALONE (UPPER BOUND)
Actual loss (not adjusted for price differences)	6.1	16.6	23.9	35.2
Actual loss in VUA 10 per cent SSNIP (adjusted for price differences)	5.1	16.6	20.3	35.2
Actual loss in LLU 10 per cent SSNIP (adjusted for price differences)	1.6	8.8	6.3	18.6

Source: Copenhagen Economics

COMPUTING THE AVERAGE ACROSS BUNDLE AND STANDALONE RESPONDENTS

5.28 To present the aggregate demand response considering both type of products, we proceeded with a weighted average based on the corresponding relative weights in the number of total FTTH subscriptions. According to ComReg, in 2022 Q2, bundled broadband subscriptions accounted for 79,5 per cent of total subscriptions with a broadband component, while standalone represented 20,6 per cent of the total.[178]

5.29 Departing from values in Table 7, we computed the corresponding weighted average for the price-corrected actual losses. Table **8** presents the resulting average demand response in both scenarios.

Table 8
Average full demand response to a 10 per cent SSNIP in WLA and corresponding actual loss per in the lower bound and upper bound demand response scenarios

FULLY ADJUSTED DEMAND RESPONSE TO A 10 PER CENT SSNIP IN WLA	LOWER BOUND	UPPER BOUND
Actual loss in VUA 10 per cent SSNIP (adjusted for price differences)	7.50	23.40
Actual loss in LLU 10 per cent SSNIP (adjusted for price differences)	3.08	8.88
Critical Losses		
10 per cent SSNIP on WLA VUA products	6.95	6.95
10 per cent SSNIP on WLA LLU product	1.81	1.81

Note: Actual loss includes the responses (i) cancel completely, (ii) cancel but switch broadband only and (iii) cancel but switch all, after all previous corrections (allocation of don't know and shop around consumers and the exclusion of fibre consumers who switch but remain in fibre networks). Values for critical loss are those computed by ComReg (see WLA Consultation)
Source: Copenhagen Economics

[178] ComReg WLA Consultation Table 8, page 116

eir

Response to ComReg Consultation:

Physical Infrastructure Access (PIA) Market Review: Consultation

ComReg Document 23/04

3 March 2023

DOCUMENT CONTROL

Document name	eir response to ComReg 23/04
Document Owner	eir
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EXECUTIVE SUMMARY

1. Market analysis is not a mechanical or abstract exercise. It requires a detailed understanding of market dynamics and how they are likely to change over the market review period. The Irish broadband market is evolving rapidly. It is transitioning from legacy copper-based access technologies, including CG services and FTTC, to state-of-the-art FTTH technologies. Intense competition between providers, including SIRO, Virgin Media and eir, is driving this transition in commercial areas, while State-backed NBI is deploying in the National Broadband Plan Intervention Area ('IA').

2. The dynamics underpinning these changes, alongside the existing provisions available under the Broadband Cost Reduction Directive ('BCRD'), are critical context to this market review. They are highly relevant to all aspects of ComReg's assessment including market definition, market power, competition concerns and remedy design. Yet, they have not been properly taken into account by ComReg in the Consultation[1]. In the case of the BCRD, they have not been taken into account <u>at all</u>. The result is that ComReg's proposed PI remedies are unnecessary, unjustified and disproportionate, as we set out in detail in this response.

3. ComReg is not required by European or domestic law to undertake a separate review of physical infrastructure ('PI') markets. A decision to undertake a standalone PI market review and, based on that review, impose remedies must be based on specific market circumstances in Ireland. Market circumstances in Ireland do not justify a separate PI market review; ComReg should continue with its past practice of considering the need for PI remedies in its review of downstream markets, as we also set out in this response.

ComReg's PI proposals are based on a flawed assessment of market conditions and, as a result, are unnecessary, unjustified and highly disproportionate

4. Imposing regulatory remedies is not cost-free. It imposes costs and disruption directly on the regulated firm and its customers. There can also be unintended consequences which risk distorting decision-making and competition in related markets. Therefore, remedies need to be carefully targeted on those product and

[1] ComReg 23/04 "*Physical Infrastructure Access (PIA) Market Review: Consultation*" ('the Consultation')

geographic markets where significant market power ('SMP') is expected to endure — to address specific competition concerns. Markets should be identified carefully so as to avoid the risk of aggregating products and geographic areas where competitive conditions may vary significantly.

5. Furthermore, it is critical that market analysis and remedy design take into account other forms of regulation or other measures which can affect the need for, or benefits arising from, additional regulation. Failing to consider these factors can lead to unintended consequences, such as overlapping or conflicting regulations, unnecessary regulatory burdens, or result in missed opportunities for innovation. As set out in the Staff Working Paper accompanying the 2020 Recommendation, when analysing "*electronic communications markets with a view to determine whether any of those markets require ex ante regulation, and before imposing any obligations, an NRA **must** take into account other types of regulation or measures already imposed which affect the relevant market. This includes, in the case of physical infrastructure, measures taken under the Broadband Cost Reduction directive*". [emphasis added][2]

6. Therefore, and consistent with the requirements set out in the Access Regulations (e.g., Regulation 8), and in the European Electronic Communications Code (the 'Code') regulatory interventions should only be made where they are proportionate to the competition concerns identified and the expected benefits outweigh the costs and risks of potential unintended consequences. eir notes that the Code has been directly effective in Ireland since December 2020, meaning that ComReg is required to comply with its provisions in carrying out its obligations; this has been expressly confirmed to ComReg by the European Commission. As a consequence, eir has referred to the relevant provisions of the Code in this response, even though the transposing Regulations (the 'Code Regulations'), while adopted by the Minister, have not as of the date of this submission, been activated.

7. ComReg's PI proposals are based on a flawed assessment of market conditions which is at odds with the underlying circumstances in the Irish market. ComReg's incomplete and overly mechanical approach to the analysis means that it fails to

[2] Page 62 of the Staff Working Paper accompanying the 2020 Recommendation.

capture important constraints on eir. As a result, ComReg's proposed findings are ill-founded; the proposed market definition is wrong and eir does not have SMP.

a. ComReg's proposed product market definition wrongly excludes non-telecoms PI, most notably ESB PI. SIRO's extensive use of this infrastructure shows it is clearly an effective substitute and should be included in the market definition. Furthermore, separate product markets should be defined for capillary and non-capillary PI reflecting the different competitive conditions for these non-substitutable types of PI.

b. ComReg's proposed national geographic market is wrong as it fails to reflect the substantial differences in competitive conditions between the IA and the commercial area.

c. ComReg's proposed market power assessment fails to take proper account of the full extent of constraints in both the IA and commercial areas. This includes the powerful constraint imposed on eir by the BCRD, which ComReg fails to consider <u>at all</u> in its assessment, contrary to the clear expectation set out in the European Commission Staff Working Document referred to above.

8. Should ComReg persevere with its faulty approach to market assessment, which places disproportionate focus on eir PI and, in doing so, finds that eir has SMP, it must consider whether other PI operators, most notably ESB, also have SMP in relation to PI. When properly assessed, there is little difference in the market circumstances faced by eir and other PI owners, most notably ESB (which is used both by SIRO and ESB Telecoms). Therefore, if ComReg considers that eir has SMP, it should reach the same conclusions in relation to other PI owners.

9. Notwithstanding the absence of SMP which renders PI remedies unnecessary and unjustified, ComReg's proposed PI remedies are highly disproportionate. They are therefore inconsistent with the requirements imposed on ComReg under Regulation 8 of the Access Regulations (and equivalent requirements under the Code, which under Article 68 imposes as a mandatory obligation when imposing remedies that '*in accordance with the principle of proportionality, a national regulatory authority **shall** choose **the least intrusive** way of addressing the problems identified in the market analysis*' (emphasis added)). The proposals not only involve the re-imposition of the highly intrusive and burdensome regulation imposed in the 2018

WLA Market Decision, but they go significantly further. eir urges ComReg to reconsider its proposed PIA remedies.

10. Particularly in light of the costs and risks of distortions associated with inappropriate regulation, it is not sufficient for ComReg to rely only on general arguments about why it considers particular types of remedy (e.g., access, non-discrimination, transparency, etc) to be appropriate or proportionate. ComReg needs to demonstrate why the specific formulation of each of the proposed remedies is necessary, justified and proportionate.

11. Furthermore, it is not sufficient for these justifications to be based solely on generic theoretical arguments made in the abstract. Rather, the specific justifications must be firmly rooted in a forward looking analysis of the market circumstances in this particular case – for example, its justifications should not cut and paste arguments from proposals in other, earlier market reviews carried out in different circumstances.

12. ComReg's PI proposals fail to meet this basic standard, and the proportionality requirements set out in the Access Regulations and the Code. In many cases, for example, ComReg fails to justify why each of the specific forms of access it proposes are justified *at all*. While in numerous other places, its justifications are almost entirely 'cut and paste' from its WLA proposals without adequate consideration of the specific circumstances of the PI market. Furthermore, in other cases, such as its various proposals in relation to non-discrimination, its justifications are purely theoretical in nature with insufficient or no consideration or engagement with the PI market realities.

13. Given the highly intrusive and wide-ranging set of remedies that ComReg is proposing to adopt, such an approach is wholly inadequate. It also means that ComReg has failed to meet its legal obligations to demonstrate that its proposals in this case are both necessary and proportionate (i.e., the least intrusive way of addressing a specific problem identified).

14. If confirmed, the proposals will necessitate further significant changes to eir's systems and processes for providing access to its PI. Such extensive re-engineering involves extensive programmes of work and the deployment of considerable

engineering, commercial and regulatory resources. Ultimately the costs (which we estimate could be in the region of €17 million to ensure compliance from an IT and regulatory finance perspective alone) for these activities are, at least in part, borne by customers. As is set out in more detail below, the imposition of these burdens, as they are exclusively imposed on eir and not on its competitors, are likely *in themselves* to distort competition, directly contrary to the objectives of the Code.

15. Such a change programme will be highly disruptive and impose an unjustified managerial burden on eir at a time when eir wants to be fully focussed on delivering our ambitious full-fibre vision for Ireland.

16. While increasing the regulatory burden and/or asking consumers to pay higher prices can sometimes be associated with longer-term competitive benefits, this is not the case with ComReg's PI proposals. As we explain in the following sections, ComReg's proposals will not result in any material change in the competitive conditions in downstream broadband markets in Ireland. There are no credible competition concerns for the remedies to address. Therefore, the additional costs ComReg is asking eir and consumers to shoulder will be for no competitive gain. There is no clearer example of a disproportionate set of regulatory proposals. Such an approach is clearly contrary to the requirements imposed on ComReg by the Access Regulations (e.g., Regulation 8).

Absent ComReg's proposals, operators would still be able to access a wide range of PI on fair and reasonable terms under the Broadband Cost Reduction Directive/Regulation

17. The need for, and effect of, ComReg's proposals should be assessed against a counterfactual whereby operators already have access to PI on fair and reasonable terms. Provisions under the EU Broadband Cost Reduction Directive ('BCRD') (and the Irish domestic transposition[3], 'the BCRR') mean that any operator that wishes to gain access to PI in order to deploy an FTTH network is able to request it from a broad range of PI owners (both telco PI owners and non-telco PI owners – not just eir).

[3] i.e., The European Union (Reduction of Cost of Deploying High-Speed Public Communications Networks) Regulations 2016 (S.I. 391 of 2016) ('the Broadband Cost Reduction Regulations')

18. While there may be differences in the details of how access is provided via the BCRD/BCRR provisions compared to a SMP remedy, ComReg's analysis still needs to take into account that the BCRD/BCRR is an effective mechanism for accessing a broad range of PI. It is highly relevant to both ComReg's market analysis and its remedy design.

19. To the extent that ComReg considers that there are limitations in the current BCRD/BCRR provisions in Ireland, the transposition of the EECC into Irish domestic legislation provides an effective and timely way for any such deficiencies to be remedied. Such enhancements would then apply to all PI infrastructures (not just eir's) and therefore will be of maximum benefit to access seekers.

20. The BCRD/BCRR does not limit the requirement for terms to be 'fair and reasonable' to either price or non-price conditions; it is widely cast. By enabling access to a broad range of infrastructure the BCRD provisions provide operators considerable flexibility to access PI that most closely meets their deployment plans, be that telecoms PI or other forms of PI.

21. ComReg has not explained or demonstrated why reliance on these powerful existing provisions in Ireland is insufficient and why additional and highly intrusive SMP regulation is proportionate given Irish circumstances. Indeed, neither its regulatory impact assessment nor its assessment of SMP and competition problems even mentions the BCRD. This is a critical omission which completely undermines ComReg's proposals and consultation process.

There are no credible competition concerns in the IA; ComReg's proposals will not lead to any additional downstream competition

22. As is acknowledged by ComReg, demand for PI in the merchant market over the forthcoming review period will be concentrated in the IA. This demand will come exclusively from NBI as the IA is, by definition, not expected to attract commercial deployment (irrespective of ComReg's actions in relation to eir's PI).

23. NBI's deployment plans are predicated on extensive re-use of existing PI, in particular, that controlled by eir. However, ESB also owns an equivalently dense and extensive PI network in the NBP IA. While ESB's PI has different pros and cons

compared to eir's, its use by SIRO (and its customers) demonstrates that overall it acts as a highly credible alternative to eir's PI. ESB's infrastructure is highly unlikely to be used by SIRO to deploy its own network in the IA, therefore ESB has an incentive to compete to supply PI to NBI to increase the utilisation of its PI. Furthermore, NBI has an incentive to ensure that ESB continues to be seen by eir as a credible threat.

24. eir is not aware of any reason to believe that ESB's PI is a less compelling proposition in the IA than in those areas where it is being used by SIRO. Indeed, publicly available documents[4] demonstrate that ESB has previously actively submitted a detailed presentation of how its PI could be used to support NBI's FTTH deployment in the IA. This presentation is attached to eir's submission.

25. The imposition of the proposed PI remedies will not have a material impact on NBI's deployment (and therefore consumers at the retail level) as there are no credible competition concerns for it to address:

   a. **Exploitative conduct**: There are no credible concerns about exploitative conduct as eir will be constrained by: a) NBI's ability to request PI access on fair and reasonable terms under the BCRD/BCRR; b) the fact NBI has already contracted with eir for the provision of its PI needs; and c) the credible threat from ESB. While ComReg raises questions about the credibility of the threat from ESB, its assertions do not appear to be based on detailed analysis or information it has gathered directly from NBI or ESB (rather it is based on a single newspaper article[5]).
   b. **Leveraging conduct**: eir will not compete with NBI in downstream markets in the IA and NBI will not compete with eir/SIRO/Virgin Media outside the IA in the period of the market review. Therefore, there are no credible vertical or horizontal leveraging concerns in the IA. In any event, the competitive threat from ESB and the existing safeguards under the BCRD/BCRR (i.e., access to PI on fair and reasonable terms) further render such concerns as highly incredible.

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[4] e.g., "*ESB Presentation on the National Broadband Plan: June 2019*"

[5] See paragraph 3.85 of the Consultation.

c. **Exclusionary conduct**: Concerns about exclusionary practices (e.g., discrimination) by eir in the IA are particularly incredible as eir will not be a rival to NBI and, in any event, the BCRD/BCRR ensures that NBI will be able to secure access on fair and reasonable terms. As noted above, the requirement under the BCRD/BCRR for terms to be 'fair and reasonable' is widely cast and is not limited to only price-based terms.

There can be no credible competition concerns outside the IA where demand for third-party PI for commercial FTTH deployment will be highly limited irrespective of ComReg's PI proposals

26. Outside the IA, competition is on the basis of self-supplied PI. There is no material demand for PI in the merchant market, nor is there expected to be over the market review period. SIRO's deployment makes use of ESB's dense, nationwide network of PI. Virgin Media's FTTH deployment will make use of its existing cable network PI, using duct where available and otherwise surface mounting fibre.

27. Neither SIRO nor Virgin Media have made material use of the existing CEI remedy, nor are we aware of any intention for them to do so in the future. Indeed, eir has only received 266 orders for CEI[6] since the launch of the current CEI remedy (excluding NBI as this is a MIP). These orders were for sub-duct access only. No orders were received for poles. Those orders equate to 175km of sub-duct access, or 0.5% of the 38,198km[7] of duct reported by eir in its regulatory accounts. Other than NBI, the access seeker which has made most use of eir's CEI, Virgin Media, has ordered 70km of eir's duct up to 15 February 2023. That represents less than 0.2% of the total 38,198km of eir's duct.[8] Looking forward, ComReg does not anticipate in the Consultation material future demand from SIRO or Virgin Media.

28. ComReg does not assess why there has been limited demand for the existing CEI remedy from SIRO and Virgin Media. This is particularly surprising given ComReg's view that the self-supplied infrastructure SIRO and Virgin Media have chosen to use is a poor substitute for eir's PI, suggesting SIRO and Virgin Media should prefer to

[6] i.e., completed orders (excluding cancelled orders) up to 15 February 2023. Of these, 178 have been delivered and 88 are awaiting delivery.

[7] As reported in eir's regulatory accounts.

[8] Indeed, the total usage of eir's duct across Virgin Media, SIRO, eNet and BT over this period only accounts for 0.2% of the total of eir's duct footprint.

use eir's PI. However, in eir's view it is not surprising that both operators would see strategic advantages in relying on their own infrastructure (which clearly have favourable characteristics and conditions to deploy their network on) and over which they have long-term control.[9] ComReg's proposals will not affect this strategic rationale for preferring self-supply. Indeed, ComReg should welcome and support the fact that these two major providers are building standalone networks. Article 3(2)(f) obliges ComReg to pursue the objective to '*promote competition in the provision of electronic communications networks…including efficient infrastructure based competition*', while Article 4 also requires national regulatory authorities to '*promote efficient investment and innovation in new and enhanced infrastructures.*'

29. It is highly unlikely that there will be material additional FTTH deployments by scale operators other than SIRO, Virgin Media and eir over the review period. In the event that such demand does arise, access to PI will be available via the BCRD/BCRR if it cannot be met via commercial negotiation.

30. Notwithstanding the very limited demand for PI outside the IA, the BCRD/BCRR allows operators wishing to access PI outside the IA to do so on fair and reasonable terms, this means that any concerns about exclusionary, leveraging or exploitative conduct are not credible outside the IA.

31. The very limited level of likely demand raises concerns about the proportionality of costly and disruptive SMP remedies to address low likelihood/impact competition concerns.

ComReg's PI proposals have no bearing on ComReg's assessment of competition in downstream markets

32. Consistent with the assessment set out in the sections above, ComReg's conclusions in relation to PI have no bearing on its assessment of competition in the downstream WLA and WCA markets:

[9] ComReg acknowledges the importance of securing long-term supply in paragraph 3.43 of the Consultation.

a. Competition in the Commercial NG WLA market is driven by strong rivalry between eir, SIRO and Virgin Media (which has entered the wholesale market). As set out above, SIRO and Virgin Media's deployment is based on self-supplied PI. ComReg's proposed PI remedies will therefore have no practical or material impact on the competitiveness of the Commercial NG WLA market.

b. The absence of SMP in the IA NG WLA market is based on the deployment by NBI which will take place irrespective of whether ComReg's PI proposals are confirmed. Absent a SMP-based PI access remedy, NBI will still be able to access third-party PI based on fair and reasonable terms either through commercially negotiated agreements with PI operators (e.g., eir or ESB) or via access mandated through the BCRD/BCRR.

c. Both the WCA and CG WLA markets (and WHQA market) will remain competitive in the absence of ComReg's PI proposals, consistent with the underlying market dynamics set out above.

The way forward

33. ComReg's PI proposals are unnecessary, unjustified and disproportionate. They do not meet the legal requirements imposed on ComReg under the Access Regulations. As a result, ComReg should move to rapidly remove SMP-based obligations on eir to provide PI access.

34. To the extent that mandated access is required, operators will continue to have access to the provisions of the BCRD, which the European Commission is in the process of reinforcing. These provisions allow operators to access a broad range of PI across the country on fair and reasonable terms enabling them to pick the PI that best meets their needs rather than relying solely on eir's PI. These provisions also avoid the market and competition distortion inherent in singling out just one operator for PI obligations, thereby creating asymmetric conditions for competition. Furthermore, operators who access PI via the BCRD/BCRR have the increased certainty of knowing the access is based on a long-term statutory footing, as opposed to SMP regulation which is reviewed regularly and therefore can be withdrawn.

35. There may be differences in the details of how access is provided via the BCRD/BCRR provisions compared to a SMP remedy, but the assessment of the proportionality of imposing additional SMP-remedies needs to be based on the counterfactual that access seekers are already able to access PI on fair and reasonable terms under the BCRD/BCRR. Therefore, the costs and risks of additional regulation should be considered against only the incremental benefits of that regulation (over and above the BCRD/BCRR). These incremental benefits will be, at best, very small as there are no credible competition concerns for SMP-based regulation to address, particularly in light of the very limited demand outside the IA. Yet, the wide-ranging and very intrusive proposed package of PI remedies will be highly costly and disruptive, at a time when eir wants to focus on delivering its FTTH ambitions.

36. The market conditions eir faces are largely the same as other PI owners, most notably ESB. Therefore, it is imbalanced and disproportionate that eir should face what is the most wide-ranging and intrusive package of SMP remedies it has ever faced while owners of other PI in very similar circumstances do not face similar obligations. The inappropriateness and unreasonableness of such a proposition is further magnified by the absence of any credible competition concerns.

37. The removal of regulated access to PI (and the related dark fibre remedy) in such circumstances would be consistent with existing precedent within the EU. In particular, in 2019, the Luxembourg NRA withdrew access to ducts based on specific national circumstances including limited demand and the existence of alternative statutory means to secure PI access. [10]

[10] See decision LU/2019/2137-2138, as referred to in footnote 198 of the European Commission's Staff Working Document accompanying the 2020 Recommendation.

38. While eir does not consider any form of SMP-based PI regulation to be necessary, justified or proportionate given the market circumstances in Ireland, ComReg certainly should not be imposing regulation in this market review that expands the regulatory burden and imposes additional incremental costs on eir and its customers. In particular, it should:

a. Not proceed with the new regulatory governance obligation and associated statement of compliance. ComReg proposes that eir is required, as a regulatory remedy, to provide ComReg all its internal documentation, decision making etc., as to how eir identifies, assess and manages regulatory risk in the organisation. ComReg states that if it is not satisfied with the internal governance arrangements within eir that it would further specify non-standard remedies. For good reason no such remedy is allowed under the European Electronic Communication Code or under the existing European Framework. As a remedy it is too subjective and ultimately becomes an argument about what "good" governance looks like. It is also outside the expertise of telecommunication NRAs across Europe. In order to impose such a remedy ComReg requires special written permission from the European Commission under the 'exceptional circumstances' notification procedure in Article 68(3). It is evident that ComReg wishes to step into the internal workings of eir as to how it would manage regulatory risk. This is in the context of ComReg also imposing the full suite of remedies available to it to monitor and ensure compliance. Such an intrusion into an operator's internal governance management is unprecedented. eir strongly urges the European Commission to intervene and reject any such proposal from ComReg.

b. Not take forward proposals to increase the EoI burden on eir. Applying EoI to PI is wholly disproportionate – ComReg should not go beyond a non-discrimination obligation based on wording consistent with the Access Regulations and the Code – but in any event it should not expand the scope of the existing EoI arrangements.

c. Not impose any obligations to develop new specific access products and services, most notably the self-remediation duct access product.

39. Furthermore, there are other important changes that ComReg should make to the proposals to make them less ambiguous, more targeted, less disproportionate or otherwise less harmful:

a. Align the grounds upon which eir is able to refuse a request for network access with the provisions of Recital 191 of the Code.
b. Refine and provide greater clarity on the process for withdrawing existing access.
c. Clarify the position on negotiating in good faith.
d. Provide greater clarity about the circumstances when redundant cables should be removed and how the costs of such activities are to be recovered by eir.
e. Limit the list of specified access products and services to only those with existing demand or are expected to have material demand over the market review period.
f. Remove the obligation to provide a self-install sub-duct product.
g. Ensure that the use of Direct Duct Access is limited to where it is not possible to use sub-duct and enhance the protections in the event of damage arising from its use.
h. Clarify the scope of the Passive Access Records obligation.
i. Ensure that the PI Co-location scope is not ambiguous.
j. Limit the PI access obligation to existing eir PI and exclude any new PI acquired by eir over the market review period.
k. Remove the dark fibre backstop.
l. Ensure that the product development process timelines are proportionate are based on a detailed assessment of the underlying activities and dependencies.
m. Make a number of important changes to the SLA regime proposals.
n. Consult on all aspects of the proposed KPI regime at the same time.
o. Amend and clarify its approach to "*clear and unambiguous language*" in relation to transparency obligations.

p. Allow more time (i.e. 12 months rather than 7) for publishing eir's engineering, planning and design rules.

40. Notwithstanding eir's view's on the appropriateness and necessity for asymmetric regulation of access to its PI, eir intends to submit a voluntary commitment under Article 79 of the European Electronic Communications Code for access and pricing conditions applicable to PI in the IA. Due to the short consultation period allowed for this Consultation which is in tandem to the WLA consultation, we have not been able to finalise such a proposal in time for submission as part of the 3 March deadline.

RESPONSE TO CONSULTATION

41. In the following sections we respond to ComReg's specific consultation questions. However, before we do so, we set out some important market context to our responses.

Despite rapid deployment of FTTH demand for PI has been highly limited

42. Market analysis is not a mechanical or abstract exercise. It requires a detailed understanding of market dynamics and how they are likely to change over the market review period. The Irish broadband market is evolving rapidly. The dynamics underpinning these changes, which we explain below, are critical context to this market review. They are highly relevant to all aspects of ComReg's assessment including market definition, market power, competition concerns and remedy design. Yet, they have not been properly taken into account by ComReg in the Consultation, as we also explain below.

Ireland is undertaking a major upgrade to its digital infrastructure with multiple operators deploying FTTH

43. Ireland is in the midst of a major upgrade in its digital infrastructure, consistent with both Irish and wider EU digital connectivity policy. It is rapidly transitioning from legacy copper-based access technologies, including CG services and FTTC, to state-of-the-art FTTH technologies.

44. eir, Virgin Media and SIRO are commercially deploying FTTH across Ireland: [11]

    a. eir has passed over 1 million homes across Ireland with FTTH, and aims to reach 1.9 million premises by the end of 2026, including covering 250,000 homes in 2023. [12]

    b. In late 2021, Virgin Media announced plans to invest €200m to upgrade its network to full-fibre for 1 million premises nationwide by the end of 2025.[13] Virgin Media has also entered the wholesale market.

[11] See paragraphs 3.37 to 3.39 of the Consultation.

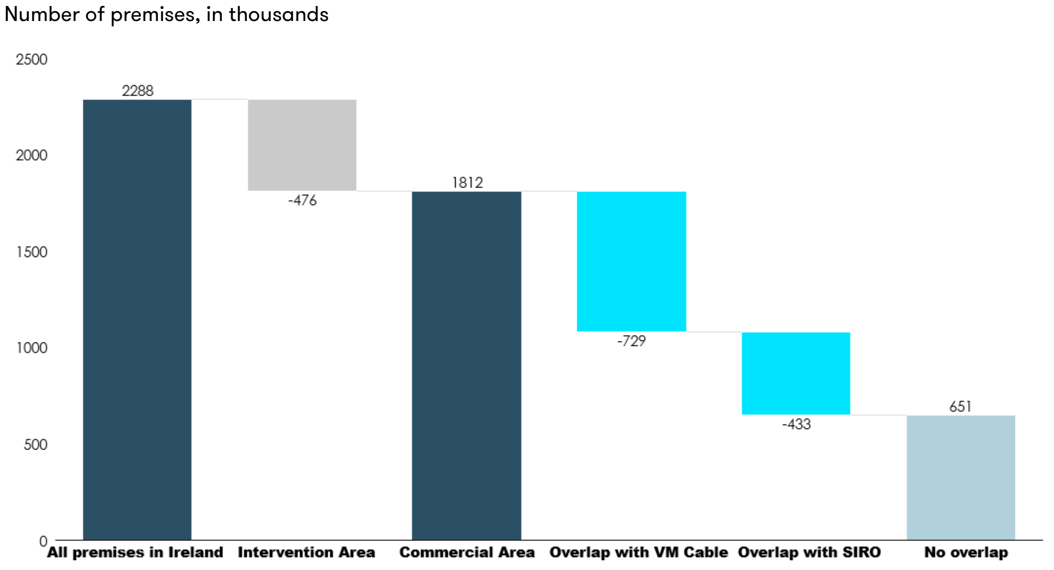
[12] See: https://infraviacapital.com/eir-infravia-partnership/ and https://home.eir.ie/pressroom/eir-and-InfraVia-Form-Partnership-to-Accelerate-eirs-Fibre-Broadband-Roll-Out/

c. In 2021, SIRO has concrete plans for an upgrade and expansion of its FTTH network, which will double its network reach from 430k premises to 770k across 154 towns. SIRO has secured significant funding for its expansion with 650mn EUR additional funding secured, including 170m EUR from European Investment Bank. 450mn EUR has already been invested. SIRO's network will reach Dublin shortly.

45. Outside of the commercial deployment areas, National Broadband Ireland ('NBI'), the State-backed operator, is also deploying FTTH services in the NBP Intervention Area ('IA'). The NBP IA comprises of over 564,000 of premises (delivery points) and covers around 1.1m people.[14]

46. As a result of this deployment, and as shown in the diagram below, eir's network already overlaps with others in 64% of the commercial area.

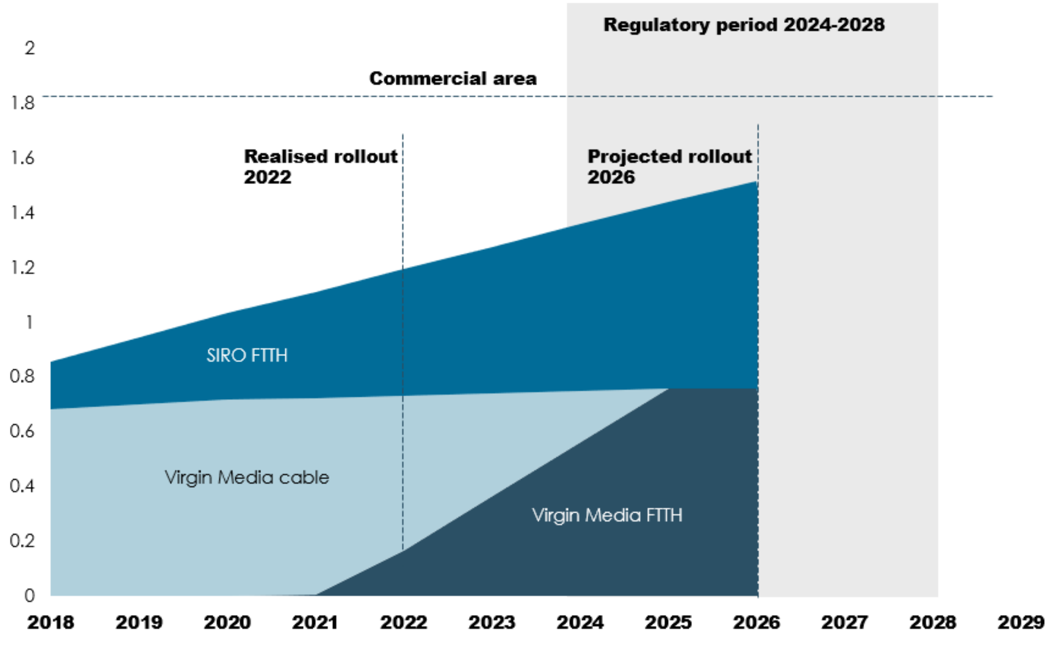
Number of premises, in thousands



Source: Copenhagen Economics based on ComReg WLA Consultation.

47. Furthermore, this overlap will grow to 84% during the regulatory period, as shown by the diagram below.

[13] See: https://www.virginmedia.ie/about-us/press/2021/virgin-media-ireland-announces-national-fibre-network-upgrade
[14] https://www.gov.ie/en/publication/c1b0c9-national-broadband-plan/



Source: Copenhagen Economics based on the SIRO website, Virgin Media website Liberty Global Fixed Income Quarterly Press Releases, ComReg WLA Consultation and Silicon Republic

Commercial deployment is based on self-supplied PI despite the existing CEI remedy

48. ComReg imposed an extensive set of PI remedies on eir in the 2018 WLA Market Decision. The remedies, referred to as the 'CEI remedies', require eir to, for example:

    a. Meet reasonable requests for access to and use of CEI. In addition to this general access obligation, eir is also required to provide access to a broad range of specified CEI access products and services related to its ducts and poles. This includes access to ingress and egress points, a CEI connection service, chambers and co-location.

    b. Ensure access is non-discriminatory and equivalent, based on an 'equivalence of input' model.

    c. Set cost orientated charges for PI access, based on the outputs of a ComReg cost modelling exercise.

    d. Provide access to dark fibre where it is reasonably available and CEI access is not available.

    e. Provide access to its Passive Access Records ('PAR'), including a range of detailed requirements about how access is provided.

f. Provide access to Eircom's operational support systems ('OSS') or similar software systems necessary to ensure fair competition in the provision of services.

g. Follow detailed rules and requirements in relation to how new PI products are developed.

h. Follow detailed rules and requirements in relation to the development of SLAs.

i. Adhere to various transparency requirements including in relation to KPIs.

49. Despite the existence of a wide-ranging and highly intrusive remedy, eir's CEI has not been used to any material extent by SIRO or Virgin Media — their deployments of FTTH are based on their own self-supplied PI:

a. Virgin Media's FTTH deployment is based on its existing cable network infrastructure. This includes the use of duct where it is available, but otherwise use of surface mounted fibre cables.

b. SIRO will make use of ESB's nationwide and dense electricity network PI.

50. eir is not aware of any material underlying demand from Virgin Media or SIRO to use eir's PI. Neither has placed material orders under eir's existing CEI remedy. eir is not aware of, nor is there any evidence presented in the Consultation[15], to suggest that either intend to change materially their PI strategy in the future (irrespective of ComReg's decisions on PI access).

51. As a result of the extensive use of self-supplied PI by SIRO, Virgin Media and eir, Irish broadband consumers will benefit from the deepest possible network competition between three scale operators. This is consistent with promoting the greatest possible benefits in terms of innovation, service quality and pricing.

52. Beyond SIRO, Virgin Media and eir, no other scale full-fibre broadband network operators are expected to commercially deploy FTTH in Ireland.[16,17] This is consistent

[15] i.e., ComReg 23/04.

[16] Eircom is not aware of any such plans. From what eir can discern given the extensive confidentiality redactions, ComReg does not appear to present evidence to the contrary in either the Consultation or in ComReg 23/03. ComReg's survey in Annex 3 does not seem to provide any firm evidence of new entry based on access to eir's PI. Nor does it seem to present evidence of any material increase in

with eir's understanding of the experience elsewhere in Europe where examples of more than three competing commercial FTTH networks is very rare. Further entry or substantial expansion to create another scale commercial full-fibre network is highly unlikely irrespective of the outcomes of this market review. The business case for such deployments is sensitive to the expected level of take-up of the new network and, given the presence of SIRO, Virgin Media and eir, it would be very challenging for another commercial operator to achieve the required levels of penetration.[18]

53. Outside of the commercial deployment areas, NBI is expected to make use of existing PI to deploy its own fibre optic cables to premises. In the first instance, NBI is expected to focus on eir's PI. However, ESB also has extensive PI in the IA (which will not be used by SIRO).

Consistent with these market dynamics, demand for the existing CEI remedy has been very limited

54. As the market dynamics set out above suggest, take up of the existing CEI remedy has been very limited, particularly outside the IA.

Between May 2019 and February 2023, NBI has rented 6,073km of duct and 475,552 poles from eir. Yet, up to 15 February 2023, eir received only 266 completed orders[19] for CEI from operators other than NBI. These orders were for sub-duct access only – eir received no orders for poles. Those orders equate to 175km of sub-duct access, or 0.5% of the 38,198km of duct reported by eir in its regulatory accounts.

55. This very limited demand for the existing CEI remedy outside the IA is also set out by ComReg in the Consultation:

demand for CEI in the merchant market outside the IA. In paragraph 3.40 of the Consultation, ComReg notes that NBI's rollout of fibre using eir's PI is the "largest component" of its anticipated growth in merchant market PI over the 2022 to 2027 period.

[17] Smaller scale and geographically limited commercial FTTH deployment is possible, but such deployment is unlikely to materially change the overall competitive landscape or ComReg's market analysis in this review.

[18] This is consistent with the survey response set out in A3.13(b) of the Consultation where the respondent set out that "*existing networks such as Eircom and Virgin Media would make market share difficult to acquire*".

[19] i.e., excluding cancelled orders. Of these, 178 have been delivered and 88 are awaiting delivery.

a. ComReg acknowledges that the "*the volume of traded PI in the wholesale merchant market is trivial in comparison to that of self-supplied PI*".[20] ComReg also acknowledges that 40% of those "trivial" merchant market purchases of duct was from non-telecom operators (e.g., ESB, Irish Railways, etc).[21]

b. Furthermore, ComReg notes that:[22]

    i. Other than NBI, there were only c.150 records of duct rentals at the end of 2021, the majority of which were "*historic or dated in nature*" – more than half were in place for over five years with an average age of seven years. This means that the majority of the existing duct rentals pre-dated the 2018 CEI remedy (and therefore regulated access).

    ii. Only NBI "*materially availed*" of eir's pole access products.

c. Also, of the highly limited existing duct rentals, it seems that they most likely related to the provision of leased lines or backhaul: "*Analysis of the 150 PI purchase/sales records indicated that they consisted of geographically randomly distributed pockets of rental/sales in some business parks and commercial areas…*".[23]

56. This market context is important. ComReg's proposes to make a number of highly material changes to the existing remedy. These will make the existing remedy yet more wide-ranging and intrusive. As set out below, eir does not, and has not, faced a more intrusive and more broadly scoped set of remedies in any previous market review. ComReg is proposing to deploy all the remedies available to it and to the greatest extent possible and also to added 'exceptional' remedies not provided for in the Code, which would require Commission approval under Article 68(3).

57. Yet, crucially, these proposed changes are not based on a detailed and evidenced assessment of any perceived material deficiencies in the existing CEI remedy.[24] The

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[20] Paragraph 1.18.
[21] Footnote 44.
[22] Paragraph 3.107.
[23] Paragraph 3.108.
[24] We note that the lack of evidence-based analysis of why the CEI remedy has been so lightly used is particularly surprising given that ComReg sets out (in paragraph 3.109) that "*the most significant development in the PIA market over the past 5 years has been the offering of SMP regulated PI products by Eircom*".

reason for this, presumably, is that the highly limited demand for the existing CEI remedy is not a result of any such deficiency, but rather the underlying market dynamics (as set out above), which will not change irrespective of the outcome of this market review.

ComReg has failed to take into account the provisions of the Broadband Cost Reduction Directive/Broadband Cost Reduction Regulations

58. ComReg's market analysis not only needs to take full account of the underlying market dynamics, it also needs to take into account all relevant existing regulatory or legal interventions. In the context of PI, the BCRD/BCRR[25] is highly relevant and important to ComReg's proposed findings, as explained further below. Yet, it has not been taken into account at all by ComReg. This critically undermines ComReg's proposals and consultation process.

59. A key component of the BCRD (and BCRR) are the provisions mandating access to existing PI. These provisions require that:

> *"Upon written request of an operator, network operators or public sector bodies owning or controlling physical infrastructure shall meet all requests for access to that physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of very high capacity networks or associated facilities."* [26]

60. The requirement for access to be provided on 'fair and reasonable' terms and conditions is widely cast. It is explicitly not limited to price considerations. As such, there is no reason this requirement cannot be used to ensure that PI owners do not seek to engage in a wide range of potentially anticompetitive or exploitative conduct. Although the BCRD does not specifically refer to non-discrimination, for example, does not mean that sufficient protections are not captured by the requirement for 'fair and reasonable' conduct.

61. Furthermore, while the BCRD does not specify in advance what would constitute a set of 'fair and reasonable' terms, there is nothing precluding ComReg, as the National Dispute Settlement Body and Single Information Point, from setting out its

[25] In 2014 the European Commission passed Directive 2014/61/EU ('the Broadband Cost Reduction Directive' or 'BCRD') which set out a range of measures intended to reduce the costs of deploying high-speed electronic communications networks. The BCRD was transposed into Irish domestic law in 2016 via the Broadband Cost Reduction Regulations. i.e. The European Union (Reduction of Cost of Deploying High-Speed Public Communications Networks) Regulations 2016 (S.I. 391 of 2016).

[26] Article 3 of the BCRD.

own guidance on how it would interpret 'fair and reasonable' if greater clarity *ex ante* is considered useful.

62. In addition, the BCRD sets out the minimum requirements that need to be transposed into Irish law – Ireland can choose to set out further requirements for its domestic transposition as, for example, eir understands are in place in Portugal. Such enhancements, which would then apply equally to all PI infrastructure (not just eir's) and therefore will be of maximum benefit to access seekers, could be readily incorporated into the process for transposing the EECC into Irish law. This would be an effective and timely way for any limitations in the BCRD/BCRD identified by ComReg to be remedied.

63. The term 'network operator' is also defined broadly. It includes not only undertakings providing public electronic communications networks or associated facilities, but also those involved in the "*service of production, transport or distribution of*" gas, electricity (including public lighting), heating and water, as well as transport services, including railways, roads, ports and airports.

64. While network operators (and public sector bodies) can refuse access, the grounds for doing so are limited and set out in the Directive. Any refusal of access needs to be communicated to the requesting undertaking within two months.

65. The Directive also sets out that requests for access need to be resolved in a timely manner:[27]

> *"where access is refused or agreement on specific terms and conditions, including price, has not been reached within two months from the date of receipt of the request for access, Member States shall ensure that either party is entitled to refer the issue to the competent national dispute settlement body."*

66. In addition, the BCRD sets out the mechanism for dispute settlement:

> "*Member States shall require the national dispute settlement body referred to in paragraph 4 to issue, taking full account of the principle of proportionality, a binding decision to resolve the dispute initiated pursuant to paragraph 4, including the setting of fair and reasonable terms and conditions, including price where appropriate. The national dispute settlement body shall resolve the dispute, within the shortest possible time frame and in any case within four months from the date of the receipt of the complete request except in exceptional circumstances, without prejudice to the possibility of any party to refer the case to a court."*

[27] See: Article 3, paragraph 4.

67. Alongside the PI access provisions, Article 4 of the BCRD also sets out various provisions in relation to transparency and the timely provision of information by network operators.

68. The European Commission *Staff Working Document accompanying the 2020 Recommendation*[28] recognises the relevance and importance of the BCRD to PI market analysis:

> *"The BCRD aims to facilitate and incentivise the rollout of high-speed electronic networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost. To that end, the BCRD mandates that any network operator (not only from the electronic communications sector but also from other utilities sectors such as energy, transport and water) meet all reasonable requests for access to its physical infrastructure under fair terms and conditions, including price. Access may only be refused for objective, transparent and proportionate reasons. In addition, if parties cannot reach a commercial agreement on the terms of access, a dispute resolution mechanism is available. Access through the BCRD represents a dispute-resolution based intervention, and is not based on an ex ante intervention by the regulatory authority."*[29]

69. As part of its Gigabit Infrastructure Act initiative the European Commission is reviewing and enhancing the provisions of the BCRD. These enhancements, which aim to enhance the BCRD and contribute to the cost efficient and timely deployment of VHCN, are particularly relevant in light of the EECC and the Commission's policy focus on supporting gigabit infrastructure deployment.

70. The new Regulation[30] will retain the provisions mandating fair and reasonable access to existing PI. This is consistent with the Commission's view that, overall, the BCRD has had a positive effect on the deployment of high-speed broadband with nearly 100,000kms of re-use of duct and aerial infrastructure.

71. The presence of the BCRD/BCRR does not preclude NRAs from imposing separate obligations on PI operators where national circumstances suggest that applying such additional obligations solely to an SMP operator, over and above its BCRD/BCRR obligations are appropriate and proportionate.[31] Furthermore, there

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[28] See: [Commission updated the Recommendation on Relevant Markets | Shaping Europe's digital future (europa.eu)]

[29] See page 63.

[30] eir understands that amongst the changes the Commission will be making to reinforce the effectiveness of the BCRD provisions will be implementing the provisions through a Regulation rather than a Directive.

[31] For example, Article 72 of the Code allows national regulatory authorities to impose access to civil engineering as a stand-alone remedy on any relevant wholesale market.

may be differences in the details of how access is provided via the BCRD/BCRR provisions compared to a nationally imposed remedy (e.g., an SMP-based remedy). However, in undertaking its market review, the national regulator's analysis still needs to take into account that the BCRD/BCRR is an effective mechanism for accessing a broad range of PI on fair and reasonable terms.

72. As such, the BCRD/BCRR is clearly highly relevant to ComReg's market review analysis in this case. For example, it is highly relevant to:

   a. the assessment of **market power**, as the BCRD/BCRR acts as an important existing legal constraint on the owners of PI, including eir, to act independently of its competitors, customers and consumers;

   b. the assessment of **potential competition concerns** as the BCRD/BCRR acts as a powerful existing constraint on the ability of any SMP operator of PI to act in an exploitative or exclusionary manner (or engage in a leveraging strategy);

   c. the assessment of the **proportionality of imposing remedies**, particularly highly intrusive access and pricing remedies – ComReg should assess the proportionality of its proposals based on the incremental benefits and costs they impose over and above the extensive access provisions included in the BCRD; and

   d. ComReg's **regulatory impact assessment** – again this should be undertaken against a counterfactual that operators would have access to a broad range of PI on fair and reasonable terms under the BCRD/BCRR absent SMP regulation.

   e. The assessment of latent demand – the low take up of BCRD/BCRR generally in Ireland reinforces eir's point that the low demand for PI from eir, simply accurately reflects overall, underlying market dynamics and structure i.e., it is not the case that more demand will somehow materialise by virtue of imposing even more stringent regulatory obligations on eir.

73. Consistent with this, and as set out above, the European Commission *Staff Working Document accompanying the 2020 Recommendation* underlines the importance of NRAs taking into account the BCRD when assessing whether PI markets require SMP regulation and before imposing any obligations.

74. However, ComReg has failed to take the BCRD/BCRR into account at all in the Consultation. This is a critical omission which undermines its proposed market analysis, remedies design and regulatory impact assessment.[32] As set out below, a proper assessment of the impact of the BCRD/BCRR on the PI market(s) demonstrates that ComReg's PI proposals are unnecessary and disproportionate.

ComReg has not demonstrated why a separate PI market review is necessary or appropriate

75. The existing CEI access remedies were imposed on eir in the 2018 WLA Market Decision. This is the first time that ComReg has undertaken a separate review of PI markets.

76. As ComReg acknowledges,[33] the PI market is not included by the European Commission in its 2020 Recommendation on markets susceptible to regulation. The European Commission found that "*at this stage and given the diverse characteristics of physical infrastructure networks across Member States, the Commission does not consider it appropriate either mandate the definition of a PIA market or to include such a market in the list of markets susceptible to ex ante regulation at Union level*"[34]. Furthermore, as also set out in the Staff Working Paper accompanying the 2020 Recommendation, "*divergences are justified by differences in network topologies, availability of ubiquitous ducts, level of demand for access to ducts and poles, etc*" [emphasis added].[35]

77. ComReg does not set out in detail why, in Ireland's national circumstances, a separate PI market review is appropriate. This is particularly surprising in light of the limited demand for the existing CEI remedy. ComReg includes a section in the Consultation entitled "*Rationale for conducting this market review*". However, this material does not address why a separate market review is necessary or appropriate (rather it focuses on ComReg's more general views of the merits of PI access).

[32] In this context, we note that, as set out on page 64 of the Staff Working Document accompanying the 2020 Recommendation, NRAs in Bulgaria and Romania have relied on the BCRD as a sufficient tool to address any potential competition concern, alongside evidence that alternative operators were deploying and expanding their network while using their own PI when concluding that no SMP remedies were required.

[33] See paragraph 2.5 of the Consultation.

[34] See page 67 of the Staff Working Paper accompanying the 2020 Recommendation.

[35] See page 65 of the Staff Working Paper accompanying the 2020 Recommendation.

78. In the Consultation' Executive Summary (only) ComReg seeks to argue that "*ComReg, in keeping with regulatory best practice, is moving its analysis of these PIA markets upstream of the active wholesale markets*". However, as made clear in the Staff Working Paper (as quoted above), there is no such "*regulatory best practice*". Rather the choice between undertaking a standalone PI market review or considering PI access remedies as part of the WLA market review should be determined on the basis of national circumstances.

79. While there are examples of countries such as the UK (now outside the EU) and France which have determined national circumstances warrant a standalone physical infrastructure market review, the majority of Member States have not followed suit. Furthermore, there are important differences in national circumstances in Ireland. For example, in the UK there is no scale FTTH operator making use of the electricity distribution network infrastructure[36] like SIRO in Ireland. This means that there is greater focus on access to Openreach's PI to foster competition to the incumbent and Virgin Media. Furthermore, BEREC's *Report on Access to physical infrastructure in the context of market analyses* (BoR (19) 94) sets out that eight NRAs in Europe had not chosen to impose SMP remedies to any physical infrastructure "*either because the [downstream] relevant market is deregulated, or because other remedies/legal instruments are deemed to be sufficient or more appropriate*". It also notes that countries such as Denmark and the Czech Republic have specifically accounted for the BCRD's obligations in their market assessments, as reported by BEREC: "*In Denmark, the SMP operator's duct access obligation was withdrawn, as the obligations from the BCRD were considered sufficient*" and in the Czech Republic "*According to the Czech NRA, the BCRD affected the scope for remedies for market 3a, thus access to physical infrastructure was not imposed (due to duplication of remedies with obligations under the BCRD)*".

[36] Which is fragmented across various different operators in the UK.

80. Notwithstanding the additional regulatory burden associated with a separate PI review, Irish national circumstances do not justify a separate market review.

a. As set out further below, there are no credible competition concerns for the market review to address, particularly in light of the presence of the BCRD/BCRR legislation and the low level of demand for PI outside the IA. Therefore, the imposition of additional PI access obligations is unnecessary and disproportionate.

b. Furthermore, by considering the case for regulated PI access in the context of the specific downstream market reviews (i.e. WLA and WHQA), ComReg is better able to minimise the risk of distorting competition in downstream markets that are competitive absent PI access. For example, in November 2018 and subsequently in November 2021, ComReg deregulated a significant number of Eircom exchanges which serve approximately 57% of urban premises in Ireland. This deregulation relies on the network presence (i.e., investment) of other operators in Eircom exchange footprints — this network investment is leveraged from operator's use of their own access to PI. With regards to the Wholesale High Quality Access (WHQA) at a Fixed Location market, in January 2020, ComReg deregulated approximately 58.4% of connected business premises in Ireland as they were within workplace zones which were considered competitive due to the presence of alternative operators' infrastructure.

   Although ComReg is undertaking a review of the WLA markets alongside this PI market review, it is not reviewing the relevant WHQA markets in parallel. Yet, it is proposing that PI access will be unrestricted, thereby allowing it to be used for leased lines and backhaul purposes nationwide[37], including in markets where competing investments by operators over time mean that they are effectively competitive. Imposing regulatory remedies where markets are already effectively competitive is not only contrary to the Access Regulations and the Code, but it also risks distorting competition and harming investment and innovation incentives. Investors who have invested in deploying their own rival infrastructure to compete risk seeing their

[37] Indeed, as set out in the context of Question 4 below, the unrestricted nature of the proposed PI remedy means that it could be used for a wide range of activities beyond those related to WLA and WHQA activities. For example, eir is concerned that the PI co-location remedies could be used to set up data centres or similar activities.

investments undermined by entrants using regulated access to eir's PI. Such unpredictable and inappropriate regulation, and the impact on the ongoing attractiveness of investments, will harm incentives to make future investments. Such harm to investment incentives will not be limited to WHQA markets.

81. On this basis eir considers that ComReg should continue to consider the appropriateness of PI access remedies as part of the WLA/WCA market review.

ComReg's market analysis is flawed

82. The purpose of market analysis is to establish whether market conditions necessitate the imposition of regulatory remedies to enable effective competition at the retail level, and, where such remedies are required, where in the value chain they should be imposed. Market analysis therefore needs to take into account the full set of constraints that exist. It should not be a mechanical or abstract process, as is set out by the European Commission in the SMP Guidelines:

> *"Market definition is not a mechanical or abstract process but requires the analysis of all available evidence of past market behaviour and an overall understanding of the mechanics of a given sector."*[38]

83. Where competitive constraints are not included within the definition of the market they should be taken into account in the SMP assessment to ensure that the market analysis as a whole is based on a complete picture of all constraints.[39]

84. However, as set out below, ComReg's proposed market analysis fails to do this. It is based on a mechanistic and flawed market analysis and is at odds with market behaviour and the underlying mechanics of the Irish market. The clearest example of this is how, having decided (wrongly) in product definition to exclude non-telecoms PI, most notably ESB PI, ComReg then proceeds to ignore completely this important source of constraint when considering market power (and remedy design). This results in an imbalanced and flawed view of the mechanics of the PI market(s).

[38] See paragraph 25.

[39] See footnote 35 of the SMP Guidelines.

Q. 1: Do you agree with ComReg's definition of the Relevant PIA Market?

85. ComReg has made three main errors in its proposed PI market definition:

a. The exclusion of non-telecoms PI, particularly ESB PI, is inconsistent with the mechanics of the Irish market and results in an unreasonably narrow product market definition. As a result, ComReg's market analysis fails to capture the important constraint non-telecoms PI imposes on eir.

b. ComReg is wrong to use all forms of PI access as the focal product. Capillary PI should be considered separately.

c. ComReg's national geographic market definition fails to reflect important differences in competitive conditions between the IA and commercial areas.

Exclusion of non-telecoms specific PI from the product market is wrong

86. ComReg should include both telecoms-specific and other forms of PI within its product market definition, consistent with the broader definition of PI adopted in the BCRD.

87. ComReg's approach of excluding all non-telecoms specific PI on the grounds that it is not sufficiently substitutable with telecoms specific PI is completely at odds with the market reality in Ireland; non-telecoms specific PI is used extensively to support the deployment of telecoms infrastructure, including scale FTTH networks.[40] As ComReg notes, 40% of merchant market duct sales are purchased from non-telecoms operators.[41] Furthermore, current FTTH deployment plans suggest that non-telecoms specific PI will be used extensively in the coming years.

88. Indeed, the extensive use of non-telecoms specific PI is in stark contrast to the extremely limited external use of eir's regulated CEI product. If ComReg's contention that non-telecoms specific PI is a poor substitute for telecoms PI is

[40] In Table 6 of the Consultation ComReg presents a simple tick/cross summary of its views on the attributes of various types of PI. eir notes that table scores ESB and Virgin Media's PI poorly – both have only one or two ticks compared to eir's six ticks. The flaws in this assessment are illustrated by both of these alternative infrastructures have been chosen by SIRO and Virgin Media respectively to deploy their FTTH networks over eir's regulated PI product (which is incorrectly presented as being vastly superior). Scores for other infrastructure also are at odds with the fact that they are used by access seekers to deploy networks. Furthermore, certain of the attributes for which eir receives ticks are only as a result of existing regulation (e.g., breakout for connections, surveys of infrastructure).

[41] See footnote 44 of the Consultation.

correct then we would have expected those planning FTTH deployments using non-telecoms specific PI, most notably SIRO, to have adapted their plans to make considerably greater use of eir's CEI. But this has not happened. [42]

89. ESB PI is the clearest example of infrastructure that has been erroneously excluded from the proposed product market definition, but it is not the only example. For example, on ComReg's own analysis[43], both BT and eNet use the national rail network. Therefore, excluding such infrastructure from the product market is also at odds with the market reality.

90. ComReg's reasoning for excluding ESB PI is particularly flawed.[44] ComReg relies on two main groups of arguments to conclude that ESB PI is not a sufficiently close substitute to telecoms-specific PI to be considered part of the same product market:

   a. **Capacity restrictions**: ComReg argues that "*in general, only one fibre cable is allowed on ESB's low voltage poles*" and that "*this means that where SIRO has deployed its fibre cables, no other Access Seeker can practically deploy on that route*".[45]

   b. **Restrictions on use:** ComReg also argues that other characteristics of ESB's PI undermine its substitutability,[46] specifically: a) the use of ESB PI has additional health and safety requirements and costs; b) the use of ESB PI requires extensive and detailed surveys and desk-top surveys are not sufficient; and c) the primacy of the electrical service limits its attractiveness.

91. ComReg further claims that access seekers, such as NBI, would need to incur switching costs to move to ESB's PI. [47]

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[42] Furthermore, if there was latent demand from another operator wanting to deploy FTTH but it could only do so using telecoms specific PI we would have expected them to have at least explored using the existing CEI remedy. But, again, this has not happened.

[43] See paragraph 3.91 of the Consultation.

[44] eir recognises that the Explanatory Note to the European Commission's 2020 Recommendation sets out that "*The scope of the relevant product market is likely to be limited to electronic communications-specific physical infrastructure in many Member States.*" This point is referred to in paragraph 3.48 of the Consultation. However, the European Commission recognises that, depending on specific circumstances in individual Member States, the definition could be wider - it does not bind ComReg to a telecoms-specific PI product market irrespective of market conditions in Ireland.

[45] See paragraphs 2.12, 3.65 to 3.70 of the Consultation.

[46] See paragraphs 2.12, 3.65, 3.71 to 3.80 of the Consultation.

[47] See paragraphs 3.81 to 3.83 of the Consultation.

92. ComReg's arguments do not justify excluding ESB PI from the product market. First, eir does not accept that the claimed capacity restrictions justify excluding ESB PI:

   a. The claimed capacity restrictions could only apply in circumstances where SIRO (or ESBT) has already deployed or have agreed plans to do so in the future (this may also raise important questions as to whether there are legitimate competition concerns from such advance hoarding of routes on what is a State monopoly). However, SIRO (and ESBT) do not have plans to deploy to the entire country. In particular, there are no plans for any commercial operator to deploy in the IA. This means that, even in the presence of the claimed capacity constraints, ESB PI is a valid alternative for operators, including NBI, wishing to deploy outside the SIRO/ESBT footprint. Indeed, publicly available documents[48] demonstrate that ESB has previously demonstrated that its PI could be used to support NBI's FTTH deployment in the IA.

      ComReg argues that the lack of national coverage "*likely reduces the attractiveness and/or availability of ESB's PI to potential Access Seekers*"[49]. However, to the extent that this is true, it would only apply to those access seekers wanting to deploy nationally or to overbuild SIRO, but this does not apply to:

      i. NBI in the IA; and

      ii. operators looking to deploy smaller scale or geographically limited networks – such operators are likely to avoid overbuilding SIRO (or other scale FTTH networks).

      Furthermore, as set out above, there is no evidence that future entry by another scale FTTH operator is likely.

   b. The claimed capacity constraints only apply to ESB's low voltage poles. ESB's other infrastructure would not be capacity constrained, even if it was in use by SIRO or ESBT. This is important for non-capillary PI requirements.

   c. ComReg has not assessed the costs/feasibility of ESB adapting capacity constrained PI to facilitate further access. The TRCEN document relied on by

[48] e.g.,. "*ESB Presentation on the National Broadband Plan: June 2019*"

[49] Paragraph 3.70 of the Consultation.

ComReg[50] notes that "*some*" ESB poles will have to be replaced to accommodate ADSS cable (even for SIRO's use). ComReg has not considered whether, as part of this process of replacing poles to enable SIRO's use whether ESB could ensure that the replacement pole is capable of hosting more than one fibre (or whether such capacity enhancements could be mandated by regulation).

93. ComReg's other claimed restrictions on use also do not justify excluding it from the product market:[51]

a. Inevitably different types of PI will have different features. This means they have different pros and cons for access seekers. Indeed, ComReg's assessment fails to consider the relative benefits of ESB PI. For example, ESB poles are larger and stronger than eir's (i.e., more likely to be made of metal, etc.). This means that they are more resilient (e.g., to bad weather compared to eir's) and therefore less prone to be subject to damage. The key question is whether these characteristics undermine the credibility of the PI as a substitute for telecoms specific PI. In the case of ESB PI, it is demonstrably the case that the differences do not undermine it as a substitute – SIRO and ESBT are making, and will continue to make, extensive use of it. Furthermore, publicly available documents[52] demonstrate that ESB has previously actively offered its PI to support NBI's FTTH deployment in the IA.

b. The claimed heightened health and safety requirements, including the use of ESB Networks to undertake certain works, clearly does not undermine the attractiveness of using the infrastructure for SIRO (and ESBT). Furthermore, it is commonplace for operators deploying fibre networks to use sub-contractors. eir sees no reason why a requirement to use contractors with the relevant training and capability (including if that is ESB itself) should be

[50] See paragraph 3.67 of the Consultation.

[51] In paragraph 3.85 of the Consultation ComReg claims that "*only one of the 10 respondents to the QQ stated that electrical PI was a suitable substitute to telecoms-specific PI*". However, the survey results in Annex 3 shows that, in fact, two respondents said that electricity infrastructure was a viable substitute (see para A3.29). Due to the extensive redactions, eir is unable to understand the significance of the specific respondents. Furthermore, only five of the respondents did not consider it to be a substitute. However, the market reality is that it is a credible substitute as it is being used by SIRO. But, importantly, not all operators need to see it to be a substitute for it to act as a credible constraint on eir. ComReg does not explain why those that did see it as a substitute are not sufficient to constrain eir.

[52] e.g.,. "*ESB Presentation on the National Broadband Plan: June 2019*"

a material barrier to using ESB PI — in particular if appropriate supervision is also put in place. Given SIRO's deployment, there will be an existing pool of trained labour.

c. ComReg's claimed survey costs and timing restrictions also do not appear to fatally undermine ESB PI as an alternative to telecoms specific PI. Again, the claimed restrictions do not stop SIRO and ESBT (and their downstream customers) using the infrastructure (despite having the option to use eir CEI).

   Under this argument, ComReg also claims that ESB PI may not be available to all premises in an area. This is also true of telecoms-specific PI, including eir's PI. However, in any event, ComReg has not presented evidence to demonstrate the materiality of this as a restriction. For example, where such gaps in ESB PI coverage exist, if they are primarily in areas where operators would not require third-party PI access because they do not have plans to deploy, the restriction is not binding and therefore is not relevant. Furthermore, operators may have alternative options in such circumstances (including self-supply) which means that ESB PI is a credible alternative for the vast majority of premises it does cover. For example, Virgin Media has demonstrated that surface mounting fibre cables itself where it does not have ducts or poles are a credible solution.[53] Furthermore, operators could use the BCRD to access alternative PI.

   ComReg also refers to the possibility that ESB duct may not be 'vaulted' outside the customer's premises and therefore would add cost and time delays to use. However, again, this has not prevented SIRO from relying on ESB PI. But, in any event, ComReg has provided no evidence to demonstrate the materiality of this concern. For example, it provides no evidence of how many premises it could apply to and the extent of the costs/delays vaulting may result in. Not all premises have a final drop or lead-in duct from eir, but that does not prevent ComReg from including eir's PI in the market definition.

   ComReg argues that desk-top surveys cannot be relied on ahead of deployment – extensive and detail surveys are required. Again, this has not prevented SIRO from using ESB PI. Furthermore, as ComReg itself acknowledges, desk-top surveys cannot be relied on for deploying network

[53] ComReg does not explain why other providers could not pursue a similar strategy to Virgin Media.

using eir's PI – site surveys are also required. ComReg should not treat ESB and eir PI differently in this regard.

d. ComReg's arguments in relation to the primacy of the electrical service also do not undermine the substitutability of ESB PI. Neither SIRO nor its customers appear to consider this to be a material restriction on ESB PI. While electricity supply may take primacy, that does not mean that acceptable SLAs cannot be agreed to use the infrastructure. Indeed, it seems likely that efforts to build, maintain or repair ESB PI will benefit both electricity supply and the hosting fibre at the same time (e.g., replacing a fallen pole will not only benefit the electricity supply, it will also restore the fibre hosting, particularly if ESB engineers are undertaking both activities as ComReg suggests they may be required to do).

94. On switching costs, ComReg provides no evidence to quantify or substantiate its claims. However, in any event, ComReg's argument appears to be predicated on the assumption that NBI would switch entirely to ESB, including existing infrastructure. However, NBI does not need to switch its existing lines for eir to be constrained by ESB PI.

95. Rather, particularly in the context where NBI's roll-out is not complete, NBI could use a multi-sourcing strategy for new deployments to constrain eir. Either the use of, or the threat of using, ESB for some or all new deployments could be used to extract competitive terms from eir. Such strategies are used extensively elsewhere in the telecoms sector, and the economy more widely, to underpin competitive markets. In this context we note that:

a. eir will only be able to generate revenues from its PI in the IA from NBI post copper switch-off. Therefore, it will have a strong incentive to remain competitive with ESB.

b. ESB should have an incentive to compete (as already demonstrated in its presentations to make its PI available to NBI) to increase the utilisation of its PI in the IA as it will not be able to do so via SIRO.

c. NBI has an incentive to structure its deployment plans in a manner that maintains ESB as a credible alternative to extract the best possible terms from eir (irrespective of whether eir's PI access is regulated).

ComReg is wrong to use all forms of PI access as the focal product – capillary PI should be considered separately to other forms of PI

96. The starting point for establishing the product market definition is identifying the focal product. This should represent the narrowest plausible definition of the product market. The product market definition is then expanded to include all relevant substitutes by considering demand-side and supply-side substitution. The SSNIP, or hypothetical monopolist test, provides a framework for assessing substitutability.

97. As set out in the SMP Guidelines, products or services that are only interchangeable or substitutable to a small or relative degree are not part of the same market:

> *"According to settled case-law, the relevant product market comprises all products and services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question. Products or services that are only interchangeable to a small or relative degree do not form part of the same market."*[54] *[emphasis added]*

98. ComReg's proposed focal product is defined as telecoms-specific PI which comprises "*the telecoms ducts and poles built specifically for wired ECNs for the provision of ECS*"[55]. This definition covers "*all passive telecoms-specific infrastructure used to house or carry fixed elements of a wired network*".[56]

99. In defining the focal product so widely ComReg draws no distinction between the different types of PI that can be used to deploy ECS. For example, the focal product includes both capillary PI (e.g., lead-in duct or poles used for the final drop) and multi-core duct or poles used to carry more highly aggregated fibre cables (e.g., backhaul).

100. Capillary PI, which is used to access individual premises from, for example, an aggregation point in a housing development, is not generally substitutable with multi-core duct or other PI between points of aggregation in networks.

[54] Paragraph 33 of the 2018 European Commission Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services ('the SMP Guidelines'), C(2018) 2374 final.
[55] Paragraph 3.49 of the Consultation.
[56] Paragraph 3.50 of the Consultation.

101. Furthermore, ComReg's assessment of the substitutability of different telecoms-specific and non-telecoms specific PI places considerable weight in numerous places[57] on whether alternative infrastructure has sufficient capillarity.[58] This is consistent with competitive conditions differing between capillary PI and non-capillary PI.

   a. Access seekers that require PI to lay fibre between different points of aggregation in their networks (e.g., backhaul) will have access to a greater range of options than access seekers requiring capillary PI (e.g., PI from eir, Virgin Media, leased lines providers, Irish railways, ESB, etc.). Furthermore, self-supply is typically a credible option for more aggregated points in the network (given the greater revenue).
   b. However, for capillary PI there are fewer options, for example, eir, ESB or self-supply (e.g., via surface mounting as Virgin Media does[59])

102. Given the lack of substitutability of capillary and non-capillary PI, and the differences in the underlying competitive conditions between the two, capillary and non-capillary PI should be treated as separate focal products for the purposes of product market definition. Yet, ComReg did not do so. ComReg does not consider <u>at all</u> whether there is a narrower plausible focal product market definition.[60]

103. This is an important flaw in its product market definition as in a number of cases ComReg's reasons for rejecting types of PI as substitutes (or constraints in the market power assessment) is based on an absence of capillary PI.

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[57] See, for example, paragraphs 3.91, 3.94, 3.113, 3.119, 3.144 and 3.145 of the Consultation.

[58] Although, capillarity is not mentioned as an essential parameter to assess competition in PI markets. For instance, BEREC's guidance on how to treat cable networks in relation to PIA assessments does not mention capillarity: "*In countries where cable operators are present, another issue that may be raised in an SMP assessment is the extent to which the physical infrastructure that was used by the cable operator for the purpose of deploying its own network may also be used for the purpose of deploying other types of networks (such as copper/fibre networks), and thus may effectively constrain, to some degree, the market power of the incumbent operator in the physical infrastructure market (or be argued to be in a position of joint dominance). In this regard, features such as coverage may become relevant for the purpose of assessing the competitive pressure that the physical infrastructure of the cable operator may exert.*"

[59] In paragraph 3.113 of the Consultation ComReg states that the requirement to seek premises owners' permission to surface mount cables "*undermines its potential use by an Access Seeker*". eir disagrees that this is the case. Virgin Media has demonstrated that it is entirely feasible for an Access Seeker to gain the necessary premises owner permissions to surface mount cables where other options are not available. eir sees no reason why such an approach would not be plausible for other operators. While it may involve incurring time and expense in a different way to using duct or poles, ComReg has not demonstrated why it is not a credible alternative.

[60] In this context, we note that, as set out on page 64 of the Staff Working Document accompanying the 2020 Recommendation, NRA's in other Member States (e.g., Germany and Austria) have imposed access obligations only in relation to parts of networks (e.g., the feeder segment). While circumstances differ in Ireland, this demonstrates the importance of considering narrower focal products than that proposed by ComReg.

ComReg's national geographic market definition fails to reflect important sub-national differences in competitive conditions

104. eir disagrees that the relevant product markets for PI are national. ComReg's limited geographic market definition fails to take into account important factors that demonstrate that there are separate geographic markets in the IA and in the commercial area.

105. The SMP Guidelines set out that the relevant geographic market can be defined as an area where "*…the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different*".[61] As a result those areas where the conditions of competition are "*appreciably different*" or heterogeneous should not be treated as a single geographic market.

106. Although ComReg makes reference to the NBI and the NBP in its geographic market definition[62], it does not then go on to consider important factors that demonstrate that there are separate geographic markets in the IA and in the commercial area:

   a. **Demand conditions materially differ between the IA and the commercial area.** Demand for PI in the merchant market will be heavily focused in the IA over the market review period, as ComReg's own forecasts demonstrate.[63] NBI is the only operator that is expected to have material demand for PI in the merchant market and its activities are focused on delivering the NBP in the IA. Merchant market demand for PI outside the IA is expected to be very limited, consistent with demand to date.

   b. **ComReg's claimed capacity constraints on ESB PI are not relevant in the IA as ESB will not be hosting SIRO.** Therefore, even on ComReg's view of ESB capacity restrictions, ESB is a more significant potential PI competitor in the IA. eir sees no reason why ESB could not readily replicate the PI service it provides to SIRO to support NBI's future deployment in the IA.[64] Indeed,

[61] SMP Guidelines, paragraph 48.
[62] In para 3.104 of the Consultation.
[63] See paragraph 3.40.
[64] While ComReg raises questions about the credibility of the threat from ESB (see paragraph 3.85), its assertions do not appear to be based on detailed analysis or information it has gathered directly from NBI or ESB (rather it is based on a single newspaper article).

publicly available documents from ESB (e.g., "*ESB Presentation on National Broadband Plan: June 2019*") show that ESB considers its infrastructure is a relevant option in the IA for FTTH deployment.

c. **Other telecoms-specific PI is considerably more prevalent in the commercial area than the IA** – for example, both LL type infrastructure and Virgin Media's PI is much more heavily focused in the types of urban and suburban areas that lie outside the IA. Such infrastructure is particularly relevant in relation to non-capillary PI.

107. Although eir does not have SMP in either the IA or commercial area, as we explain below, the nature of constraints does differ between the two areas reflecting the different competitive conditions therefore they should be considered separately when assessing SMP (and remedy design, if necessary).

Q. 2: Do you agree with the SMP assessment and that Eircom is likely to have SMP in the Relevant PIA Market?

108. eir disagrees with ComReg's proposed finding of it having SMP in relation to PI. The proposed finding is at odds with the competitive dynamics and market reality in Ireland. ComReg's flawed assessment fails to adequately reflect the full range of competitive and regulatory constraints that eir faces both in the IA and outside the IA, as set out below. Furthermore, as set out above, it proceeds on the basis of a flawed market definition.

109. Should ComReg persevere with its faulty approach to market assessment which places disproportionate focus on eir PI and, in doing so, finds that eir has SMP, it needs, taking into account its obligations to act impartially and in a non-discriminatory manner, to also consider in detail whether other PI operators, most notably ESB, also have SMP in relation to PI. When properly assessed, there is little difference in the market circumstances between eir and other PI owners, most notably ESB (which is used both by SIRO and ESB Telecoms), face. For example, ESB also has a dense ubiquitous PI network which is capable of hosting fibre cables. Therefore, if ComReg considers that eir has SMP, it should reach the same conclusions in relation to other PI owners. (See inter alia Article 4(a) of the Code which provides that national regulatory authorities shall '*ensure that in similar circumstances there is no discrimination in the treatment of providers of electronic communications networks and services*').

eir does not have SMP in the IA

110. As set out further below, eir is highly constrained in the IA by two main constraints: a) the BCRD/BCRR; and b) the competitive threat from ESB.

111. ComReg's SMP analysis fails to take into account the powerful existing constraint imposed on eir by the BCRD/BCRR. This is a very significant failing. As set out in detail above, the BCRD/BCRR provisions allow operators to request eir to provide access to its PI on request on fair and reasonable terms. This severely constrains any ability eir may otherwise have to act independently of its competitors, customers and consumers.

112. The presence of these provisions means that any operator wanting access to eir's PI (or indeed any PI within the scope of the Directive) has very considerable countervailing buyer power.[65] The provisions provide a powerful bargaining chip for operators seeking commercial PI access arrangements, including NBI. The provisions will remain in place irrespective of the outcome of ComReg's market review.

113. In addition to the constraint imposed by the BCRD/BCRR, eir also faces a strong competitive constraint from ESB.[66] As set out above, the claimed capacity constraints on ESB (to the extent they are a valid concern) are not a credible concern in the IA as no commercial operator (including SIRO) is likely to deploy in the IA. Therefore, even on ComReg's view of ESB capacity restrictions, ESB is a significant potential PI competitor in the IA. eir sees no reason why ESB could not readily replicate the PI service it provides to SIRO to support NBI's future deployment in the IA.

114. As set out above, NBI does not need to switch all of its existing lines to ESB PI for eir to be constrained by ESB PI. Rather, NBI could use a multi-sourcing strategy for new deployments to constrain eir – such strategies are commonplace in other markets. A combination of the use of, or the threat of using, ESB for some or all new deployments could be used to extract competitive terms from eir.

115. ComReg recognises that ESB is a potential competitor to eir as "*it has a nationally ubiquitous electrical network with capillarity*" but, because of the reasoning discussed above, ComReg excludes ESB PI from the market definition. On this basis, ComReg argues that ESB PI is not "*an effective substitute for Eircom's network*".[67] However, as set out above, ComReg's reasoning for excluding ESB PI from the market definition is flawed. ESB PI is demonstrably an effective substitute for eir's network as SIRO has chosen to use it for its FTTH deployment notwithstanding regulated access to eir's CEI being available to it. Indeed, publicly available

[65] ComReg's consideration of countervailing buyer power does not take the BCRD/BCRR into account at all. The framework adopted focusses exclusively on scenarios based on switching activity. However, the bargaining power from the BCRD/BCRR does not rely on switching and therefore ComReg's framework is not relevant to considering it.

[66] Even if ComReg (incorrectly) continues to exclude ESB PI (and other non-telecoms PI) from the product market definition it must separately consider the importance of such out-of-market constraints when assessing market power and designing remedies. ComReg should not completely ignore non-telecoms PI having excluded it from the product market definition.

[67] See paragraph 4.51 of the Consultation.

documents[68] demonstrate that ESB has previously demonstrated that using its PI could be used to support NBI's FTTH deployment in the IA.

116. The combination of these powerful constraints means that eir does not meet the criterion that it be able to "*behave to an appreciable extent independently of competitors, customers and ultimately consumers*"[69] in the IA.

<u>*eir does not have SMP in the commercial area*</u>

117. The fact that eir does not have SMP in relation to PI in the commercial area (i.e., outside the IA) is demonstrated by the fact that eir's two main rivals in the provision of scale FTTH networks (i.e., SIRO and Virgin Media) are deploying large scale FTTH networks without the use of eir's PI. As acknowledged by ComReg, both SIRO and Virgin Media deploy FTTH using their own self-supplied PI, not eir PI. This is despite regulated access to eir's PI being available for the best part of a decade.

118. Consistent with the extensive use of self-supplied PI by SIRO and Virgin Media for their FTTH deployments, eir expects demand for PI in the merchant market outside the IA to be highly limited over the next market review period. As set out above, no other operator is expected to invest in a scale FTTH deployment in Ireland in the foreseeable future, irrespective of ComReg's finding in this market review.

119. Given the presence of these two competing PI networks, which will result in very limited demand for PI in the merchant market, eir is not able to "*behave to an appreciable extent independently of competitors, customers and ultimately consumers*" outside the IA. Both SIRO and Virgin Media have access to highly effective substitutes to eir PI which they have chosen to use. The availability and use of these two effective substitute PI networks to deploy scale FTTH networks demonstrates that eir does not have SMP.

120. While there may be limited demand for smaller scale and geographically limited commercial FTTH deployments,[70] such deployments are unlikely to be in areas

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[68] e.g.,. "*ESB Presentation on the National Broadband Plan: June 2019*"

[69] Paragraph 52 of the SMP Guidelines.

[70] There may some limited additional demand for applications beyond FTTH (e.g., for leased lines). However, eir notes that in nearly 60% of the State leased lines provision has been completely deregulated as there is no SMP (even in the absence of regulated PI access).

where SIRO has or intends to deploy (as such deployments typically seek to avoid overbuilding existing networks given the impact of overbuild on penetration and therefore the viability of deployment). Therefore, ESB's claimed capacity constraints will not prevent ESB being an important constraint on eir for such deployments, further undermining any possible market power for eir.

121. In addition, other forms of telecoms-specific and non-telecoms-specific PI are more likely to be alternatives for more geographically limited FTTH deployments which do not (by definition) require nationwide PI footprints.[71] This includes Virgin Media's PI network. While some of these alternative PI may not have extensive capillarity, Virgin Media's use of surface mounted cables, which it is expected to continue to use for its FTTH deployment, demonstrates that there are credible alternatives for operators, including self-supply. Furthermore, as noted in the Consultation,[72] operators can and do deploy their own PI, particularly in the urban areas outside the IA.

122. eir disagrees with ComReg's dismissal of the importance of indirect constraints[73]. eir will face a material indirect constraint from SIRO and Virgin Media (and the downstream wholesale and retail services they support). ComReg's objection to this constraint is the lack of "*national coverage, capillarity and ubiquity*" which ComReg argues means that they would not be a strong constraint on eir. However:

   a. SIRO and Virgin Media's FTTH coverage outside the IA will be extensive over the course of the next review period; and

   b. the use of nationwide uniform pricing by wholesalers and retailers in Ireland means that the constraint imposed by SIRO and Virgin Media is transmitted across the wider area outside the IA – it is not necessary for them to be present across the entirety of eir's downstream footprints.

Furthermore, given the higher value nature of leased lines, they typically are provided using self-provided PI. Such self-supply will continue to constrain eir.

[71] eir disagrees with ComReg's view that nationwide coverage is important (see paragraph 4.30). For alternative PI to be an effective substitute it requires coverage in areas of interest for its deployment. Given that no operators plan nationwide deployments, nationwide coverage is not necessary. Furthermore, access seekers do not necessarily need access to one PI provider to cover their entire planned footprint - it is commonplace in competitive markets for firms to use multiple wholesale providers. Such procurement strategies can be an important mechanism for securing competitive terms from providers.

[72] See paragraph 4.40 of the Consultation.

[73] See paragraph 4.42 of the Consultation.

123. Beyond these important competitive constraints, as set out above in the context of the IA, ComReg's analysis importantly fails to take into account the powerful existing constraint imposed on eir by the BCRD/BCRR. The presence of these provisions means that any operator wanting access to eir's PI (or indeed any PI within the scope of the Directive) outside the IA has very considerable countervailing buyer power.

Q. 3: Do you agree that the competition problems and the associated impacts on competition end-users identified are those that could potentially arise in the related downstream markets of PIA?

124. There are no credible competition concerns in relation to PI in either the IA or commercial areas, as discussed below. ComReg's proposals will have no impact on the competitiveness of the already competitive PI and relevant downstream markets[74]:

    a. Competition in the Commercial NG WLA market is driven by strong rivalry between eir, SIRO and Virgin Media (which has entered the wholesale market). As set out above, SIRO and Virgin Media's deployment is based on self-supplied PI. ComReg's proposed PI remedies will have no material impact on the competitiveness of the Commercial NG WLA market.

    b. The absence of SMP in the IA NG WLA market is based on the deployment by NBI which will take place irrespective of whether ComReg's PI proposals are confirmed. Absent a SMP-based PI access remedy, NBI will still be able to access third-party PI based on fair and reasonable terms either through commercially negotiated agreements with PI operators (e.g., eir or ESB) or via access mandated through the BCRD.

    c. Both the WCA and CG WLA markets will remain competitive in the absence of ComReg's PI proposals, consistent with the underlying market dynamics set out above.

    d. Nearly 60% of leased lines market in the State has already been deregulated.[75] Outside those areas, self-supply of PI is a credible option (as is demonstrated by the extensive use of self-supplied PI for leased lines). Furthermore, access to other PI is possible either through commercial negotiation or the BCRD.[76]

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[74] As a result ComReg's conclusions in relation to PI have no bearing on its assessment of competition in the downstream WLA and WCA markets.

[75] In January 2020, ComReg deregulated approximately 58.4% of connected business premises in Ireland as they were within workplace zones which were considered competitive due to the presence of alternative operators' infrastructure.

[76] In addition, while a high proportion of the current demand for PI in the merchant market is for leased lines or backhaul, in absolute terms the overall level of demand has still be highly limited. This is despite regulated access to eir's CEI having been in place since the 2018 WLA Market Decision. Therefore, to the extent that there is any residual competition concern outside the areas that have already been deregulated, regulated access to eir's PI is not an effective remedy.

125. ComReg argues that there are three main types of potential competition concerns in relation to PI:[77]

a. **Exclusionary practices**: where eir acts in a manner which could prevent current or potential competition in downstream wholesale and/or retail markets, by foreclosing access to its PI (e.g., by imposing a margin squeeze or refusing to supply access to PI);

b. **Leveraging**: where eir, a vertically-integrated SP leverages its market power in a relevant PIA market in order to exert undue influence in other markets, also restricting and/or distorting competition. ComReg argues that this could include: restrictions on or denial of access, delaying tactics, quality discrimination, creating or exploiting information asymmetries and withholding relevant information, unreasonable quantity forcing or price-based leveraging.

c. **Exploitative practices**: where eir engages in exploitative behaviours, such as excessive pricing or practices leading to inefficiency and/or inertia, to the detriment of both competition and end-users.

126. All three of these competition concerns rely on eir having SMP in a relevant PI market. However, for the reasons set out above, this is not the case. Notwithstanding this, we set out below why there are no credible competition concerns (in the event that ComReg finds eir to have SMP in relation to PI in either the IA or outside of it).

There are no credible competition concerns in the IA

Exclusionary practices

127. eir has neither the incentive nor ability to engage in exclusionary practices in the IA. eir will not be competing with NBI in the IA,[78] as acknowledged by ComReg[79]. This is because the IA is uneconomic to serve commercially so no commercial operators, including eir, are expected to deploy FTTH. Therefore, eir will only be a PI supplier to

[77] See paragraph 5.7 of the Consultation.

[78] eir's current generation broadband services are not an effective substitute for NBI's FTTH services prior to copper switch-off. This is consistent with ComReg's decision to define separate product markets for CG WLA services and NG WLA services in the IA in ComReg 23/03.

[79] See paragraph 5.4 of the Consultation.

NBI in the IA, not a rival. This means that eir will have no incentive to engage in discriminatory conduct.

128. Furthermore, as households migrate from eir's legacy CG services to NBI's FTTH[80] the provision of PI will be eir's sole source of revenue in the IA. As a result, it will have no incentive to exclude customers from using the infrastructure – its incentives are to maximise utilisation.

129. In any event, even if eir did have an incentive to engage in exclusionary conduct (which it does not):

   a. NBI could turn to ESB to use its PI. As set out above. Indeed, ESB has actively offered its PI to support NBI's FTTH deployment in the IA.

   b. Alternatively, the BCRD/BCRR allows NBI to access PI on fair and reasonable terms (and thereby evading any potentially anticompetitive conduct). As set out above, the presence of the BCRD/BCRR provides NBI with considerable countervailing buyer power.

Leveraging

130. eir has no incentive or ability to engage in anticompetitive leveraging. This is because:

   c. First, there can be no credible horizontal leveraging concern. NBI is only active in the IA while eir (alongside SIRO and Virgin Media) is only active in the commercial area, so eir could not undertake actions that would leverage any market power in the IA into the commercial area (or vice versa).

   d. Second, there is no credible vertical leveraging concern. eir will not be competing with NBI in downstream markets in the IA (as set out above). Therefore, it has no ability or incentive to engage in any form of vertical leveraging activity.

[80] eir's incentive is to support this transition as it will allow it to decommission its under-utilised and costly copper network sooner.

e. Third, even if it was possible for eir to seek to engage in anticompetitive leveraging in the IA, NBI would be able to negotiate access to ESB PI, as set out above.

131. Furthermore, in any event, the BCRD/BCRR provides strong protections against any form of anticompetitive leveraging. For example:

a. Operators are able to access PI on fair and reasonable terms (thereby preventing behaviours such as restricting/denying access, quantity discrimination, quantity forcing, and price-based leveraging). As set out above, the requirement for terms and conditions to be 'fair and reasonable' is widely cast in the Directive. For example, it explicitly is not limited to only pricing terms.

b. The BCRD has well-defined mechanisms (see Article 3) to ensure that access is granted in a timely manner (e.g., 2 month deadline) and, in the event of disputes, that they are resolved in a timely manner (and within 4 months). This undermines the ability of any PI owner to engage in delaying tactics.

c. The BCRD has extensive provisions in relation to the provision of relevant information regarding the availability of PI (see Article 4). This undermines the ability of any PI owner to create or exploit information asymmetries.

Exploitative conduct

132. There are no credible concerns about exploitative conduct in the IA. This is because eir is constrained by:

a. NBI's ability to request PI access on fair and reasonable terms under the BCRD/BCRR. The BCRD/BCRR provides a powerful bargaining chip for operators seeking commercial PI access arrangements, including NBI. The provisions will remain in place irrespective of the outcome of ComReg's market review.

b. The credible threat from ESB. As set out above, ESB has previously actively demonstrated that its PIA could be used to support NBI's FTTH deployment in the IA. As eir's only credible source of revenue in the IA will be for access to its PI it has an incentive to ensure that access remains competitive and attractive in the face of potential competition from ESB. This means it will

face incentives to remain efficient and invest in its infrastructure (to the extent necessary).

133. ComReg also raises a potential theoretical concern that eir could be "*insulated from the need to innovate and improve or maintain the quality of its PI*" which may "*limit the rollout of competing networks and/or lead to higher cost and less efficient methods of supply*".[81] eir disagrees that such concerns are relevant in this case. As ComReg acknowledges, eir is in fact currently undertaking an upgrade of its PI to support NBI's roll-out, contrary to ComReg's theoretical concerns.

134. In response to this significant programme of investment by eir, ComReg further argues that eir could "*fail to continue maintaining and upgrading its PI network to the extent that this would inhibit other SP using its PI to deploy rival ECSs, for example by failing to remove redundant cable and equipment in the PI on receipt of a PIA order*".[82] eir disagrees with this concern:

    a. First, ComReg's concern rests on frustrating deployment of "*rival ECSs*" but, as set out above, eir will not be competing with NBI in the IA so such concerns are not valid.

    b. Second, eir will have an incentive in the IA to ensure that NBI can effectively access its PI as it will want to maximise the utilization of its PI, as set out above.

[81] Paragraph 5.37 of the Consultation.
[82] Paragraph 5.38 of the Consultation.

<u>There are no credible competition concerns outside the IA</u>

Exclusionary practices

135. eir does not have either the incentive or ability to engage in exclusionary practices outside the IA. Deployment of competing FTTH networks outside the IA is proceeding on the basis of self-supplied PI, as set out above. Therefore, eir has no ability to exclude rivals in downstream markets through its PI access terms and conditions. Furthermore, because such a strategy would be ineffective, eir has no incentive to engage in it.

136. In any event, even if eir did have the ability to engage in exclusionary conduct, the BCRD/BCRR allows operators to access PI on fair and reasonable terms (and thereby evading any potentially anticompetitive conduct).

Leveraging

137. eir has no incentive or ability to engage in anticompetitive leveraging. This is because:

    a. First, there is no credible horizontal leveraging concern. eir is only active in the commercial area (alongside SIRO and Virgin Media), and NBI is only active in the IA. Therefore, eir could not undertake actions that would leverage from the commercial area into the IA (or vice versa).

    b. Second, there is no credible vertical leveraging concern. eir has no ability to engage in vertical leveraging as SIRO and Virgin Media both self-supply their PI in the commercial area. Therefore, it has no ability or incentive to engage in any form of vertical leveraging activity.

138. But, in any event, the BCRD/BCRR provides strong protections against any form of anticompetitive leveraging, as set out above (in the context of the IA).

Exploitative conduct

139. There are no credible concerns about exploitative conduct outside the IA because eir is constrained by:

a. SIRO and Virgin Media will both be self-supplying their PI. Therefore, there will be very limited demand for PI in the merchant market. This means that eir has no ability to engage in exploitative conduct in the merchant market. Furthermore, its conduct will be constrained by competition from SIRO and Virgin Media in downstream markets.

b. Operators' ability to request PI access on fair and reasonable terms under the BCRD/BCRR. The BCRD/BCRR, which will remain in place irrespective of the outcome of ComReg's market review, provides a powerful bargaining chip for operators seeking commercial PI access arrangements.

140. As explained in the context of the IA, ComReg also raises a potential theoretical concern that eir could "*fail to continue maintaining and upgrading its PI network to the extent that this would inhibit other SP using its PI to deploy rival ECSs, for example by failing to remove redundant cable and equipment in the PI on receipt of a PIA order*".[83] eir disagrees with this concern. ComReg's concern rests on frustrating deployment of "*rival ECSs*" but, as set out above, both SIRO and Virgin Media, by far the largest potential purchasers of eir PI given their plans to deploy scale FTTH networks, will be self-supplying their PI requirements (irrespective of the outcome of this market review). Therefore, eir has no way to frustrate their deployments in the way ComReg suggests. Furthermore, as ComReg acknowledges, eir is currently undertaking an upgrade of its PI to support NBI's roll-out.

[83] Paragraph 5.38 of the Consultation.

Q. 4: Do you agree with ComReg's proposed non-pricing remedies in the PIA market?

- AND -

Q. 22: Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market?

141. ComReg's proposed PI remedies are unnecessary, unjustified and wholly disproportionate. As a result, they fail to meet the requirements set out in the Access Regulations (e.g., Regulation 8) and in the Code. Given this, ComReg should withdraw its proposals and the existing regulation of PI. In any event, ComReg certainly should not be imposing regulation in this market review that expands the regulatory burden and imposes additional incremental costs on eir and its customers.

ComReg's proposed PI remedies are wide-ranging and highly intrusive

142. ComReg has proposed a wide-ranging and highly intrusive package of remedies for PI. eir has not faced a more intrusive and more broadly scoped set of remedies in any previous market review. ComReg is proposing to deploy all the remedies available to it[84] and to the greatest extent possible.

143. ComReg's set of proposed remedies includes:

Proposed access remedies

- A wide-ranging and highly unrestricted PI access obligation which severely constrains eir's ability to refuse access. This provides alternative operators with a wide range of ways of using eir's PI, including a new form of access. eir will be required within seven months of the final decision to make available a new duct access product whereby all remediation is undertaken by the access seeker. This also runs directly counter to ComReg's most recent legislation on this subject, Direction 21/60R which directed that eir carry out all duct repairs; noting in this regard ComReg's obligation to 'promote regulatory predictability by ensuring a consistent regulatory approach' (Article 3(4)(a) of the Code)

[84] Indeed, in the case of the Regulatory Governance Obligation it is going beyond the remedies set out in the relevant legislation.

- An amended requirement to grant access to eir dark fibre in circumstances where access to eir PI is not possible, or using eir PI would involve costs that the access seeker is not prepared to pay (as long as those costs exceed €11,000).
- A requirement for eir to provide access seekers with access to its operational support systems.
- A requirement to provide access to its Passive Access Record, including a range of detailed requirements about how that access is provided.
- Detailed rules and requirements in relation to how new PI products are developed – this involves material changes to the existing processes and timeframes.
- Detailed rules and requirements in relation to the development of SLAs. The specification of SLAs is left to negotiation, but is required to be completed within a six-month period.

Proposed non-discrimination remedies

- Adoption of the most stringent and intrusive form of non-discrimination remedy (i.e., EoI).

Proposed transparency remedies

- A requirement to publish a specific PIA Reference Offer.
- Imposition of a KPI monitoring regime. eir has seven-months to identify, document and implement any development and processes that may be required for the monitoring and reporting of KPIs, three months for the first data collection period, and two months to gather, process and publish the PI KPI metric report.
- Requirements to publish information on product development and PI rollout plans.
- A requirement to make available eir's Engineering, Planning and Design Rules.
- A requirement to publish a description of the processes and systems relied upon by eir to provide PIA.

Proposed regulatory governance obligation

- Material changes to eir's regulatory governance arrangements through the introduction of a new standalone regulatory obligation to have in place 'regulatory governance arrangements, as well as the introduction of a Statement of Compliance ('SoC') regime. eir would be required to publish its regular SoC submissions to ComReg. Furthermore, ComReg would have the ability to impose further requirements, including non-standard remedies, on eir in the future (and outside the market review process).

144. In addition, ComReg proposes imposing a cost orientation remedy requiring eir to set its prices for PI access based on the outputs of a ComReg cost model, which ComReg proposes to make a number of changes to for this market review.

145. While some of ComReg's proposed remedies mirror several of the elements already in place as part of the 2018 CEI remedy, ComReg is proposing to make a number of highly significant changes. All of these changes increase the regulatory burden imposed on eir and are not justified by ComReg on the basis of evidence of clearly identified and material limitations or issues with the existing CEI remedy.

146. The CEI remedy has been very lightly used by Access Seekers. For the reasons set out above, this is unlikely to change in the foreseeable future, particularly outside of the IA, irrespective of the outcome of this market review. However, this lack of demand should not be seen as evidence that the existing remedy is inadequate and therefore ComReg's proposals needs to go further. Rather, to the contrary, it is evidence that the remedies are unnecessary and wholly disproportionate (and therefore inconsistent with the legal requirements imposed on ComReg under the Access Regulations). As set out above, the limited demand, particularly outside the IA, reflects specific features of the Irish market which will not change irrespective of the outcome of this market review.

Regulation must be targeted, balanced and proportionate

147. Well-designed, targeted and proportionate *ex ante* regulation can support benefits for consumers. However, the imposition of such regulation is not without costs and risks of harm. Even well-designed, targeted and proportionate regulation can risk unintended consequences (e.g., harming competition in adjacent markets by

distorting incentives). Furthermore, it typically imposes a significant burden and costs on regulated firms, including acting as a significant managerial distraction and slowing product development. This can lead to higher prices for end users and stifle innovation and investment. The harm from poorly designed/targeted and disproportionate regulation will be materially greater.

148. Consistent with this, the European Commission's Staff Working Document accompanying the Commission's 2020 *Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation* notes that:

> *"Regulation must be targeted and balanced in accordance with the principle of proportionality. NRAs should therefore choose the least intrusive way of addressing potential harm to effective competition in the identified market. Indeed, an excessive regulatory burden on operators could stifle investment and innovation, whereas insufficient regulation and failure to apply it where it is needed would reverse the achievement of the past decades of liberalisation, and reduce consumer choice and competitive dynamics in the sector."*[85]

149. This obligation to choose the least intrusive option when devising SMP obligations is expressly reiterated in Article 68 of the Code. This underlines that *ex ante* regulation should not be imposed for its own sake, or to guard against theoretical, but low likelihood or harm outcomes. Rather the ultimate "*objective of ex ante regulatory intervention is to create benefits for end-users by making retail markets competitive on a sustainable basis*"[86]. Where regulation cannot be expected to deliver clear incremental benefits for consumers over and above other existing regulation, and do so in a proportionate manner, it should not be pursued. This is reflected in Article 3(4)(f) of the Code which provides that national regulatory authorities should '*impose ex ante regulatory obligations only to the extent necessary to secure effective and sustainable competition in the interests of end users and relax or lift such obligations as soon as that condition is fulfilled*'

150. On this basis, *ex ante* regulation should:

   a. Be targeted on markets where SMP exists and is expected to endure. The boundaries for those markets should be drawn to minimise the risk of

[85] Pages 10 and 11 of the Staff Working Paper accompanying the 2020 Recommendation.
[86] Page 7 of the Staff Working Paper accompanying the 2020 Recommendation.

combining product or geographic markets which are characterised by SMP and those that are not.

b. Be designed in the least intrusive manner possible as stipulated in Article 68 of the Code. Where more intrusive regulation is proposed it should be based on evidence-based analysis of why less intrusive interventions are not sufficient to address competition concerns and why a more intrusive approach is proportionate.

c. Be imposed only where it will deliver clear benefits to retail competition and those benefits are expected to outweigh the risks and costs associated with intervention. Highly intrusive and costly regulation should not be imposed for its own sake, or on the basis of theoretical concerns that are either low likelihood or harm.

d. Take into account other existing forms of regulation or other measures which can affect the need for, or benefits arising from additional regulation. As set out in the Staff Working Paper accompanying the 2020 Recommendation, when analysing "*electronic communications markets with a view to determine whether any of those markets require ex ante regulation, and before imposing any obligations, an NRA **must** take into account other types of regulation or measures already imposed which affect the relevant market. This includes, in the case of physical infrastructure, measures taken under the Broadband Cost Reduction directive*". [emphasis added][87] Equally, Article 73(2) of the Code requires that '*where national regulatory authorities consider the appropriateness of imposing any of the possible specific obligations... and in particular where they assess in accordance with the principle of proportionality whether and how such obligations are to be imposed, they **shall** analyse whether other forms of access to wholesale inputs either on the same or related wholesale market would be sufficient to address the identified problem in the end user's interest.*'

151. ComReg's approach to remedy design must also be consistent with its legal duties and obligations, including the Access Regulations[88] which require, *inter alia*:

[87] Page 62 of the Staff Working Paper accompanying the 2020 Recommendation.
[88] https://www.irishstatutebook.ie/eli/2011/si/334/made/en/pdf

- Regulation 8: "(5) *Where, in exceptional circumstances, the Regulator intends to impose on operators with significant market power obligations for access or interconnection other than those set out in Regulations 9 to 13, the Regulator shall submit to the European Commission a request for permission to impose such other obligations. The Regulator shall not impose such other obligations pending the decision of the European Commission in accordance with Article 8(3) of the Access Directive to authorise or prevent the Regulator from taking such measures.*" This obligation is also set out in the Article 68(3) of the Code.
- Regulation 8: "*Any obligations imposed in accordance with this Regulation shall-*

  (a) be based on the nature of the problem identified,

  (b) be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and

  (c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations."
- Regulation 12: "(4) When considering the obligations referred to in paragraphs (1) and (2) and, in particular, when assessing how such obligations would be imposed proportionate to the objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, the Regulator shall take into account in particular the following factors—

  (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of access or interconnection involved, including the viability of other upstream access products such as access to ducts,

  (b) the feasibility of providing the access proposed in relation to the capacity available,

  (c) the initial investment by the facility owner taking account of any public investment made and the risks involved in making the investment,

(d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure based competition,

(e) where appropriate, any relevant intellectual property rights, and

(f) the provision of pan-European services"

These factors are also set out in the Code, with the addition of obligations to, for example, have *'particular regard to investments in and risk levels associated with very high capacity networks.'*

152. As set out below, ComReg's PI proposals fail to adhere to these basic principles and legal requirements. To the contrary, ComReg's PI proposals are unnecessary, unjustified and disproportionate.

ComReg's proposals fail to adhere to basic regulatory principles and its legal requirements

153. eir disagrees with ComReg's proposed PI remedies. The remedies are unnecessary, unjustified and wholly disproportionate. They do not meet the legal requirements imposed on ComReg under the Access Regulations (e.g., Regulation 8) or by the Code. As set out above, eir does not have SMP in relation to PI.[89] As a result, there is no economic or legal justification for the imposition of a wide-ranging and highly intrusive set of remedies. Notwithstanding this, there are no credible competition concerns in relation to PI (irrespective of what ComReg concludes in relation to SMP). This means that ComReg's proposed remedies are also entirely unnecessary.

154. As a result, and consistent with the experience of the existing CEI remedy, ComReg's proposed remedies will have no material effect on competition in downstream markets. They will not generate benefits for Irish broadband customers. However, the proposed remedies are costly for eir:

[89] As set out above, ComReg's market definition is faulty. For example, it fails to consider whether separate product markets should be considered for capillary and non-capillary PI. This means that it has failed to consider whether remedies should be constrained to certain product markets. In France, for instance, the SMP operator must provide non-discriminatory access to its infrastructure, "*except if the infrastructure is used to deploy backhaul networks, where it is sufficient to ensure that the wholesale conditions are comparable to those provided by Orange for its own operations*". (Cullen International, 2020, s. 8)

a. eir incurs material costs and managerial time to ensure it remains compliant with the existing obligation; and

b. ComReg's proposed changes will result in significant incremental managerial burden and associated costs.

155. Imposing a substantial and growing regulatory burden, and the associated costs, on eir is not without harm. Where it is able to do so, eir will need to recover the increased costs from its customers, these costs are likely to be passed on (at least to some extent) to end users. Adding further cost pressures, particularly in light of the broader macroeconomic environment; where there is no competitive gain makes absolutely no sense.

156. If eir is unable to recover the increased costs it faces from regulation its incentives to invest and innovate in the future will be harmed. The remedies will also restrict eir from being able to compete freely with operators who are not subject to the same onerous restrictions; in other words the remedies in themselves will distort competition. Furthermore, the disruption and cost from the material changes to the existing remedies will act as a managerial distraction and a budgetary constraint at a time when we want to be fully focused on delivering our ambitious FTTH plans, which will deliver significant benefits for Irish broadband customers.

157. While increasing the regulatory burden and/or asking consumers to pay higher prices can sometimes be associated with longer-term competitive benefits, this is not the case with ComReg's PI proposals. As explained above, ComReg's proposals will not result in any material change in the competitive conditions in downstream broadband or leased line markets. Therefore, the additional costs ComReg is asking eir and consumers to shoulder will be for no competitive or social gain. There is no clearer example of a disproportionate regulatory proposal.

ComReg's proposals risk unintended consequences and distortions in a range of other markets

158. ComReg's proposals also risk unintended consequences and distortions to competition in a range of other markets. ComReg seeks to justify its proposals in terms of the impact they will have in downstream broadband markets. However, ComReg's proposals do not limit the use of the proposed remedies to the

deployment of FTTH networks – as currently framed PIA can also be used by operators for a range of other applications, for example, duct and poles access could be used to deploy leased lines to businesses or for backhaul, while PI co-location services could be used to, for example, establish a datacentre in an eir exchange. Indeed, as ComReg notes in the Consultation, the majority of demand for PI in the merchant market to date has been for leased lines/backhaul (which does not seem to form part of a multi-service network also including a FTTH network deployment).

159. Yet, ComReg has not assessed nor demonstrated whether making PIA available for an unlimited set of infrastructure deployments is appropriate or proportionate in light of market circumstances in the broad range of markets, including WHQA[90], which could be affected by such a widely cast PIA remedy. Without such an assessment there is a heightened risk that PIA distorts competition in these markets, particularly in markets and areas where competition is effective absent regulated PI access. eir can see no justification for ComReg risking distorting competition in unregulated markets, such as in relation to datacentres, through such a poorly targeted PI remedy.

160. The most appropriate response to such risks is for ComReg to consider the appropriateness of PI remedies in the relevant downstream markets such that its use can be limited to addressing the relevant competition concerns identified. However, in the event that ComReg continues to undertake a separate review of PI markets, eir submits that ComReg should be clear about its intended use cases for PI services, ensuring that its use is targeted, balanced and proportionate. This should explicitly avoid the use of PIA to distort competition in already competitive downstream markets.

eir's views on ComReg's proposed access remedies

161. This section sets out eir's views on ComReg's proposed access remedies under the following headings:
    - A. ComReg's proposed obligation to meet reasonable requests for access

[90] eir notes that in January 2020, ComReg deregulated approximately 58.4% of connected business premises in Ireland as they were within workplace zones which were considered competitive due to the presence of alternative operators' infrastructure.

- B. Greater clarity surrounding the removal of redundant cables
- C. The scope of the proposed specific access obligations is disproportionately wide
- D. ComReg's proposals for self-remediation access would result in unacceptable risks
- E. ComReg needs to ensure the use of direct duct access is only used where it is not possible to use sub-duct
- F. ComReg's proposed Passive Access Records obligation is too expansive
- G. PI Co-location scope should not be ambiguous
- H. ComReg's proposals should distinguish between existing and new PI
- I. ComReg should not mandate a dark fibre fall-back
- J. ComReg's product development process proposals are not proportionate
- K. eir disagrees with ComReg's SLA proposals

162. As the comments demonstrate, eir considers that a number of important changes are required to ComReg's proposals.

A. <u>ComReg's proposed obligation to meet reasonable requests for access</u>

163. ComReg proposes to impose on eir an obligation to meet reasonable requests for Access[91] and states that there are three corollaries to this obligation:[92]

1. Any refusal or partial refusal of access must be objectively justified;
2. Access already granted ought not be withdrawn; and
3. Negotiations for access must be conducted in good faith.

164. eir's comments on these corollaries are set out in this section.

1. Refusal or partial refusal of requests:

165. ComReg has incorrectly summarised and unduly limited the meaning of Recital 191 of the Code when considering the grounds upon which eir can reject requests.[93]

166. In ComReg's view, Eircom may only reject requests based on technical feasibility and network integrity. However, it is clear from the wording of Recital 191 of the Code that there is no such legal power to allow ComReg to limit eir's consideration to only technical feasibility and network integrity. Recital 191 of the Code states *"…[access] requests should only be refused on the basis of objective criteria <u>such as</u> technical feasibility or the need to maintain network integrity." [emphasis added].* Consequently, Recital 191 is not providing an exhaustive list. The stated requirement of Recital 191 is that any consideration for refusal must be based on objective criteria.

167. It is clear that any assessment must be broader than "*only*" technical feasibility and network integrity. In addition, as set out above, Regulation 12 of the Access Regulations specifically states that ComReg must also have regard to "*economic viability*" and the "*initial investment by the facility owner, bearing in mind the risks involved in making the investment*". It is not the case that obligations can be imposed on eir by means of an Access request, which could not have been imposed on eir by means of regulation on foot of the Code.

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[91] Paragraph 6.32 of the Consultation.
[92] Paragraph 6.33 of the Consultation.
[93] In paragraphs 6.34 to 6.36 of the Consultation.

168. A request may not be reasonable for a number of objective reasons where, for example, based on the market trends and/or market needs may make such a request economically unfeasible. The key requirement under Recital 191 of the Code is that any such assessment (for example, in this case, economic feasibility) is based on objective criteria.

169. The fact that there are additional considerations which would allow the refusal of an access request is also consistent with ComReg's view[94] that *"ComReg does not believe that it would be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances"*. If there are, correctly, <u>proportionate circumstances</u> that allow the withdrawal of access to facilities already granted it logically follows that there are also similar circumstances — using objective criteria — to refuse access based on similar considerations that would make an access request unfeasible.

170. Similarly, taking into account Regulation 12 of the Access Regulations which provides that ComReg in making access obligations must have regard to *inter alia "economic viability"*; *"the initial investment by the facility owner, bearing in mind the risks involved in making the investment"*; and *"the need to safeguard competition in the long-term"*. This clearly acknowledges that there may be circumstances which make it reasonable to reject a specific access request — in particular, for example, if the SMP operator already provides viable alternative access/services that meet the needs of the access seeker and that this further access request may have an adverse impact on the business case of the SMP operator.

171. The wording of section 7.2 of the Decision Instrument states *"and a request for Access may only be rejected, refused or otherwise denied <u>for objective reasons such as</u> where Access, as per the request, is not technically feasible or threatens network integrity and concerns in this respect may not be objectively mitigated satisfactorily by way of suitable terms and conditions"*. The second half of this sentence is a new provision for which there is no legal basis in the Code or the Access Regulations, and which therefore exceeds the limits of the restraints NRAs

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[94] As stated in paragraph 6.46 of the Consultation.

are permitted to impose. As such, this provision would not be enforceable under the established rules on harmonisation and transposition of EU law, without going through the exceptional cases procedure. It is particularly surprising that, as a secondary instrument, the Decision Instrument is explicitly departing from the language of the Code, when the Code Regulations adopted by the Minister carefully transpose only the terms of the Code and do not exceed it, in the relevant provisions. eir considers that it would be more beneficial to make the wording completely consistent with Recital 191 of the Code to acknowledge (and remove doubt) that an assessment is not solely restricted to technical feasibility and/or network integrity considerations.

172. Similarly, it is incorrect for ComReg in section 7.2 of the Decision Instrument to state that "*all requests for Access to Eircom's Physical Infrastructure in the Relevant Market shall be deemed reasonable, subject always to reasonable terms and conditions*". This is incorrect on a number of legal grounds:

  a. ComReg's proposed text goes beyond what is permitted by EU law, in this case Article 73 and Recital 191 of the Code. The ability to impose Access obligations is derived from the Code, and, when adopted, the implementing Code Regulations. The Code is a harmonising Directive i.e., it sets the limits of the Access obligations that may be imposed. As Recital 5 of the Code notes '*This Directive creates a legal framework to ensure freedom to provide electronic communications networks and services subject **only** to the conditions laid down in this Directive*'. NRAs have no legal authority to impose restrictions on SMP designated operators that are more restrictive than those laid down in the Code, other than by means of the exceptional provisions notification process. To do so would contravene the harmonising intent of the Directive. There is no provision in either the Access Regulations or the Code which would allow the imposition by an NRA of such a pre-emptive ruling on reasonableness. Indeed, this provision appears to directly contravene the Access Regulations and the Code. Both envisage that it is a matter for the SMP operator to assess requests, and require them to only accept requests that are 'reasonable requests'. It is clear therefore that NRAs are only granted the ability to impose an obligation to meet reasonable requests, but that the assessment of reasonableness is to be carried out by

the SMP operator, by reference to objective criteria. There is no provision anywhere in the Code granting NRAs the right to remove an SMP operator's ability to objectively assess the reasonableness of Access requests by pre-emptively legislating that "all requests…shall be deemed reasonable".

b. Recital 191 of the Code does not provide that the panacea to make access requests reasonable is to simply apply "terms and conditions" to such requests. While eir agrees that any terms and conditions associated with granted access must be fair and reasonable it does not hold that the mere application to terms and conditions makes "all access requests…reasonable".

2. *Withdrawal of access already granted:*

173. eir welcomes ComReg's acknowledgement that it would not *"be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances"*[95] and recognises that there should be a process to manage withdrawals.

174. However:

- ComReg's proposed process should be reserved for cases where eir and the access seeker have not agreed that the access will be withdrawn and agreed the terms of that withdrawal. In circumstances where eir is able to reach a commercial agreement with an access seeker to remove access (e.g., both parties reach an agreement to re-route the access seekers network), it should not be necessary to notify ComReg or secure ComReg's approval. Furthermore, to the extent ComReg wants visibility of such withdrawals, notification should be based on a light-touch process.
- There should be timeframes set out in the final decision over how long each of the stages of ComReg's proposed notification and approval process will take to complete. Such clarity is necessary to provide regulatory certainty to all stakeholders, including eir, to support more efficient network planning. As ComReg notes in the context of product development, uncertainty can potentially lead to increased costs across the industry.

[95] Paragraph 6.46 of the Consultation.

3. Requirement to negotiation in good faith:

175. eir agrees with the proposed requirement for it to negotiate in good faith. However, in respect to ComReg's view that this includes *"Eircom assisting Access Seekers in formulating, for instance, technical aspects and specifications of their requests for access, in light of its knowledge and expertise of its own network and systems"*[96] it is important to note that there is a significant difference in "assisting" access seekers and requiring eir to reformulate an access seekers requirements. It is not the responsibility of eir staff to reformulate access seekers requests be it from a technical, regulatory or network integrity perspective – ultimately the access seeker is responsible for their own access request. Those access requests will then be assessed using objective criteria by eir. eir reiterates that as a harmonising measure, the Code does not provide for such an obligation to be imposed on SMP operators, and that per Article 68(3) *"in exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission."*

[96] See paragraph 6.49 of the Consultation.

B. Greater clarity surrounding the removal of redundant cables

176. ComReg proposes that "*Eircom may not refuse to meet a PIA order on the basis that there is no capacity available where there are redundant cables which may be removed, and in such circumstances, Eircom is required, on receipt of a PIA order, to remove the redundant cable(s)*".[97]

177. eir urges ComReg to recognise explicitly in the final decision and SMP conditions that there may be circumstances in which there are redundant cables that *could* be removed (i.e., it is technically feasible), but either it is not practically possible to do so, or doing so could result in damage to duct (or other infrastructure). In such circumstances it would not be practical or desirable for eir to remove the cables.

178. eir agrees to negotiate in good faith with any access seeker regarding capacity constraints and to investigate in good faith the potential removal of redundant cables.

179. Any costs eir incurs from such cable removal (including any costs associated with harm caused to ducts or other infrastructure) must be recoverable for eir. ComReg must be clear in the final decision about how it is treating such costs — eir proposes that such cost is borne fully by the access seeker as an upfront payment.

[97] See paragraph 6.39 of the Consultation.

C. The scope of the proposed specific access obligations is disproportionately wide

180. ComReg's proposed PI access obligations are wide-ranging. In addition to mandating eir to respond to all reasonable requests (with very limited exemptions), ComReg proposes that eir is also required to provide access to a broad range of specified products and services, including:[98]

- Pole access;
- Duct access[99];
- Sub-duct access;
- Direct duct access;
- Dark fibre access where it is reasonably available and PIA is not available;
- Associated facilities including:
  - Access to chambers;
  - Ingress and Egress points;
  - Access to Passive Access Records;
  - PI Co-location;
  - Co-location Resource Sharing;
  - Co-location Rack Interconnection; and
  - PI Tie Connection Services between the Co-location space/rack and the Ingress and Egress points.

181. Where ComReg identifies specific access services, eir is required to ensure that it complies with all other regulatory obligations which are imposed in relation to them. For example, specified access products and services need to be included in the PIA Reference Offer, KPI monitoring and reporting, etc. This significantly increases the regulatory burden imposed on eir.

182. ComReg provides no evidence of expected future demand for those specified products and services that have not been used to date. Rather, its justifications are entirely theoretical about why the product might be of interest to an access seeker.

[98] See paragraph 6.56 of the Consultation.

[99] References to "duct" throughout this response refer to structured duct only. The definition of 'Duct' in the decision instrument must be updated by ComReg to include and recognise that any remedies imposed by ComReg are in respect to structured Duct only.

However, mandating eir to incur considerable cost to launch and maintain specified access products and services purely on a theoretical basis and without any reasonable expectation of demand for them is wholly disproportionate.

183. As the table below shows, excluding demand from NBI, there has been no demand for several of the specified access products since the launch of CEI. This includes: pole access, duct access (as opposed to sub-duct access), direct duct access, dark fibre and co-location resource sharing had no demand, while there was only <u>one</u> order for co-location rack interconnection and PI tie connection services since launch.

Product	Number of orders since Launch	Number of orders in 2022/23
Pole access	0	0
Duct access (includes SDSI)	0	0
Sub-duct access	293	196
Direct duct access	0	0
Dark fibre where PIA not available	0	0
PI Co-location*	280	54
Co-location resource sharing	0	0
Co-location rack interconnection	1	1
PI Tie connection services	1	1

**Note: Co-location has been ordered for the purposes for in-building handover of LLU, WHQA (data) products as well as WLA and the above order volumes reflect provision of co-location since initial launch*
***Note: NBI figures not shown in as NBI is not delivered by an order basis. Since June 2020 to Feb 23 NBI has rented 6,073km in sub-duct access and 475,552 poles.*
Source: eir

184. A less disproportionate approach, particularly in light of the limited demand for PI since the launch of CEI, would be for ComReg to only require access for those specified PI products and services that have a credible expectation of demand during the market review period (e.g., because they are or are expected to be used by NBI in the IA). If demand for other services arises during the market review period, operators would be able to request them under the general access obligation and, absent any objective reason (consistent with Recital 191) to refuse the request, eir would be required to provide the services in a timely manner. Once the product has been put in place, it would then be included in the PIA Reference Offer and other transparency measures.

D. <u>ComReg's proposals for self-remediation access would result in unacceptable risks</u>

185. ComReg proposes that eir should provide a new duct access product whereby all remediation is undertaken by the access seeker. eir strongly disagrees with this proposal. As a preliminary point it is important to stress that there are already products available to Access Seekers that enable them to self-install sub-ducts, but up until now, ComReg legislation (D10/18 and Direction 21/60R) have stipulated that eir is to be responsible for carrying out repair work. As ComReg is aware, eir has also appealed to the High Court an obligation for eir to permit Access Seekers to carry out unblocking work at eir's expense. In the circumstances, eir does not consider that ComReg has, as it is required to do by Article 68, as a preliminary step identified a 'problem' with the existing products that warrants the imposition of this proposed, extraordinarily intrusive new remedy allowing Access Seekers to carry out repair work on eir's duct network. Further, for the reasons set out below, eir considers that the proposed remedy is severely disproportionate, in that it is highly intrusive, carrying with it a significant risk of harm, and essentially wholly removing eir's property rights in its own assets.

186. First, self-remediation access remedies (as well as sub-duct self-install) raise very significant concerns for eir about the erosion of the very essence of its property rights in its network assets and its ability to ensure that it network assets are maintained and adapted to an appropriate standard. eir strongly objects to any access remedies which result in it losing ultimate control over the engineering and operational standards associated with its PI. Poor engineering or operational standards (e.g., poor quality repairs, practices which result in damage to existing infrastructure, etc) can not only have serious operational and financial consequences for eir (including in relation to remediation and potentially the payment of service credits), it can also have serious detrimental consequences for other operators and their customers. In that regard, eir notes that duct repair involves completely removing and replacing broken duct i.e. eir completely loses control overs it property if the right to carry out this duct replacement is granted to a third party. Such a complete abrogation of its property rights does not comply with Article 52 of the Charter of Fundamental Rights, which provides that any limitation on the exercise of fundamental rights (including property rights) '*must*

respect the essence of those rights'. Granting third parties the right to remove eir's ducts entirely and replace them with different ducts is not respecting the 'essence' of eir's property rights; it is removing that right completely.

187. As the owner and operator of the PI facing both contractual and regulatory obligations to others regarding PI, it is critically important that eir is able to oversee and ensure the quality of all operational and engineering activities involving its PI. Duct repair in particular is a highly intrusive activity involving the use of specialist heavy machinery, the removal of the ground surface (tarmac, pavement etc.) digging down to the duct, removing broken duct and replacing it. It carries with it a very high risk of damage to eir property and service outages impacting eir customers. It takes place on the land of third parties (county councils, private landowners) and gives rise also to risks of damage to their property and business interruption. If sufficient oversight and enforcement mechanisms are not in place, there is a serious risk that poor practices by third-parties could result in the types of poor outcomes that have become increasingly common in France, for example. ARCEP has granted operators considerable rights in relation to self-install in France. However, eir understands that these rights, without the right oversight and enforcement mechanisms, have resulted in widespread poor practices including damage to infrastructure resulting in examples of customers of other operators being deliberately disconnected by operators and their sub-contractors.[100] Such is the severity of the situation in France, and its consequences for end users, it has received coverage by the national press.[101]

188. eir is deeply concerned that ComReg's self-remediation proposals risk similar harm both to eir's network property and to Irish end-users. Despite vague references to "*reasonable terms and conditions*" and "*accredited civil engineering resources*"[102], ComReg's proposals fall a long way short of providing the necessary clarity and comfort about the oversight and enforcement mechanisms that would be needed to provide confidence that the French experience would not be repeated in Ireland.

[100] For more detail see: "*Consultation publique de l'Arcep portant sur la réalisation des raccordements finals FttH sur tout le territoire : Réponse de l'Avicca*", Avicca, 4 March 2021. This response provides numerous photographic examples of concerning harm.

[101] For example, see: https://www.lemonde.fr/economie/article/2022/05/03/fibre-optique-le-far-west-des-telecoms_6124513_3234.html

[102] Paragraphs 6.67 and 6.68 of the Consultation.

189. A particular aspect of the self-remediation proposals is that NBI has expressed a desire to engage in 1-2,000 kms of self-remediation annually (i.e. carrying out all unblocking and repair activities needed on eir's Ducts prior to self-installation of sub-ducts at a very large scale). As eir has already submitted in detail to both NBI and to ComReg, self-remediation at this scale in particular is not technically or economically feasible for eir. eir refers ComReg to those submissions for further detail on eir's concerns. In light of the above issues ComReg needs to:

   a. Withdraw the proposals for self-remediation for duct access and self-install for sub-duct. Requiring such remedies is disproportionate, as set out above, and indeed runs counter to the position taken by ComReg most recently in Direction 21/60R where it expressly concluded that it was appropriate for Eircom, as the owner of its network property, to carry out repairs on it — bearing in mind ComReg's obligation to promote regulatory predictability by means of consistent decision making; indeed Eircom can see no reason why ComReg is now proposing a complete U-turn on a position it legislated for as recently as late 2021, nor is any such reason given in the consultation. The disproportionate nature of such a requirement is even starker in light of the very significant risks of regulatory failure arising from self-remediation/install remedies. But, requiring such products is also unnecessary and unjustified. eir faces stringent KPI and SLA regimes, alongside a range of other demanding access conditions. These regimes and requirements mean that there is no competition problem for the remedies to address – access seekers will be able to access timely provision by eir, and on a non-discriminatory basis, by means of the existing duct access remedies. As already set out directly to ComReg and NBI (and eir refers ComReg to those submissions), there is no factual basis for any claim that allowing for self-remediation will avoid the risk of 'delays' in the installation of sub-ducts arising from the fact that repair is eir's responsibility. In particular, prior to carrying out repair, a number of steps will always need to be taken, including (a) requesting and negotiating a road opening licence and/or wayleave with the relevant landowners (b) securing approval for a decision to proceed or not with repairs, depending on feasibility and cost and (c) scheduling a truck roll with the necessary heavy machinery and staff to carry out the specialist road opening, excavation and duct repair

activities. These steps are simply intrinsic to the process of duct repair, and will in no way be accelerated or eliminated by granting access seekers responsibility for carrying them out. Further, other elements of the repair process, including the need to schedule service outages and supervision mean that it is not in any event practically feasible to design a process whereby eir is wholly eliminated from duct repair. This is separate from the legality of in effect excluding eir, as the property owner, from any rights over its property.

b. If it persists with the remedies, which eir fundamentally objects to, ComReg would need at a minimum to engage with eir and set out in detail in the final decision provisions to ensure that operators face contractual requirements to ensure that all activities undertaken by them or their sub-contractors on eir PI are undertaken in compliance with eir's operational and engineering standards. In that regard eir notes that the Code specifically provides the national regulatory authorities may lay down technical or operational requirements for the beneficiaries of access obligations (See Article 73(3) *'When imposing obligations on an undertaking to provide Access in accordance with this article, national regulatory authorities may lay down technical or operational conditions to be met by the provider or the beneficiaries of such access where necessary to ensure normal operation of the network'*.) These minimum standards also need to backed up by meaningful penalties for breaches. These penalties should not be limited to financial sanctions — eir should have the power to suspend operators or sub-contractors from undertaking further work until deficiencies have been remediated. To ensure that there is proper oversight, eir needs to be able to monitor and sign-off on all remedial or self-install works involving its PI. This is not only important for ensuring there is an effective monitoring regime, it is also important given that eir has responsibilities for record-keeping in relation to its PI. All costs that eir incurs from monitoring and remediating any sub-standard work (including the payment of service credits to operators whose provision has been harmed by the sub-standard work) should be recoverable by eir (and ComReg should be explicit about this in the final decision).

eir expects to negotiate an SLA with our PI customer which specifies the minimum service level covering the timeframes for it making our supervisor staff available (e.g., in x% of times a supervisor will be available to supervise works within x days). eir would be liable for service credits in the event that it does not meet the SLA. However, ComReg should also be explicit that access seekers should be liable for charges in the event that they miss supervision appointments or eir is unable to verify that remediation work has been undertaken to the required standard for reasons within the control of the access seeker.

E. <u>ComReg needs to ensure the use of Direct Duct Access is only used where it is not possible to use sub-duct</u>

190. eir welcomes ComReg's acceptance that "*as a matter of general principle, Eircom's policy that fibre optic cables ought to be installed within a protective sub-duct so as to minimise the risk of damage to existing cables as a result of drawing in new cables into conduits*"[103].

191. It is important that ComReg's final decision on Direct Duct Access, and the legal instrument, are consistent with this general principle. In particular:

   a. Direct Duct Access should only be available to access seekers where the space available is not sufficient to allow the use of sub-duct (except in the case of lead-ins) — where the use of sub-duct is possible it should always be used. While ComReg notes that "*requiring Eircom to allow Direct Duct Access is necessary and justified in specific circumstances, namely where the space available… is not sufficient to accommodate a sub-duct…*"[104] it is not explicit that the use of sub-duct will only be available in those specific circumstances.

   b. If Direct Duct Access is used, access seekers should be required to take all reasonable steps to ensure that the new cables being drawn do not cause damage to existing cables in the duct. Access Seekers should not try to install cables in ducts that are full. ComReg should be explicit that Access Seekers cannot dig down on ducts every 50m or less to thread cables in short sections, as having to do so is not because the ducts are damaged and in need of repair but because they are full. ComReg should be explicit that access seekers using Direct Duct Access will be liable for the costs of remediating any damage to existing cables;

   c. If access seekers install cables directly into ducts then eir and other access seekers should not be liable for any future damage to those cables. The risks of Direct Duct Access are clear and should sit with the access seeker not eir.

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[103] Paragraph 6.73 of the Consultation.

[104] Paragraph 6.73 of the Consultation.

F. ComReg's proposed Passive Access Records obligation is too expansive

192. Before focussing on specific PAR obligations, it would be beneficial to set out what eir provides to access seekers today.

- Prior to November 2019, Eircom provided CEI information to Access Seekers through a software platform known as Click Before You Dig. ComReg was dissatisfied with this, and Eircom agreed to develop a more comprehensive GIS Platform.
- Since 01 November 2019, Eircom has - through its open eir division - provided access to other operators through the eMaps software client, a comprehensive GIS platform which facilitates other network operators in planning and designing their infrastructure requirements. In essence, it is an internet web portal that permits Access Seekers to view Eircom's CEI information.
- eMaps is a web-based GIS software application which provides a whole-Ireland mapping view of Eircom's existing CEI network of underground ducts (displayed in blue), together with the location of Eircom future-planned CEI, otherwise referred to as its Build Plan (displayed in green). As new CEI infrastructure goes live, this is updated on the eMaps platform, which is accessible to Access Seekers via the openeir.ie website.
- The software provides highly detailed information to Access Seekers in easily navigable and readily searchable form as to Eircom's records of its existing infrastructure and its build plans throughout Ireland. In addition to the bird's eye zoom view, eMaps facilitates searches by street name and Eircode to facilitate Access Seekers' planning requirements. Once a user selects a geographic area to view, they can zoom in and out to see where Eircom's record of CEI is located. Should a user wish to extract information for use in another application, they can export an extract at a defined scale and the system automatically emails the extract to the user's registered email account. The extract includes a geo-coordinate that defines the location within Ireland to which the extract relates. This facilitates users to import and utilise this data within such GIS client as they may be using.

- For the past number of years, National Broadband Ireland NBI has drawn comprehensively upon information provided by open eir in the rollout of its significant national network infrastructure project in the State-subsidised Intervention Area. Separately, Eircom has provided duct access to a number of operators over the past three years including Virgin Media, SIRO, eNet and BT. For the most part however, Virgin Media and SIRO rely on their own independent networks. It is important to stress however that Eircom's electronic PAR records (whether accessed via Smallworld or eMaps) are both incomplete and not reliable for historic reasons (they show only a partial record of the presence of copper cables, even though they are present throughout the network of ducts). In all cases the only way to obtain accurate PAR data about any potential CEI route, is to carry out a physical survey of that route. This is what Eircom does, and has done for itself and every Access Seeker whenever Access to PAR is sought.
- Finally, in addition to eMaps, Eircom provides a quarterly GIS data extract which Operators can import into their own systems.

193. Against the background of what is already provided to access seekers eir submits that:

    i) ComReg must specifically recognise that eir cannot give access to third party licensed software;
    ii) eir is only required to provide extract information in a single format;
    iii) a number of the proposed information requirements are excessive and unnecessary;
    iv) ComReg's consultants have made a number of incorrect assumptions regarding Smallworld and therefore a longer lead time is required, if further system development can be lawfully mandated

<u>*ComReg must specifically recognise that eir cannot give access to third party licensed software*</u>

194. ComReg states[105] that *"In alignment with the proposed non-discrimination obligations, Access Seekers when accessing Eircom's Geographical Information*

[105] Paragraph 6.99 of the Consultation.

System must have access to <u>*all features and functionality*</u> *that Eircom uses for its own purposes"* [emphasis added].

195. ComReg must make clear that "*all features and functionality*" does not refer to the information eir may have regarding geo-directory information, location of ESB or Irish Water or Gas Networks infrastructure and that this is not required by the Access Obligations. Such information constitutes Third Party Information which eir licences or is supplied by agreement. ComReg has previously clarified that eir is not required to make third party licence information available but has failed to do so as part of this Consultation. If Access Seekers regard this information as useful for the purposes of their network design, they could obtain this information themselves from the relevant network companies, as eir has done.

<u>*eir is only required to provide extract information in a single format*</u>

196. ComReg states[106] "*In order that PAR information is capable of use in the above context, it must be available in such a format that it can be applied and used, in the same way as by Eircom, in the Access Seeker's chosen design/planning tools. ComReg is of the view that making PAR available by way of a digital map in a format such as PNG/JPEG displayed on a web client (e.g., a browser Safari/Chrome) through a gateway to PI inventory/GIS does not provide effective PAR access.*"

197. The obligation that it "*must be available in such a format*" is too expansive and could mean that eir is required to provide bespoke formats such that it is capable of being imported to the access seekers own GIS. Today, the PAR extract can be used by access seekers to configure their own client application to represent the data however they wish. Putting the onus on eir to develop a user application client that it does not have itself in order to meet access seekers expectations is an unreasonable and disproportionate demand that is not grounded in the 'nature of the problem' and is not, as required by the Code, the 'least intrusive' means of providing information to Access Seekers. Furthermore the list of wishes and asks that would likely arise in developing such a bespoke client solution for access seekers is likely to be lengthy.

[106] Paragraph 6.95 (and similarly paragraph 6.93) of the Consultation.

198. ComReg's analysis does not reflect an understanding of the extent to which PDF data, geo-coordinates and scale information can be effectively imported into other GIS clients. Such a requirement also does not reflect the type of SMP that ComReg considers eir has in the PIA market – here, the choice of GIS is fully within the access seekers control. An open-ended obligation to facilitate data export and integration to unspecified software applications is unrealistic and is not proportionate on eir to facilitate.

199. eir submits that Access Seekers can readily export content from eMaps in PDF formats. eMaps facilitates PDF exports and measuring facilities are included in a range of PDF reader software applications. Similarly, since October 2021, eir has made available extracts from its GIS in a mapping format (ESRI Shapefile) suitable for import into other operators GIS.[107] Access Seekers can readily import scaled PDFs from eMaps into their own GIS software, to measure route lengths etc. Remedies imposed must be 'based on the nature of the problem' and be the 'least intrusive' means of doing so. ComReg has not identified a 'problem' at all, with the existing provision of data that would warrant the imposition of these highly costly and intrusive measures.

A number of the proposed information requirements are excessive and unnecessary

200. ComReg sets out[108] a list of information which it considers constitute PAR and which eir must make available to access seekers irrespective of its accuracy.

201. ComReg states[109] that in addition to fibre connectivity, PAR should comprise conduit connectivity. This is a requirement that eir does not see as a necessary requirement to have incorporated in GIS — given that a field survey is always used to determine duct continuity/capacity in reality. ComReg's rationale presumably is that by inclusion of this in PAR that somehow an access seeker can do their design from a desk and have confidence of the conduit (sub-duct) connectivity being at a specific location. There are many factors that determine the location of couplers joining sub-ducts not least being the amount of sub-duct remaining on a drum and

[107] In addition to CEI information, recorded cable locations, joints/splice locations are also shared.
[108] Paragraph 6.87 of the Consultation.
[109] Paragraph 6.87(c) of the Consultation.

the number of drums that can be transported to a work site. The suggestion that the PAR records should contain the record of where sub-ducts are cut, joined, terminated, adapted is not recorded today, will continuously change over-time and is excessive given the reality that a field survey will always be required <u>in all cases</u>.

202. ComReg states[110] that surface type needs to be recorded in PAR. However, this fails to consider that the GIS capability is limited to recording a single surface type by underground route segment. In practice an underground route may comprise of multiple route segments. Furthermore, road widenings, cycle path constructions etc. are not obligated to be approved or pre-surveyed by eir in advance of their construction. The maintaining of an accurate record of this surface type information is at best an aspirational goal. Google street view or a physical survey is the best method of determining the surface type. Increasingly the cost of remediation of duct incurs additional expense determined by the local authority and in practice the remediation of footway in some circumstance will be greater than that in carriageway depending on the specific conditions applied to the granting of a licence. Therefore, the expectation that the PAR information will inform the cost, complexity or conditions associated with using a section of underground route is ill founded. As set out in eir's response to Question 15, eir proposes that duct prices be set on a single national rate (irrespective of surface type).

203. ComReg suggests[111] that the access seekers business case will be built based on the cross section capacity of the trench and spare capacity when clearly the absence of the most space consuming infrastructure (the copper network components) in PAR makes that method of assessment fundamentally flawed. The requirement to undertake a field survey to determine duct availability has been highlighted consistently to ComReg and yet the expectation of developing a duct space record in PAR continues to be a recurring theme.

204. ComReg sets out[112] a new requirement on eir, namely, to have the imagery captured referenced in the PAR. While eir captures and references imagery by means of extracting metadata from photos, there has been a consistent objection from

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[110] Paragraph 6.87(d) of the Consultation.
[111] Paragraph 6.92 of the Consultation.
[112] Paragraph 6.96 of the Consultation.

access seeker to follow the same path and supply imagery referenced to the PIA they are interacting with. While eir agrees that access seekers should also provide reference imagery. It is disproportionate to put the onus solely on eir to incorporate access seekers imagery referenced in PAR which is not in the control of eir. If ComReg considers that such a requirement is necessary, ComReg must accept that such a requirement will be a stipulated requirement for granting access to eir's PIA and there will be associated penalties levied on access seekers for failing to comply. ComReg has also failed to give adequate consideration as to the cost associated with storage and system implications including how those costs can be recovered by eir.

205. ComReg proposes[113] that eir updates its PIA records within one month when:

"(a) Eircom or its contractor completes specific work, whereby
(i) New PI is created; or
(ii) Existing PI changes state;

(b) An Access Seeker provides confirmation and all required information (as set out in Eircom's product documentation) to Eircom that specific work on Eircom's PI has been completed, whereby the PI changes state"

The imposition of this requirement is unreasonably broad and totally impractical and disproportionate as this predominantly relates to new PIA which developers own and construct for housing developments. The Consultation proposes to impose a requirement on eir to somehow manipulate its GIS to show the information provided by the developer on a micro level (i.e., as individual homes or small groups of homes are completed).

206. As has been explained to ComReg previously, developers submit their plans for entire housing developments or large phases and that eir's PIA designs supplied to the developer is in that order of scale. Therefore, a design will encompass the PIA to be constructed over a multi- year timeframe. The design is created as a project and the PIA is moved into service when the project completes. [✂]. This is a capability that eir does not have. Given that the two main new development network competitors (SIRO and Virgin Media) have their own commercial relationships with

[113] Paragraph 6.105 of the Consultation.

Developers, it is unreasonable to put the onus on eir to develop new system capability where no demand for its PIA exists (and where there is no reciprocal arrangements available for eir to access from SIRO or Virgin Media). Again, eir reiterates that ComReg is required not to discriminate between network operators, i.e., national regulatory authorities must ensure that '*in similar circumstances there is no discrimination in the treatment of providers of electronic communications networks and services*' (Article 3(4)(b) of the Code). There is no objective difference in circumstances between eir, SIRO and Virgin Media when it comes to new housing developments so eir can see no objective basis on which ComReg can justify the imposition of this obligation on eir alone. See also Copenhagen Economics Report which identifies that asymmetric regulation of newbuild would distort competition.

ComReg's IT consultants have made a number of incorrect assumptions regarding Smallworld and therefore a longer lead time is required

207. eir IT has reviewed the ComReg Passive Access Records Report 23/04a and has a number of observations to make in relation to the proposed solution. eir IT have made the following observations:
- It appears that Realworld/ComReg may have based their proposed solution on a version of SmallWorld that has not been implemented in eir;
- Any solution to provide Access Seekers with remote access to the Eircom SmallWorld application will have to adhere to the Eircom security standards. This will require the implementation of the following mechanism for remote access:
  - VPN Connection
  - VDI Ports
  - Citrix Clients
  - Active Directory (AD) authentication
- The implementation of the above mechanism will require additional VDI licences, Citrix licences, possibly new SmallWorld licences and additional IT capacity. Note that the costs of the additional licences could be significant. The existing Eircom VDI infrastructure may also have to be replaced to support remote access to the SmallWorld application.
- ComReg document 2304a states:

"Objects which 'contain' other objects will be enhanced to include a reference to the inventory housed in them.

This will include the cables housed in a conduit, the sub ducts housed in a duct, the splices in a chamber or on a pole, the ducts in a route.

Adding this information will enable the Access Seeker to understand the available capacity for new fibre or sub-duct design"

- However, eir does not have capacity data in the SmallWorld application. In reality a field survey is always used to determine capacity.
- ComReg has summarised target response times for selected transaction types in the Report. Eircom would need to understand any external access SLAs in the context of overnight jobs that might impact performance, routine maintenance tasks etc. In addition the SmallWorld application and/or underlying infrastructure may be unable to the meet the targets as outlined in the ComReg report. The execution of data extracts on the SmallWorld application has a severe performance impact on the application and would be unable to meet the target response times outlined in the ComReg Report.
- The estimated cost €99,930 of the "PAR client" development as outlined in the ComReg Report is completely unrealistic. Before any internal eir IT development costs are attributed to such a development, based on likely components required including licencing the expected cost could be in the order of €1.5million (this does not include the change in any additional IT requirements from regulatory finance which would have further cost implications).
- The proposed timeline of 10 weeks to implement the PAR Client solution as outlined in the ComReg feasibility study is unrealistic and does not factor in other elements such as potential upgrades as outlined above. Eircom's previous experiences of SmallWorld developments have been that it is challenging to implement SmallWorld changes in a short timeframe. In addition, the activities relating to remote access connectivity and additional processing capacity would have a material impact on the timelines. In the situation whereby new VDI infrastructure, a solution for sharing files with Access Seekers or an upgrade to the SmallWorld application is required, then the timelines to implement a solution could potentially be very significant. A solution assessment would need to be undertaken as a first step to identify and size a fit for purpose solution to meet the functional and non-functional requirements. It is only upon completion of the Solution Assessment that Eircom would have a view of the resourcing demands (internal and external) and costs for delivering the solution. The project would then have to progress

through the design, build and test phases to deliver the solution. Based on the scope and complexity of the solution (e.g. remote connectivity, compute capacity, SmallWorld changes, file share solution, etc.) Based on previous experience the timeline of 7 months set out in the draft decision is not realistic and a timeline of 12 months plus is more realistic.

- Any such IT developments would impact other RAP requirements which are likely to delay other access requests. In addition, the Renaissance (OSS Transformation) Programme would be severely impacted and would potentially need to be parked if Eircom was to try and implement a solution within an unrealistic timeframe. The Renaissance Programme is critical for Access Seekers as it will deliver a more robust IT solution for the open eir RAP products which they consume.

G. PI Co-location scope should not be ambiguous

208. In the context of access to Co-location Rack Interconnection, ComReg proposes that eir be "*required to allow Access Seekers to interconnect their co-located equipment in exchange buildings or similar facilities*"[114] [emphasis added].

209. eir urges ComReg to avoid using ambiguous language such as "*or similar facilities*" as it is inconsistent with providing eir and access seekers with clarity over ComReg's intended scope for the access obligation. eir operates a broad range of facilities, including those core to providing WLA and WHQA services (e.g., exchange buildings) and facilities that are unrelated to such regulated services as they are used to undertake a broader set of commercial activities (e.g., data centres, network testing labs, etc.).

210. Providing access to facilities used to provide broader activities, which are not designed to provide such access, would be disproportionate. eir's understanding is that ComReg does not envisage the term "*or similar facilities*" as requiring access to such facilities, but the current proposed position is highly ambiguous and does not explicitly rule out such access.

211. In order to provide regulatory certainty, eir urges ComReg to remove such ambiguity from the final decision by specifying the precise scope of the facilities to be in-scope of this access obligation. eir considers that the appropriate language

[114] Paragraph 6.111 of the Consultation.

would be "*Exchange Buildings and Exchange Floor only, equivalent to where eir puts its own Core & Access Network Technology for the delivery of RAP products and services*".

212. Similarly, ComReg states[115] that access includes "*chambers located within the exchange building footprint ('Exchange chamber')*". An exchange chamber is in the basement of the exchange building where cables transition between external ducts and the exchange floor. open eir has received one request for access to an Exchange chamber from BT. The request was declined on the basis that:

- the Ingress point to open eir's ducts is the nearest chamber outside an exchange
- the mandated CEI tie connection service provided by open eir links the Ingress Chamber to the Access Seekers equipment on the Exchange floor
- open eir does not house equipment in the Exchange chamber.

213. eir does not agree that it is appropriate for an open ended access obligation to Exchange chambers to be granted or that it is proportionate for ComReg to mandate such a requirement, in particular without any restriction for circumstances where network integrity is at risk of being compromised. Consistent with Recital 191, an access request is not considered reasonable and can be rejected where it can be demonstrated using objective criteria that eir's network integrity could be comprised. eir submits that there is a risk to network integrity if operators are granted access to Exchange chambers and damage important cables. Exchange chambers can be subject to flooding and eir cannot be liable for damage to an Access Seeker's equipment through no fault of its own. Consequently, eir itself does not install its own equipment in Exchange chambers. eir is willing to accommodate a site visit for the ComReg so that it can better understand how Exchange chambers are used. Again, eir notes the need for national regulatory authorities to regulate the access of beneficiaries, where this is necessary for the operation of the network (Article 73(3) of the Code).

[115] Paragraph 6.79 of the Consultation.

Co-Location Rack Interconnection Service clarifications required

214. eir requests that ComReg is explicit in the final decision that, for Rack Interconnection Service, all cable run by operators must be clearly labelled, safe and tidy and where eir infrastructure is being used permission must be sought in advance with details provided on route and trays to be used to ensure the quality and integrity of cabling is maintained.

215. Furthermore, eir should explicitly be able to reserve the right to ask operators to tidy/change any cabling outside of their own co-location space where it does not meet appropriate standards, or is unsafe etc., and to impose fines on operators for any delay in remediating eir's request.

216. ComReg should also be clear that access seekers will have to follow any guidelines that may be issued by eir for this facility in any exchange (e.g., using IBH Racks).

217. Also, ComReg should be clear that access seekers will also be liable for all liabilities (damage or accidents etc.) for all cables that they run.

218. Finally, there is a cost to eir where operators use capacity in trays and eir has to install new trays for future own use or that of another operator in the future. It is not clear to eir how those costs will be recovered or where they have been considered in setting regulated prices – ComReg should be clear about this in the final decision.

PI Tie Connection Service clarifications required

219. eir currently provides a connection from an access seeker's serviced exchange footprint to a suitable open eir Underground Utility Box. eir considers that given the sensitivity and complexity of this work (this includes protecting our exchange building and equipment/cables - and the equipment/cables of other operators - from, accidental damage, gas, vermin, water, fire, power issues etc.), eir should continue to provide the same service as is provided today, and it should not be a self-service option for access seekers, given the many risks involved. Consequently eir agrees with the definition (7.6(v)(d)) that Eircom installs and makes available the connection, noting that the connection could be in the form of sub-duct.

Mast Access references in the Decision Instrument

220. eir notes that in the Decision Instrument the definition of Co-location includes "mast access". No further elaboration is provided in the Consultation as to what this "mast access" refers to our why this is considered to be a proportionate or justified remedy in the PIA market. eir notes that ComReg is proposing that in the WLA consultation that the physical co-location product offering also includes a wireless PoH (point of handover) option so that Access Seekers can use wireless backhaul. Consequently, for completeness we have repeated our response on mast access here:

- As eir does not own many masts and is unlikely to build many in the future it does not seem proportionate to impose this remedy. eir notes in any event that the NBP will have such a remedy and that it is not necessary to impose it as a result in this market review. The major mast network operator in Ireland is Towercom who offer access to both fixed and wireless operators on a commercial basis. If any remedy were to be imposed it would be more suitable to impose it on Towercom, given the separate market in masts. Data circuits in Dublin are provided by Wireless OAOs today, open eir provide a significant variety of interfaces for interconnect and products for legacy, Ethernet and leased line services for network to network interfaces (NNI). There is no demand for a new interface for supporting wireless OAOs and no bottleneck justifying its imposition.

- eir offers a commercial backhaul service for design and implementation for Wireless Operators (MNO) which is specific to meeting their managed service requirements. Typically these commercial services use existing interfaces, therefore no new point of handover is necessary for Wireless Operators. In any event there would be planning related delays associated with eir facilitating third party operator access to open eir masts for the purposes of wireless backhaul. First of all it would have to be determined, in each individual case, whether or not the installation of backhaul equipment on eir masts necessitated planning permission or determining whether the equipment is entitled to the benefit of exemptions. This would lead to further cost and delays in a situation where eir does not own a sufficient number of

masts to justify the imposition of such a regulatory burden and where there is no demonstrated market failure.

- In paragraph 9.59 of the WLA Consultation, ComReg states that "*ComReg notes that in some circumstances, wireless backhaul may be a viable alternative to fixed backhaul where it is not technically and/or economically feasible for the Access Seeker to use fixed backhaul services.*" However, no evidence has been produced by ComReg as to the type of operator it is trying to protect. There is a lack of cogent reasoning as to why ComReg considers it appropriate in the current market to provide an alternative access facility for access seekers for whom "*it is not technically and/or economically feasible for the Access Seeker to use fixed backhaul services.*" If competitors are not at scale and are not likely to achieve same, then they should not be supported by any regulatory regime — as this would lead to productive inefficiency. Note that this does not imply that sub-scale operator capable of reaching scale should be protected. If there are already enough other firms operating at scale, then it is not necessary and, indeed, productively inefficient, to offer regulatory protection to such sub-scale firms.

- Finally, while eir notes that this requirement was also specified by ComReg pursuant to ComReg D10/18, there has been no demand for this product. It is not proportionate or justified to maintain obligations on eir where such regulated services are not demanded – equally consistent with ComReg's statement that "ComReg does not believe that it would be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances". eir also notes that per Article 3(f) of the Code, ComReg has a positive obligation to lift ex ante regulation where it is not necessary. It is appropriate to remove this obligation.

H. ComReg's proposals should distinguish between existing and new PI

221. The proposed PI access obligations would apply irrespective of how and when eir acquired the PI. For example, it is commonplace for developers of new housing estates to run competitions for operators to access PI they deploy in building the estate. Where eir acquires such PI it does so in an open competition[116] with other operators such as SIRO and Virgin Media. It is quite common for developers to grant an exclusive right of access to another operator such as Virgin Media or SIRO. It is clear that in this situation eir, by definition cannot have SMP in this new PI.

222. Third party developers hold the rights in respect of ducts on future-planned infrastructure until such time as it is completed, and therefore control completion of these ducts. The ducts in question are built by developers, not by eir. eir only installs sub-ducts into already built ducts and only when the third party developer grants it permission to do so. Other infrastructure providers have the exact same access to information on developments and access to developments as eir, and in many cases, gain exclusive access to these developments.

223. Requiring eir to provide access to such PI when it has acquired it in a competitive process risks undermining competition for such infrastructure. See Copenhagen Economics Report and in particular Box 1 entitled "Example of Physical Infrastructure Access in newbuild areas".

224. eir agrees with Copenhagen Economics analysis. ComReg should exclude any new PI acquired by eir over the market review period from the scope of any PI access remedy. The focus of any access obligation should be on existing PI only.

[116] Our experience is that SIRO/ESB are aggressively pursuing new estate developers arguing that they only need to install one infrastructure for both electricity and telecoms. For example, see: https://youtu.be/vQgsEKbdrUU?list=PL5hAEpymn6vkbVuF7WGx5ULPpFYYolFpp

I. ComReg should not mandate a dark fibre fall-back

225. ComReg should also remove its proposed dark fibre access remedy. Under ComReg's proposals access seekers would be able to require eir to provide access to dark fibre in circumstances where either access to eir's PI is not available[117], or the use of eir's PI is deemed too costly by the operator.[118] Mandating access to dark fibre is both highly disproportionate and runs contrary to ComReg's objectives, including under the Code, of encouraging operators to invest in their own fibre infrastructure.

226. It is unclear why ComReg considers it appropriate or necessary for access seekers to have such an option, which is not available to operators such as eir, Virgin Media and SIRO who self-supply their PI and invest in their own infrastructure.

227. By mandating such a measure, ComReg risks distorting downstream competition through distorting build-buy signals between PI access seekers and those self-supplying PI. ComReg should not disincentivise operators from using their own self-supplied PI as competition between fully independent networks has the potential to deliver the greatest benefits to end-users.

228. Rather than imposing the proposed dark fibre remedy, access seekers should be expected to either:

- pay eir to undertake the necessary remediation;
- self-provide the PI; or
- use the provisions of the BCRD/BCRR to access alternative PI.

229. This approach would create a level playing field with those deploying networks using their own infrastructure and PI access seekers.

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[117] Furthermore, in such circumstances, the access seeker would be able to request access to the dark fibre for "*the entirety of the duct or pole route or just a proportion*" (see paragraph 6.75 of the Consultation). It is not clear how ComReg proposes to delineate the "duct or pole route".This means that access seekers would be able to use dark fibre in cases where, potentially for large proportions of the route, PI access would be feasible and viable. That further runs contrary to ComReg's aims of encouraging operators to invest in their own fibre infrastructure.

[118] i.e. where the access seeker would incur a cost of duct network remediation work above €11,000 per km the access seeker would have the choice of asking eir to proceed with the work, or access existing eir dark fibre.

230. We note that ComReg's proposals are at odds with the approach adopted by Ofcom in the UK. Ofcom considered whether to impose a dark fibre backstop in its 2019 PI market review.[119] It found that imposing such a requirement was neither appropriate nor proportionate.[120] In coming to its conclusion, Ofcom noted that it had "*not seen any evidence that the number of instances when such a product would be necessary would be significant enough to warrant the imposition of the remedy*".[121]

231. Therefore, Ofcom's approach is that, if operators do not wish to pay the costs associated with Openreach making network adjustments, they should either self-supply or seek alternative supply. Ofcom also notes that exposing access seekers to the choice of incurring the costs to self-supply or to get Openreach to make the network adjustments can allow efficient decision-making.[122] eir agrees with Ofcom's approach and considers it should be adopted by ComReg.

[119] Ofcom, 2018 Physical Infrastructure Market Review, Volume 1 (see: Volume 1: market analysis, SMP findings, and remedies for the Physical Infrastructure Market Review (PIMR) (ofcom.org.uk), paragraph 5.77 onwards.
[120] Ofcom, 2018 Physical Infrastructure Market Review, Volume 1, paragraph 5.77.
[121] Ofcom, 2018 Physical Infrastructure Market Review, Volume 1, paragraph 5.78.
[122] See paragraph 5.110 onwards of Ofcom's 2018 Physical Infrastructure Market Review, Volume 1.

J. ComReg's product development process proposals are not proportionate

232. ComReg proposes a number of timelines and associated actions for each stage of the product development process.[123] However, in a number of cases the timelines and the associated actions required by eir to undertake within those timelines significantly shorter than today and not proportionate. In respect of these provisions ComReg has not carried out the first step in the assessment of whether to impose an Access obligation, namely, is it 'based on the nature of the problem identified by a national regulatory authority in its market analysis'. ComReg has simply not identified the 'problem' at all, in that it has provided no justification or cogent reasoning as to why the existing product development timelines, which are based on requirements specified by ComReg in ComReg D10/18, are a 'problem' that needs to be addressed by introducing the proposed new timelines – other than to say at a high level that "the Access Seeker's requirement for quick availability in order to compete in downstream markets".

233. ComReg claims that "*the PIA Market is largely a process driven market. Most Access requests in the PIA Market, including for new PIA products, are delivered by new processes, amendments to existing processes and\or updates to internal Eircom systems. This would lend itself to achieving quicker delivery times for Access requests*".[124] But it provides no evidence to support these assertions. In reality, while there may be some PI product requests that can be developed relatively quickly, it is not possible to anticipate all future requests and therefore rule out requests which could be more complex and time consuming to deliver. Furthermore, eir has finite resources which need to be appropriately prioritised. Therefore, ComReg cannot rule out that there may be cases where it takes longer to develop a new PI product due to reasonable prioritisation decisions based on the published prioritisation scores.

234. Furthermore, even in the event that on average new PI products could be delivered quicker than active products, much of the activity involved at the outset of a new product development does not depend on the complexity of the underlying product being developed. The product development process is an important and necessary

[123] See paragraph 6.125 to 6.133 of the Consultation.
[124] Paragraph 6.126 of the Consultation.

process (which is discussed further below) which is the same irrespective of the product being requested. ComReg's proposals are not supported by any analysis of the activities required at each stage and an assessment of the reasonable timeframes for each — indeed ComReg has not engaged at all with eir, as the product developer, to identify what is involved. Rather, they are based on what ComReg "*believes*" is reasonable, but without any apparent basis for this belief.

235. Consistent with this, ComReg's proposed 10 month deadline for new product developments (where there are no developments required for Access Seeker systems) is not based on any analysis or evidence and, in eir's view, is unreasonable and disproportionate. Furthermore, as with the other timelines proposed, ComReg does not propose any mechanism for eir to extend deadlines when it is justifiable and reasonable to do so (for example, due to factors beyond its control). This lack of justifiable flexibility reinforces the unreasonable and disproportionate nature of the proposed timelines.

236. First, the activity of "Publish request" requires eir to *"to include details of the request's allocated unique reference number (to allow tracking of the request), a copy of the request, and a description of the key features and functionality requested"*. Importantly, the number of days proposed to undertake this activity has been significantly reduced from 40 days to 15 days. No justification is provided by ComReg for the proposed reduction — as such, ComReg's proposal fails on a number of consultation grounds including proportionality and failing to consider whether existing obligations already address the competition problem identified.

237. Importantly, the timeline needs to be sufficient to ensure that:

i) Eircom has sufficient time to assess whether the request is complete and to request any clarifications (as necessary) from the requestor;
ii) the requestor has sufficient time to respond to queries raised by Eircom;
iii) Eircom must then re-assess whether the request is now fully understood based on any clarifications required from the operator; and
iv) it is only when the request has been confirmed to be complete that Eircom than then undertake a reasonableness assessment. Consequently, eir

submits that the current timeline allowing within 40 days to complete this activity is appropriate, proportionate and justified.

238. Second, the activity to "Publish an engagement plan" must be undertaken within 15 days of receipt of request. This is an entirely new activity – which eir does not have an issue with in principle. For the reasons, outlined above it is not possible to undertake such an activity within the first 15 days of receipt of request. Each request is on a case-by-case basis which may require different levels of engagement with operators. It is justified and proportionate that eir be allowed sufficient time to plan an effective engagement plan. eir proposes that once the first activity is complete that it will "Publish an engagement plan" within 15 days. Consequently, eir proposes that the timeline of this activity should be within 55 days of receipt of request and no more than 15 days following the completion of the "Publish request" activity.

239. Third, *"The development timelines including proposed notification, publication and launch dates, and where Eircom anticipates at that stage that IT developments on the part of Access Seekers may be required"*. The current regulation provided for under ComReg D10/18 is the requirement to "Publish proposed solution with indicative timeline plan". The requirement for an indicative timeline plan recognises that it is proportionate for forward plans to be subject to reasonable changes as initial solution assessments and resource planning to provide indicative project timelines can only ever be indicative. Furthermore, new requests achieving higher prioritisation scores may have necessary implications on the timelines for existing requests and therefore it is correct that plans can only be given indicative and not actual timelines. Such an outcome is also recognised by ComReg.[125]

[125] See paragraph 6.133 d (iii) of the Consultation.

240. ComReg also states[126] that, as part of the Product Development process, within the 85 days eircom must provide "*The priority level granted to the request and any impact on the priority granted to other Access request… and where other Access requests are being reprioritised as a result (whether granting a lower or higher priority), the reasons for same*". It is unclear to eir what ComReg is seeking eir to provide additional information on. It is already self-evident that a re-prioritisation arises from a situation where the priority score granted to a new request is higher than an existing priority score. eir requests ComReg clarification in this regard including cogent reasoning as to what such additional information could reasonably contain. This is particularly relevant where product development and new access requests is a continuing process meaning that it is not justified or proportionate to require eir to produce a report every cycle to justify the re-ordering of CRDs (if such an event occurs based on priority scores within that cycle) when it is self-evident from the prioritisation scores.

241. Finally, as there is a maximum of 85 working days to publish a proposed plan, ComReg's proposal for a maximum 10 month timeline to launch products (including notification periods) will not be practically feasible in all cases. 85 working days translates into 2.8 months, allowing for the notification period of 3 months for a change to an existing product means that there is only ca. 4 months for SLA negotiations (if applicable). This is significantly shorter than the proposed maximum 6 months for SLA negotiations proposed in paragraph 6.141 by ComReg. Note that SLAs are not capable of being negotiated until after the solution to be provided is set out by eir (i.e., within a maximum of 85 working days or 2.8 months). Therefore, whenever SLAs are required/necessary the most proportionate maximum timeline (absent IT development) to launch a product is a maximum of 16 months (85 working days + 6 maximum time for BAFO for SLA negotiations + 7 notification period (1 month to ComReg plus 6 months to operators) for new product or changes to an existing product that requires operator development)).

242. eir notes that there is also ambiguity in the text of the draft decision which should be revisited and clarity provided prior to publication of the final decision.

[126] See paragraph 6.133 d (iii) of the Consultation.

K. eir disagrees with ComReg's SLA proposals

243. eir recognises that there can be a role for an effective SLA regime should ComReg (wrongly) persist in requiring PI access. However:

a. The design of the SLA regime and the burden it imposes on eir needs to be proportionate to the market circumstances. Mandating a highly onerous SLA regime for an access product or service with very limited expected demand is disproportionate. Furthermore, the SLA regime needs to recognise the differing circumstances for different access products and the scope for the SMP operator to influence service levels. Where an access seeker is consuming an active product (e.g., a white-label bitstream service) the wholesale provider has much greater influence over the ongoing ability of the access seeker to maintain quality of service in downstream markets,[127] as compared to where the wholesale provider is providing PI access only. In such circumstances, the wholesale provider has very limited influence over the downstream service quality. As such, notwithstanding other considerations, a proportionate SLA regime for PI should look very different compared to one for an active service.

b. The design of the SLA regime should be settled by negotiation between eir and access seekers. eir agrees with ComReg that the "*nature of an effective, fit-for-purpose SLA will depend on many factors, including the nature of the wholesale services provided by Eircom and the nature of the downstream retail or wholesale services to be provided by Access Seekers… The precise nature of a particular SLA is best settled in negotiations between Eircom and Access Seekers*"[128]. It is clearly right that neither ComReg nor eir will be able to establish the "*many factors*" that matter to Access Seekers and their relative importance in designing SLAs. Negotiations provide the right forum for exploring such matters. Access seekers planning to access eir's PI are highly sophisticated industry players who will be well-placed to understand the incentive properties and pros/cons of different SLA regimes (both for

[127] And therefore needs to ensure it has commitments on minimum service levels to give it confidence about the level of service it will be able to provide in downstream markets.

[128] See paragraph 6.136 of the Consultation.

them and eir). In such circumstances, regulatory interventions to constrain or distort commercial negotiations risk poorer outcomes.

244. In light of this, eir has serious concerns about ComReg's SLA proposals for PI:

a. Negotiations of SLAs should not require eir to provide information on its costs of meeting SLAs or the expected losses to access seekers from not meeting SLAs.[129] This is because:

    i. It is not practical for eir to estimate with any degree of precision its costs or the potential losses for others from not meeting SLAs. eir manages its operations such that it expects to meet all relevant SLAs. Failure to meet SLAs typically arises as a result of unexpected circumstances. As such, it is difficult to identify the costs eir would incur to insure against all such circumstances, even if that was possible in all cases (which it is not). Furthermore, eir is not in a position to unilaterally understand the impact of missing SLAs on its customers. That would involve access to commercially sensitive information that eir is not privy to.

    ii. Even if eir could produce such information on its costs (which it cannot), it would likely be commercially sensitive so it would not be appropriate to share with external parties.

    iii. Notwithstanding this, eir disagrees that it is reasonable or proportionate for it to be required to provide such sensitive information to sophisticated access seekers.[130] Access seekers will be well-placed to develop their own negotiating strategies based on the extensive information and experience available to them. Requiring eir to provide sensitive information risks distorting those negotiations and undermining efficient outcomes.

b. Eircom also disagrees with ComReg's approach to service credits and compensation:

[129] As proposed in paragraph 6.148(a) of the Consultation, for example.

[130] For the avoidance of doubt, Eircom is not objecting to providing worked examples or other information that explain how agreed SLAs and service credits would operate.

i. ComReg states[131] that service levels must be meaningful and that "*Meaningful compensation means that Access Seekers recoup through compensation at a minimum the direct costs and any other loss of value arising from Eircom's failure to meet the agreed level of service*" [emphasis added]. eir accepts, and already provides in its regulated contracts for the payment of reasonable Service Credits for non-compliance with Service Levels, which it considers appropriately recompenses Access Seekers. However ComReg's proposed measure is highly punitive and goes beyond the established law on the limits of what service credits may legally provide for.

ii. As ComReg will be aware, contractual clauses for damages can be categorised as either liquidated damages clauses or penalty clauses. As noted in Clark on Contract Law, penalty clauses are generally unenforceable. A liquidated damages clause will only be valid and enforceable if it is a genuine pre-estimate of loss, not if it is a penalty clause. The provision proposed by ComReg would not be a 'genuine pre-estimate of loss' as it is wholly open-ended, requiring estimation on a case-by-case of what the 'loss of value' is for each Access Seeker – this is simply not a liquidated damages clause at all, but rather a pre-determination of liability for both direct and indirect loss. In that regard it also goes far beyond what is considered reasonable in commercial contracts, where liability is inevitably capped and liability for indirect losses is specifically excluded. This is the case in all of eir's wholesale contracts, and eir expects, is also the case in contracts entered into by Access Seekers such as BT, VM, Siro etc. In other words, no reasonable business contracts to accepted unlimited liability for indirect losses either generally or by means of a service credit. In that regard, it is not proportionate and profoundly unfair and contrary to established commercial practice for ComReg to require eir to also compensate the access seeker for "direct costs and any other loss of value". Such unspecified and uncapped liability does not meet the criteria for a legally valid liquidated damages clause (as the damage is not liquidated) and also does not replicate the

[131] See paragraph 6.147 of the Consultation.

outcomes or conditions of competitive markets in respect to what would be reasonably expected from contract negotiations. It directly contradicts the liability provisions in eir's ARO which have been in place for many years. In that regard, it is important to note that ComReg has the ability under dispute resolution to review the service level agreements. As such, the incentives for access seekers are first negotiate with eir and then to raise a dispute regardless of outcome with ComReg in the knowledge that the access seeker will have a "no-regrets outcome". Conversely, the power to intervene by ComReg encourages eir to negotiate and provide fair and reasonable service levels.

c. It is not practical or desirable for eir and access seekers to agree SLAs and service levels in parallel with the product development timelines and ensure that SLA requirements are agreed for when the new product launches.[132]

   ComReg proposes that the start date from the SLA Negotiation Period will be the date on which the access request itself is received.[133] However, it is not feasible to properly start negotiating SLAs and service credit levels until the product itself is sufficiently well advanced for this to be a meaningful exercise. In practice, the earliest that SLA negotiation could commence is when the status update is published (i.e. by day 85 – see the discussion of product development above). It is only at this point that the description of the solution to be provided is established (following consultation with the requestor and other access seekers). It is only when there is this solution description that any form of meaningful SLA discussion can be had.

   Therefore, ComReg's proposals should be amended such that eir and access seekers either:

   i. have a longer window to launch products so that the SLAs and service credits can be agreed at launch; or

   ii. have a separate window (e.g., 85 days) to finalise negotiations on SLAs and service credits following product launch.

[132] Paragraph 6.144 of the Consultation.
[133] Paragraph 6.144 of the Consultation.

eir's views on ComReg's proposed non-discrimination remedies

245. eir strongly disagrees with ComReg's non-discrimination proposals. The proposed imposition of a strict equivalence of input ('EoI') approach is highly intrusive and wholly disproportionate. Furthermore, ComReg's reasoning and justification for the proposals is flawed and inadequate.

246. As ComReg sets out[134], under the Access Regulations and Article 70 of the Code, ComReg may impose an SMP obligation of non-discrimination to ensure that the SMP operator:

    a. applies equivalent conditions in equivalent circumstances to other operators providing equivalent services; and

    b. provides services and information to others under the same conditions and of the same quality as the SMP operator provides for its own services or those of its subsidiaries, affiliates, or partners.

247. However, ComReg proposes to go beyond this form of non-discrimination obligation and adopt a strict equivalence of input ('EoI') approach to non-discrimination. Under this approach eir would need to supply access products and services to "*all undertakings, including to itself, on the same timescales, terms and conditions, including those related to price and service levels, and by means of the same systems and processes, in order to ensure equivalence of access*".[135]

248. ComReg further sets out that for "*the avoidance of doubt, the obligation which ComReg proposes here to impose is a straight obligation that Eircom in all cases uses the same systems and processes as are available to Access Seekers in respect of PIA*"[136] and that "*under no circumstances shall differences be permitted between systems and processes that Eircom itself uses and the systems and processes that Access Seeker(s) uses in the PIA market*"[137].

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[134] Paragraph 6.155 of the Consultation.
[135] Paragraph 6.158 of the Consultation.
[136] Paragraph 6.167 of the Consultation.
[137] Paragraph 6.169 of the Consultation.

249. Under ComReg's PI proposals, eir would be required to implement the necessary changes to its processes and systems in place within seven months of the effective date of the market review.[138]

250. ComReg's proposals therefore go significantly beyond requiring eir to "*apply equivalent conditions in equivalent circumstances to other operators providing equivalent circumstances*". It also goes significantly beyond the related concept of equivalence of outputs ('EoO') under which eir would be required to ensure that its provision of services or information to operators, including its own downstream businesses, are equivalent in terms of outputs measured by reference to product functionality, price, terms and conditions, service levels and timescales.

251. The proposed EoI approach is also stricter than that adopted by ComReg in the 2018 WLA Market Decision. Under that approach, system and process differences were permitted when such differences could be objectively justified. As ComReg sets out, the "*objective at the time was to allow some practical and very limited flexibility regarding the implementation of EoI while still ensuring a level playing field from a competition perspective*".[139]

252. While eir accepts that it is open to ComReg to impose obligations that further specify the standard adopted in relation to non-discrimination (e.g., EoO or EoI), doing so needs to be proportionate to the specific market circumstances.

253. ComReg's rationale for its proposed EoI approach in this market review is:[140]

    a. "*An obligation of non-discrimination will ensure that Eircom does not favour itself, or unduly favour any particular Access Seeker in the provision of PIA products , services and information, such that it might otherwise restrict or distort competition in any downstream market, ultimately impacting on the development of sustainable retail and/or wholesale competition*".[141]

[138] Paragraph 2.17 of the Consultation.

[139] Paragraph 6.168 of the Consultation.

[140] ComReg makes reference to the European Commission's 2013 *Recommendation on non-discrimination obligations and costing methodologies* in setting out its EoI proposals. However, for the avoidance of doubt, the 2013 Recommendation does <u>not</u> recommend that NRAs should adopt the strict form of EoI proposed by ComReg.

[141] Paragraph 6.158 of the Consultation,

b. "*…ComReg has not identified a different but equally effective obligation to remedy the potential risk of discriminatory behaviour that is less intrusive*".[142]

254. eir considers ComReg's proposals to be unnecessary, unjustified and disproportionate:

a. As set out above, there are no credible discrimination concerns in the IA or in the commercial areas (i.e. outside the IA). Therefore, there is no competition problem for the EoI proposals to address. As discussed above, demand for PI (irrespective of the outcome of this market review) will be focussed in the IA. Yet, as also explained above, eir will not compete with NBI in downstream markets in the IA. This lack of competition means that eir will not have the ability and incentive to discriminate in the IA. Outside the IA, as set out above, the only material demand for PI is from SIRO and Virgin Media. Both have strategic reasons for self-supplying PI which will not change irrespective of ComReg's decisions in this market review. Therefore, eir will not be able to act in a discriminatory manner against SIRO or Virgin Media.

b. ComReg does not provide any evidence to demonstrate material deficiencies in the current equivalence arrangements. While eir disagrees that the current application of EoI is justified and proportionate, ComReg does not establish why it needs to go *even* further. It provides no evidence that any access seeker is suffering from discrimination and not benefiting from equivalence. Therefore, there is no evidence that the proposed changes will have any effect on the experience received by eir's PI customers and therefore will generate any benefits in either the retail or wholesale markets. Given this, eir disagrees that "*ComReg has not identified a different but equally effective obligation… that is less intrusive*" – the current arrangements, while still disproportionate, unnecessary and highly intrusive, are as effective as the proposed EoI regime.

c. Making the necessary process and systems changes (particularly against a seven month deadline) will be highly disruptive and costly to eir and its customers. Furthermore, as this is a regulatory requirement it would be prioritised over all other existing access requests — which would mean that

[142] Paragraph 6.165 of the Consultation.

any existing development requests would be de-prioritised. ComReg has not considered or estimated the costs and disruption in coming to its proposals (even though it is required to do so by Article 68).[143] Without such evidence it cannot make a robust judgement about the proportionality of its proposals and, therefore, its regulatory impact assessment is seriously flawed. This is an unnecessary and unwelcome distraction at a time when eir wants to be fully focussed on delivering its FTTH ambitions, something which, as national regulatory authority, ComReg is meant to positively support rather than inhibit (see for example Article 3 of the Code). Equally, Recital 29 of the Code emphasises the goal of reducing rather than increasing ex ante regulation as ComReg is now proposing '*This Directive aims to progressively reduce ex ante sector specific rules*'. In such circumstances, eir considers that ComReg would need very clear, factually based evidence to justify *increasing* ex ante regulation on eir. It is highly disproportionate to require eir to incur such costs and disruption when: i) there are no credible competition concerns; ii) immaterial demand outside the IA; and iii) existing arrangements that already result in equivalent outcomes for customers. eir notes that the changes to the current systems and processes that underpin the regulated services present a risk that the changes may require development by Operators as a result of the changes need to achieve this level of EOI. Furthermore these changes could be breaking changes where operators are usually given at least 6 months release notifications before such changes are implemented. Given that this level of information as to the impact of a change are not identifiable until late in the development process there is a risk that Operators will not be able to complete their system development on time to avail of these when the go live.

255. For the reasons set out above, the EoI proposals are unnecessary, unjustified and disproportionate. They will not have any impact on the provision of services to third party access seekers as eir already provides a fully equivalent experience, and would do so without an EoI obligation. Therefore, they will have no impact on competition at either the wholesale or retail level.

[143] In the limited time available to eir to respond to this consultation (which is also in parallel with the WLA/WCA consultation), eir has not been able to fully assess the extent of disruption and cost that it would incur as a result of ComReg's proposals, but they will require a number of material changes to our processes and systems that we expect to be highly disruptive and costly to implement.

256. As such, eir strongly urges ComReg to not adopt the proposals and, instead, revert to a standard non-discrimination obligation which would require "*equivalent conditions in equivalent circumstances to other operators providing equivalent services*", as set out in the Access Regulations.

257. In this context, we note that Ofcom, the UK NRA, previously used EoI provisions extensively in its regulation of Openreach in various markets. However, in its 2021 Wholesale Fixed Telecoms Market Review, it decided against the use of a strict EoI approach in relation to PIA noting that:

> *"In the physical infrastructure market we have decided to impose a no undue discrimination requirement as proposed in our consultation. In this market, we interpret the condition as requiring strict equivalence where possible with discrimination permitted only in cases where Openreach can demonstrate that a difference in respect of a specific service, system or process is justified.*
>
> *Our decision reflects the fact that Openreach has been extensively using its physical infrastructure to supply a broad range of services over many decades. To implement full EOI today would therefore require extensive re-engineering with the associated disruption and cost. However, given the importance of PIA, Openreach should be able to demonstrate that any difference between its own use and use by other providers is justified.*
>
> *In practice, imposing an EOI obligation on Openreach in relation to PIA would require it to alter its organisational structure to separate the part which uses PIA as an input from that which supplies and manages PIA. We consider that this would be disruptive (impacting on availability of key services at a crucial time for network rollout) and would increase Openreach's costs." [emphasis added]*[144]

258. eir faces a similar situation to Openreach in that imposing a strict implementation of EoI as proposed by ComReg it will need to re-engineer systems, processes and organisational structure to separate the part of eir that uses PI as an input from that which supplies and manages its provision. That would be a highly disruptive and costly exercise.

259. The correct appropriate approach to remedies (and market analysis more generally) depends on national circumstances, as set out above. However, the UK circumstances in 2021 differed from those currently in Ireland, in that there were credible discrimination concerns and significant latent demand for PIA.

260. Therefore, the case for EoI faced by Ofcom was considerably stronger than that faced by ComReg. However, despite this, Ofcom did not consider a strict interpretation of EoI to be the appropriate approach because of the level of

[144] See Ofcom Wholesale Fixed Telecoms Market Review, Volume 3 (2021 WFTMR Volume 3: Non-pricing remedies (ofcom.org.uk)) paragraphs 3.74 to 3.76.

disruption and cost it would impose on Openreach. Ofcom therefore adopted a more proportionate and appropriate interpretation of equivalence. ComReg should adopt a similar approach to Ofcom.

eir's views on ComReg's proposed transparency remedies

261. This section sets out eir's views on ComReg's proposed transparency remedies under the following headings:
    - A. ComReg should consult on all aspects of its proposed KPI regime at the same time;
    - B. ComReg's approach to "*clear and unambiguous language*" needs to be amended and clarified; and
    - C. ComReg's understanding of "PI Roll Out" is incorrect and the proposals fail to incorporate learnings from compliance case 1389.
    - D. ComReg's proposals regarding the timelines for publishing eir's engineering, planning and design rules are insufficient

262. As the comments demonstrate, eir considers that a number of important changes are required to ComReg's proposals.

A. <u>ComReg should consult on all aspects of its proposed KPI regime at the same time</u>

263. ComReg's proposals include various requirements in relation to a proposed KPI regime, including in relation to the publication cadence. However, crucially ComReg does not provide details on the specific KPIs it proposes to require eir to monitor and publish. Rather, "*ComReg intends to consult further in respect of a further specification of Eircom's obligation to monitor and publish KPIs including as regards the details of the relevant performance indicators and how they should be measured*"[145].

264. However, eir cannot properly consider and comment on ComReg's KPI proposals without visibility of the details of the KPIs themselves. A set of KPIs that is fundamentally disproportionate would render the entire requirement to monitor and report KPIs also disproportionate.

265. Further, the nature, scope and extent of KPIs may also have implications for the proposed timings. Therefore, eir urges ComReg to consult on all aspects of its

[145] Paragraph 6.226 of the Consultation.

proposed KPI regime alongside proposals for the KPIs themselves. At most the SMP obligations should set out an enabling power to impose a KPI regime, with all other details left for a subsequent consultation.

B. <u>ComReg's approach to "clear and unambiguous language" needs to be amended and clarified</u>

266. ComReg states[146] "*For the purpose of meeting transparency obligations, clear and unambiguous wording must be used in all material published or to be provided to Access Seekers. <u>In accordance with general principles governing contracts, vague or ambiguous terms will be construed in the favour of Access Seekers</u>.*" [emphasis added].

267. While eir agrees that this is a general principle governing contracts in contract law of contra proferentum, i.e., that a provision should be construed against the party seeking to rely on it, in the first instance, eir would ask on what basis ComReg considers itself to be entitled to codify general contract principles, under Articles 69-74 of the Code. These provisions relate to the imposition of specific obligations relating to electronic communications services, not to legislate for general principles of contractual interpretation with a view to skewing them in favour of Access Seekers and against Eircom. As such it would appear to be an exceptional measure requiring specific notification, a BEREC opinion and Commission approval under Article 68(3). In addition, the proposed measure appears to go beyond, and not comply with the contra proferentem rule, as many of the provisions in Eircom's Access Reference Offer are those prescribed by ComReg i.e. they are not provisions devised or proposed by Eircom. In effect therefore, by this measure ComReg is stipulating that regulatory obligations it is imposing by means of the ARO **must also** be construed against Eircom if there is any vagueness or ambiguity, even if that provision is a result of a ComReg Decision Instrument. This goes well beyond any principles governing contracts, and therefore, ComReg's position is not a priori correct.

268. In addition, as outlined below, such "general principles" cannot be implemented in a regulatory context due to inter alia non-discrimination obligations. It is important to note that in addition to the bulk of the ARO terms emanating from ComReg, others are proposed by Access Seekers so it is not the case that the contra proferentem rule, as applied to the ARO would mandate all "vague or ambiguous terms" be construed in favour of the Access Seeker i.e. what is proposed unfairly

[146] Paragraph 6.177 of the Consultation.

favours Access Seekers in a way the general rules of contract law would not. Eircom notes that given that it has a well-established process of consulting with Access Seekers, if an issue of vagueness or ambiguity arises, then there is ample scope to "close the loop" by raising this, and agreeing to amend the relevant reference offer for all Access Seekers to remove it.

269. eir submits that in the case of a regulated entity where ComReg has proposed to impose non-discrimination obligations that such a "general principle" cannot apply. It is also clear that eir cannot "construe" terms to automatically apply to all purchasers – this would be inconsistent with the commercial rights of the seller to protect itself from financial/commercial detriment. More generally, ComReg has not identified any specific problem to justify this proposed new measure, particularly given that the rules on contra proferentum already apply to both Eircom and to Access Seekers i.e., there is no need, or statutory basis to legislate for it, while the manner in which ComReg proposes to legislate, will in fact potentially end up undermining if not contravening the very rule it purports to be implementing (by mandating that a clause be construed against Eircom even if it never introduced that clause in the first place).

270. Consequently, eir accepts that on a general principle level that the language it uses should be clear and understandable, but that it is sufficient for the existing contract law rules (which apply to both eir and Access Seekers equally) to continue to apply, but that there is no legal basis or no justification to seek to codify and skew contract law against eir in the manner proposed... However, if any such language is subsequently considered not to be clear, eir will consider appropriate remediation and/or clarification.

Changes to general terms and conditions

271. ComReg states[147] "*for the avoidance of doubt, in relation to existing contracts, text changes proposed by Eircom to the general terms and conditions will not be automatically incorporated into existing contracts. Amendments of existing contracts will require agreement of the parties to the contract as changes to Access Seeker contractual obligations. Eircom can negotiate with Access Seekers regarding*

[147] Paragraph 6.210 of the Consultation.

any such changes." eir notes that there are a number of necessary exceptions that must be automatically incorporated into existing contracts for regulatory purposes. These include:

- Eircom's dispute resolution procedures to be used between it and Access Seekers;
- Definition and limitation of liability and indemnity;
- Glossary of terms relevant to wholesale inputs and other items concerned;
- Changes associated with each of the products, services and associated facilities provided in the PIA Market, or to their technical characteristics including relevant engineering or technical standards for network access; and
- Changes on foot of regulatory obligations including pricing and non-pricing amendments.

272. eir submits that it is self-evident that to ensure compliance with a number of regulatory obligations including pursuant to any subsequent decision (if any) taken by ComReg on foot of this obligation which requires the automatic incorporation of certain terms and conditions. To require eir and Access Seekers to have to individually negotiate and implement contract changes which have in fact been prescribed by law, is to introduce wholly unnecessary bureaucracy for both eir and Access Seekers. It will also create legal uncertainty for all parties as it will mean that rather than taking effect automatically, regulatory changes will not take effect until further contract negotiation has taken place. It also raises the question of what happens if individual Access Seekers then refuse to accept changes even though they have been mandated by ComReg. Finally, it is important to reiterate that it is necessary, on foot of Eircom's non-discrimination obligations, that amendments to its regulated contracts take effect for all Access Seekers equally. This is why it is necessary that the contracts contain mechanisms that allow for this.

C. ComReg's understanding of "PI Roll Out" is incorrect and the regulatory proposals fail to incorporate learnings from compliance case 1389.

273. ComReg states[148] that *"while Eircom may engage in planning network roll out on an ongoing basis, it may not always commit to building planned infrastructure, or the actual roll out may be deferred until, for example, budget to complete the roll out becomes available"*. eir respectfully submits this is a clear misrepresentation of eir's PI network roll-out.

274. As ComReg should be now aware PI network roll-out specifically refers only to PI in new property developments. eir does not have or control specific information on the date on which planned ducts will become serviceable. Third-party developers ("Developers") hold the rights in respect of ducts on future-planned infrastructure until such time as it is completed, and therefore control completion or Ready for Order dates of these ducts. The ducts in question are built by developers, not by eir. eir only installs sub-ducts into already built ducts and other infrastructure providers have the exact same access to developments as eir. As such, eir's build plan information does not provide "actual Ready for Order date for the planned infrastructure," as it cannot compel third parties to provide that information.

275. eir's access to this information is indirect and imprecise. eir's contractors liaise on an *ad hoc* basis with Developers to ascertain when individual developments will be accessible for network installation works. Once network infrastructure has been installed, eir is notified.

276. In respect to PI Roll-out Plans, eir agrees to:

i) formally facilitate advanced ordering by Access Seekers for CEI routes marked "proposed" in its quarterly extracts or denoted by Green dotted lines in eMaps, or included in its published monthly build plan, by means of an order acceptance stage.

ii) as installed duct is notified ready by developers to eir, eir will publish a weekly notification to alert all Access Seekers of the information received. eir will then proceed to prepare the developer installed CEI for cabling for both self-supply and for those Access Seekers with pending CEI orders. The

[148] Paragraph 6.214 of the Consultation.

quantity of CEI (sub-duct) to be installed will be that which eir has designed for self-supply plus that which was ordered by the Access Seeker in their design to accompany the order placed. The notification and subsequent installation will be termed the order activation stage and will signal the imminent readiness of that phase of developer ducting and associated houses for cabling.

277. [✂]

278. eir requires formal acknowledgement from ComReg that the remedies now proposed as part of PI Roll-Out Plan do not expand beyond those set out in paragraph 276.

D. ComReg's proposals regarding the timelines for publishing eir's engineering, planning and design rules are insufficient

279. ComReg proposes that "the technical information which Eircom is required to publish as part of the PIARO includes engineering, planning and design rules, namely the rules relating to network planning, workmanship standards, physical access, management of space and physical characteristics of chambers, ducts, sub-ducts, cables, equipment and ancillary materials with respect to Eircom's PI".[149] Furthermore, "*Eircom is required to do so and have them published at the same time as the PIARO, namely within 7 months from ComReg's final Decision*". [150]

280. ComReg has not justified why seven months is a proportionate time horizon for producing such an important document which would require considerable effort to produce and will need to be iterated on with PI customers. Based on our experience of producing similar types of documentation, eir considers that it would be more proportionate for ComReg to allow for up to 12 months for eir to produce the documentation. It is in eir's interests to have such materials available as soon as possible, but additional time is required to ensure they are detailed, accurate and understandable.

[149] Paragraph 6.188 of the Consultation.
[150] Paragraph 6.190 of the Consultation.

eir's views on ComReg's regulatory governance obligation

282. This section sets out eir's views on ComReg's proposed regulatory governance obligation under the following headings:
    - A. A Regulatory Governance Statement of Compliance obligation is not provided under the ECC Regulation
    - B. ComReg's proposals are disproportionate in light of the extant regulatory obligations including dispute and investigative powers Eircom faces
    - C. ComReg has failed to take into account the IOB reporting process already in place
    - D. ComReg's reasoning and justification for the proposed regulatory governance arrangements is flawed and inadequate
    - E. The alleged relevance of Regulation 15
    - F. ComReg appears to have prejudged the outcome

283. While ComReg today receives a statement of compliance under the 2018 Decision and 2020 WHQA decision it is important to highlight that eir conceded to those obligations in light of the Settlement Agreement.

284. Additionally, and crucially, the statement of compliance obligations ComReg is now proposing in the Consultation also goes far beyond the current requirements. It is evident, from paragraphs like 8.10 that ComReg intends to undertake its own assessment of the appropriateness of the regulatory governance within eir. For example, paragraphs 8.13, 8.29 and 8.30 require eir to provide information to ComReg regarding the inner workings of how regulatory risk is managed in eir. As a remedy it is too subjective as to what "good" governance should look like.

285. As the comments demonstrate, eir strongly disagrees with ComReg's regulatory governance proposals. The requirement to produce and publish a 'Statement of Compliance' is highly intrusive and wholly disproportionate. Furthermore, ComReg's reasoning and justification for the proposals is flawed and inadequate.

286. For the benefit of the reader, throughout this section eir has used applied the full meaning of such a statement as "Regulatory Governance Statement of Compliance" ('RGSoC').

A. ComReg's reasoning and justification for the proposed regulatory governance obligation is flawed and inadequate

287. ComReg states that its proposals are motivated by it being concerned that "*the lack of take up of passive based PIA products suggests that Eircom may not be playing their role in full in supporting the development of sustainable infrastructure-based competition both from an Access Seeker's perspective and that of alternative networks who would use passive PIA products to expand their existing footprint*".[151]

288. ComReg also states that "*A key aspect in assessing Eircom's regulatory governance arrangements and whether additional measures are required in this respect, is to understand in the presence of PIA products available to Access Seekers, whether they are effective in terms of facilitating effective competition and establishing that there is a level playing field for all users, including relative to how Eircom supplies itself. This includes understanding whether this is a supply problem or a demand problem and that there are no underlying incentive structures in place that seek to jointly maximise profits across Wholesale and Retail activities.*"[152]

289. ComReg then goes on to make a series of assertions about eir's incentives as a vertically-integrated operator, with the inference that the lack of take up arises from supply side issues (i.e. inadequate regulatory controls). It is on this basis that ComReg proposes to impose the highly intrusive regulatory governance obligation.

290. Alongside the requirement to produce and publish a RGSoC, ComReg also sets out that "*Eircom's obligations may be respecified or complemented by further requirements, including non-standard remedies where and if justified, depending on the outcome of ComReg's review*"[153].

291. eir strongly objects to ComReg seeking to establish a seemingly unbound power to impose whatever obligations it wants in the future. It is not appropriate for ComReg to impose SMP remedies outside of a market review process. ComReg's powers to impose remedies stem from the presence of market power. If it considers that changes to the remedies are required, those changes should be made in the next

[151] Paragraph 8.7 of the Consultation.
[152] Paragraph 8.8 of the Consultation.
[153] Paragraph 8.10 of the Consultation.

market review. If ComReg is able to demonstrate that the need for changes gives rise to exceptional circumstances it should then consult on undertaking a market review early.

292. Attempts to amend remedies outside the market review process risk serious market failure, particularly given that Irish broadband markets are at an important stage in their technology transition. But, they also risk increasing regulatory uncertainty for all stakeholders, and for eir in particular. This is at a time when investors are looking to invest large sums in competing FTTH networks. This is clearly highly damaging and contrary to ComReg's statutory duties and Community obligations.

293. Furthermore, such a process seriously impinges on eir's rights to due process. ComReg has provided no details on the process it intends to follow in order to impose "*further requirements, including non-standard remedies*". Therefore, eir has no clarity as to how its rights to due process will be upheld. This further increases uncertainty. In particular, eir is aware that ComReg has in the recent past adopted two Directions purporting to 'further specify' eir's obligations and in that context taken the position that it is not required to either publicly consult on, or follow the EU notification process in relation to, such measures. As ComReg will be aware, eir has appealed one of these Directions and a ruling is awaited. eir notes that there is no provision in the Code entitling national regulatory authorities to bypass these obligations of consultation and notification, and that should ComReg seek to adopt measures relating to regulatory governance in the future, it would be obliged at a minimum to comply with these obligations. Further, as none of the provisions of Articles 68-74, 79 and 80 allow for the adoption of legislation prescribing regulatory governance, eir considers that ComReg would need to follow the 'exceptional circumstances' procedure in Article 68, which deals with the situation where, in exceptional circumstances, national regulatory authorities wish to impose obligations not provided for in the Code.

294. Notwithstanding these serious concerns, eir also strongly disagrees with ComReg's premise for why it considers the proposed regulatory governance obligation is required.

295. ComReg's reasoning and justification for the proposed regulatory governance arrangements is flawed and inadequate:

a. First, while ComReg sets out that it is "*concerned*" about the low take-up of the existing regulated PI access product, it presents no evidence-based analysis of what is driving the low take-up. As ComReg itself acknowledges, the reasons could be demand-side or supply-side. It asserts that the reasons are supply-side, but its arguments (which are not evidenced) are all based on assertions about eir's incentives. It has not, for example, presented evidence from operators/access seekers about why the existing CEI remedy is not used. Furthermore, ComReg presents no evidence of complaints or specific concerns about deficiencies in the existing arrangements. Unevidenced and unsubstantiated general 'concerns' are not sufficient to impose such a highly intrusive remedy on eir. ComReg's approach is highly disproportionate. As previously noted, ComReg is required to identify a specific, objective, factual 'problem' with the existing regulatory obligations, before it can even propose imposing new, more onerous obligations (Article 68). It has not done so.

b. Second, the reasons for the low level of CEI take up are discussed above and apply equally here. Outside the IA, the only potential demand for PI is from SIRO and Virgin Media – however, both have strategic reasons for self-supplying PI which will not change irrespective of ComReg's decisions in this market review, including any decisions in relation to the RGSoC.

c. Third, as set out above, there are no credible concerns about eir employing the types of discriminatory or exclusionary behaviour that seem to underpin ComReg's concerns. eir will not be competing with NBI downstream in the IA, therefore, its incentives are to ensure that access to its PI is effective. While eir will be competing with SIRO and Virgin Media outside the IA, both are self-supplying their PI and their strategic reasons for doing so will not change irrespective of the outcome of this market review. Therefore, eir has no ability to engage in discriminatory or exclusionary conduct against SIRO or Virgin Media. Furthermore, as acknowledged by ComReg[154], the creation of Fibre Networks Ireland is a significant development which further reduces any ability and incentive for eir to act in the manner that ComReg is "concerned" about.

[154] Paragraph 8.9 of the Consultation.

d. Fourth, even if eir did have an incentive to undermine PI access arising from its vertical-integration, the range of other access remedies neutralise this incentive, as set out below. As already noted, national regulatory authorities, are required to explicitly take into account the existing remedies, in assessing whether further remedies are genuinely the 'least intrusive' option. In the present situation, no justification has been provided for further, highly intrusive arrangements which are neither necessary nor proportionate. eir therefore disagrees that the RGSoC proposals are "*the least intrusive measure which ComReg may impose on Eircom*".[155]

296. For the reasons set out above, the regulatory governance proposals are unnecessary, unjustified and disproportionate.[156] They will not have any impact on the provision of services to third party access seekers as eir already provides a fully equivalent experience. Therefore, they will have no impact on competition at either the wholesale or retail level. As such, eir strongly urges ComReg to not adopt the proposals. eir further notes that in any event, were it to seek to adopt the proposed measures, it would first have to go through the 'exceptional circumstances' procedure in Article 68(3). This is because there is no provision in Articles 69 to 74 and Articles 76 and 80 which allows a national regulatory authority to legislate for regulatory governance measures in the manner proposed. Article 68(3) is clear that '*In exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission. The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures. These implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3).*' It is clear from this provision that NRAs should only seek to impose a remedy not set out in Articles 69 to 74 and Articles 76 and 80 in "exceptional circumstances', that it must be done by means of a **separate** notification procedure under Article 68 whereby it may be 'authorised' or 'prevented' by the Commission, taking account of an 'opinion of

[155] Paragraph 8.10 of the Consultation.

[156] ComReg asserts (without evidence) that there will be no additional burden imposed on eir as a result of the RGSoC requirement in relation to PI as eir is already generating the required information. However, this does not make the imposition of a highly intrusive remedy such as the RGSoC lawful or proportionate, particularly given that there will be no incremental benefits in terms of competition arising from it.

BEREC'. The extension of regulatory obligations into this sphere is contentious and as recognised by the ECC Regulations, ComReg should only go beyond the scope of the Code in "exceptional circumstances" by means of the prescribed procedure. It should be noted at this stage that eir is the only SMP operator where ComReg has imposed obligations to report on risk management. None of the other operators are required to report on how they manage risk of regulatory non-compliance, although all the mobile operators (such as Vodafone and Three) have all been designated as having SMP in relation to at least one market. ComReg has not provided any justification for this difference in treatment. Whilst eir does not accept that the imposition of statement of compliance obligations is strictly part of ComReg's regulatory remit, it has been content to abide by the directions to date as eir would typically conduct internal assessments independently. Critically though, until now, it has always been left to eir to determine the substance of what risks it identifies and what controls it implements.

297. In terms of the specific provisions proposed, eir considers the three month deadline for the first SoC to be unreasonable. Producing an RGSoC with the required level of quality assurance and other internal governance is not possible in a three month timeframe despite the extensive arrangements and processes eir already has in place. In eir's view 10 months would be a more reasonable and proportionate timeframe for the first RGSoC. This is based on eir's experience in undertaking the 'All-Risks' review as part of the Settlement Agreement (which took in excess of 3,000 hours to complete) and similar large scale regulatory risks reviews.

B. <u>ComReg's proposals are disproportionate in light of the extant regulatory obligations including dispute and investigative powers Eircom faces</u>

298. ComReg proposes that eir "*should be required to ensure that it has in place effective regulatory governance arrangements ensuring compliance with its obligations of access, non-discrimination, transparency, accounting separation, cost accounting and price control, including as regards its arrangements, and the implementation of those arrangements, with FNI*"[157]. ComReg further proposes that "*this obligation be further specified for the time being by reference to a requirement to prepare and provide to ComReg, an SoC*"[158]. However, ComReg proposes that it should subsequently be able to impose "*further requirements, including non-standard remedies*".

299. The regulatory governance obligation would oblige eir to "*provide, and keep up to date, a Statement of Compliance that details and explains Eircom's risk assessment and control and governance measures*"[159]. ComReg further proposes that the RGSoC would need to be signed by a Director authorised to represent the Board of Directors of eir.[160] The RGSoC would need to describe the processes followed and information relied on by the signatory.

300. Under ComReg's proposals eir would be required to provide an RGSoC for the PI market(s) within three months from the effective date of the final decision.[161] Furthermore, ComReg proposes that eir should make the RGSoC (with relevant confidential information removed) publicly available on its wholesale website one month after it is provided to ComReg, unless otherwise agreed with ComReg.[162]

301. The context for the regulatory governance obligation proposals is that eir already has in place some of the most rigorous regulatory governance arrangements in place amongst telecoms operators in the EU. This includes rigorous independent scrutiny of our processes and procedures through the Independent Oversight Body ('IOB') – as discussed further below.

[157] Paragraph 8.10 of the Consultation.
[158] Paragraph 8.10 of the Consultation.
[159] Paragraph 8.11 of the Consultation.
[160] Paragraph 8.27 of the Consultation.
[161] Paragraph 8.33 of the Consultation.
[162] Paragraphs 8.39 and 8.40 of the Consultation.

302. Notwithstanding these arrangements, eir has strong incentives to ensure that it continues to comply with its regulatory obligations, not least as a result of the other SMP remedies it faces. ComReg has already imposed the full suite of remedies available under the ECC Regulations[163] to address potential anti-competitive behaviour. ComReg has prescribed very specific access requirements (including publication of relevant timelines regarding product development etc.), transparency, non-discrimination, pricing & cost accounting and accounting separation to facilitate effective competition. Furthermore, ComReg proposes to implement these obligations in the most extensive and intrusive manner possible.

303. eir's compliance with these remedies is self-evident in a number of cases such as publication of reference offers, publication regulatory accounts. These obligations are already capable of being monitored through transparency measures, such as KPIs, which make it easier to identify discrimination and monitor compliance including identifying emerging issues during the review period.

304. In other cases, remedies are in themselves supporting the effectiveness of other obligations, for example, as ComReg itself states "*Non-discrimination obligations also play an important role in ensuring the effectiveness of other obligations such as those relating to access, transparency, and price control. In turn, obligations of transparency, for example those relating to KPI metrics and performance metrics, support non-discrimination obligations*".

305. Finally, access seekers can raise a complaint or a dispute with ComReg if they consider that Eircom is not compliant with any of its regulatory obligations. ComReg can use its investigative powers to determine Eircom's compliance with its regulatory obligations – including pursuit of financial penalties in respect of breaches.

306. These arrangements, which ComReg has failed to consider properly in its proportionality assessment, mean that access seekers can have a very high level of confidence in eir's compliance arrangements and its underlying incentives to comply. It is unnecessary, unjustified and disproportionate for eir to also be

[163] Noting that the finding of SMP requires only at least one remedy to be imposed.

required to provide further (and highly intrusive) information on its internal decision-making and how it manages regulatory risk to ensure its compliance. As a matter of principle, the concern for ComReg and access seekers should be that eir complies with its regulatory obligations, how eir chooses to manage its compliance is a matter for it and it alone. eir can also see no statutory basis granting ComReg the powers it is now giving to itself, to compel the provision of the internal assessment of individual risks. Furthermore, it is unnecessary and inappropriate for ComReg to seek to retain the power to apply further requirements in the future.

307. The inappropriateness of ComReg's regulatory governance obligation proposals is further demonstrated by the fact that eir is not aware of any other telecoms operator in Europe that faces such requirements either in relation to PIA or other wholesale access products.[164] This includes countries such as Portugal, Spain, UK and France that have placed considerable regulatory emphasis on access to PI.

[164] This likely reflects the fact that ComReg's highly intrusive proposals are not included in the list of remedies set out in the Access Regulations (and their successors), as discussed further below.

C. <u>ComReg has failed to take into account the IOB reporting process already in place</u>

308. ComReg has also failed to take into account the very detailed reporting on regulatory compliance that eir is already providing to the IOB established on foot of the Settlement Agreement. As ComReg is aware, the role of the IOB role is "*to provide assurance to eir and ComReg that there is in place a clear and unambiguous set of measure, arrangements, structures and internal controls that will ensure compliance with the eir's Regulatory obligations*"[165].

309. ComReg states[166] "*that the IOB Report was wholly based on evidence provided by Eircom and that Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate*". It is misleading to suggest the IOB's entire report is in some way insufficient under the Settlement Agreement, because of an absence of external assurance i.e., review by a further third party such as an accountancy firm. The IOB's two reports to date have fully complied with what was required of it by the Settlement Agreement and ComReg has not challenged this. The Settlement Agreement is explicitly structured to require Eircom to provide a list of reports (prescribed by ComReg) to the IOB, and for the IOB to base its expert opinion on this information. There is no requirement in the Settlement Agreement for the IOB (a third party whose members have considerable telecoms expertise and experience — the majority of whom are appointed by ComReg, independently of Eircom), to bring in yet another third party to review Eircom's data for it. ComReg is aware that this model was explicitly raised and rejected in the negotiation of the Settlement Agreement (which ComReg accepted and contractually signed), so it is also misleading to present it as an issue that has now emerged, or as something that is required by the Settlement Agreement, when it is neither.

310. Furthermore, ComReg states that "*Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate.*" ComReg is aware that Eircom has voluntarily allowed the independence of its internal audit function to be independently

[165] Annex 3 to Settlement Agreement date 10/12/2018 IOB charter

[166] Paragraph 8.5 of the Consultation.

reviewed by a major accountancy firm, against a recognised, international standard. Furthermore, eir notes that the KPMG review ComReg commissioned to report on the EY's External Quality Assurance assessment is broadly positive and while it recommends a small number of "considerations" these are heavily caveated. As such ComReg's opinion, regarding the adequacy of a review by a professional accountancy body qualified in the conduct of such reviews, is not only odd but also outside its professional expertise.

D. <u>ComReg appears to have prejudged the outcome</u>

311. A common aspect of risk management is the development of a register of risks, and a 'risk and control matrix' or RACM. Typically, this is an internal company spreadsheet that lists key risks identified by a company and the controls put in place to reduce the possibility that those risks might materialise. Companies do not typically publish their internal risk registers or RACM. They are also not typically required to provide them to regulators. For example, Virgin Media, Three or Vodafone have no obligation to provide their registers of regulatory risks to ComReg.

312. All companies must manage risk. Ordinarily, this is a matter for each individual company and not the subject of regulation. Regulatory obligations are strict, and it is a matter for each regulated company how it manages its risk of non-compliance. However, ComReg has on a number of occasions not only indicated that it intends to substitute its views for the of eir but also to propose further "*non-standard*" remedies which eir considers can only mean that ComReg proposes to introduce "*how*" eir manages its regulatory risks, a clear departure from the norm where such matters are the sole responsibility of each company. For example, ComReg states that "*Eircom's obligations may be respecified or complemented by further requirements, including non-standard remedies where and if justified, depending on the outcome of ComReg's review of the effectiveness of Eircom's RGM as referred to in the Electronic Communications Strategy Statement*".[167]

313. eir is concerned that the nature such statements gives the impression that ComReg considers that it is entitled to go further than provided for in the ECC Regulations or Framework to first impose such obligations and, second, that it can form its own view of what it considers eir's internal RACM should contain. There is no basis in the ECC Regulations or the Framework to impose such a "remedy". Even if there were such a basis, it cannot be the case that ComReg could substitute its own view of what constitutes 'adequate' risk consideration for that of eir.

314. ComReg states that Eircom's obligations may be subject to 'further requirements' or 'respecification'. Eircom notes that any imposition of further or new obligations

[167] Paragraph 8.10 of the Consultation.

must comply with the procedures set out in Article 68 for the imposition of SMP obligations, including the obligations to publicly consult, and notify the European Commission, and, in the case of 'exceptional cases' outside the relevant Articles, follow the procedure in Article 68(3). In that regard, Eircom is aware that ComReg has in the recent past adopted Directions purporting to 'further specify' Eircom's obligations under D10/18 and that it has argued that when adopting such Directions its obligations to publicly consult and notify the EU Commission do not apply. Eircom reiterates therefore that there is no provision in the Code allowing NRAs to bypass the requirements of Article 68 by characterising new obligations as either 'further specifying', 'further requirements' or 'respecifications' or by denoting them as 'non-standard'. Neither the ECC Regulations nor the Framework allows ComReg following SMP designation to impose "non-standard remedies". In this regard, eir notes that the Code, which, per Article 1(1) *'establishes a harmonised framework for the regulation of electronic communications networks'* contains no specific provisions on regulating operators' governance, nor, as noted above, do the Articles specifically dealing with SMP designated undertakings, contain any provision authorising NRAs to prescribe an SMP operator's regulatory governance or its assessment of risk as now proposed. It is not clear therefore on what basis ComReg can claim, to have any authority to purport to regulate an area outside the scope of the telecommunications regulatory framework. Third, any such "review" of eir's RGM by ComReg would be entirely subjective regarding appropriate governance structures, as there are so many ways in which companies can, and do, approach regulatory governance, depending on their particular needs.

315. It is the nature of the subjectivity of an assessment that concerns eir. ComReg has already publicly, and incorrectly in eir's view, stated that "*some concerns around the state of competition and the culture of compliance within Eircom in the presence of the enhanced RGM*".[168] This appears at odds to the significant deregulation that has been occurring over the past number of years in Ireland based on the presence of competition, and also at odds with the findings of the IOB in its two annual reports to date. As such, it appears ComReg has already prejudged any such assessment to the extent that any such review would likely to suffer from confirmation bias.

[168] Paragraph 8.6 of the Consultation.

316. Finally, eir voluntarily allowed the independence of its IARG function to be independently assessed by a major accountancy firm, as to its conformance with the Institute of Internal Auditors Global Standards and the Internal Audit Code of Practice. That report remarked positively regarding eir's Internal Audit Regulatory Governance function.

E. A Regulatory Governance Statement of Compliance obligation is not provided under the ECC Regulation

317. The ECC Regulations provides that "*Where an undertaking is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 67, national regulatory authorities shall, as appropriate, impose any of the obligations set out in Articles 69 to 74 and Articles 76 and 80. In accordance with the principle of proportionality, a national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis.*"

318. The obligations referred to are: access, non-discrimination, transparency, pricing & cost accounting, and accounting separation. While the ECC Regulations provide that an NRA may impose a remedy, not set out in Articles 69 to 74 and Articles 76 and 80, it is noted that this is in "*exceptional circumstances*" and must "*submit a request to the Commission*" to do so.

319. The extension of regulatory obligations into this sphere is contentious and as recognised by the ECC Regulations could only be implanted in "*exceptional circumstances*". It should be noted at this stage that eir is the only telecoms operator in Ireland where ComReg has imposed obligations to report on risk management. None of the other telecoms operators are required to report on how they manage risk of regulatory non- compliance, although all the mobile operators (such as Vodafone and Three) have all been designated as having SMP in relation to at least one market. While eir does not accept that is strictly part of ComReg's regulatory remit, it has been content to abide by the directions to date as eir would typically conduct equivalent internal assessments independently. Critically though, until now, it has always been left to eir to determine the substance of what risks it identifies and what controls it implements.

320. It is not appropriate for ComReg to assert or reserve a future power to impose unspecified "*further requirements, including non-standard remedies*" as set out above. But, in addition, should ComReg want to do so it needs to ensure that eir is afforded due process, including engaging with the European Commission on any

proposal to impose further remedies, and explicitly requesting consent from the European Commission to impose "*non-standard remedies*".

321. The proposed regulatory governance obligation is excessive and the requirement to provide its Regulatory Governance analysis should not be mandated. The adequacy of how eir carries out its risk assessments and control design is a matter for eir and not for ComReg to decide upon. eir is agreeable to providing ComReg with the list of new risks or controls identified, but not the analysis of how it arrived at its decision. It is the responsibility of the Directors of Eircom Ltd to be satisfied that the governance arrangements including risk analysis and control development within eir is appropriate.

F. The alleged relevance of Regulation 15

322. ComReg states *"In light of the fact that Regulation 15 of Framework Regulations has been triggered, ComReg has an obligation to assess the impact of decision making by FNI and the associated incentives on the provision of PIA by Eircom"*.[169] However, this fails to consider that FNI remains part of Eircom, is controlled by Eircom and all regulatory obligations are discharged by Eircom. This is also recognised by ComReg itself in the Consultation:

a. *"ComReg notes in this regard the position expressed by the European Commission that FNI was not a full function joint venture for the purpose of the EU Merger Regulation. On the basis of the Transaction Documents reviewed by ComReg, it is notably the case that FNI will be limited to an activity that is essentially auxiliary to one of its parents' (Eircom's) and it does not have its own direct access to, or presence on, the market. It is also does not appear that FNI will have sufficient resources to operate independently on the market, i.e., sufficient assets, staff and financial resources to perform its activity on a day-to-day basis".*[170]

b. *"a number of agreements mean that Eircom in practice retains operational control…"*[171]

[169] Paragraph 8.10 of the Consultation.
[170] Paragraph 3.32 of the Consultation.
[171] Paragraph 3.34 of the Consultation.

323. Furthermore, as identified – acknowledged and signed by the parties, in ComReg 22/57, that as provided for in the Investment Documents entered into between Infravia and Eircom that inter alia *"Eircom remains wholly responsible for and has all of the legal rights and entitlements required by it to ensure that the regulatory obligations associated with its status of operator with Significant Market Power including but not limited to the obligations under ComReg Decision D10/18 dated 19 November 2018 ("Decision D10/18") are met in full" [emphasis added]* and *"that none of us* [meaning Infravia or Eircom] *will invoke or apply any provision of the Investment Documents or otherwise take, or omit from taking, any action which would impede or obstruct Eircom from complying with or discharging its obligations in full under Decision D10/18"* and *"that no Service Level Agreement or any other performance agreement is entered with FibreCo, directly or indirectly, which could have the effect to incentivise the prioritisation of FibreCo's business or favour FibreCo or Eircom in any way"*.

324. Consequently, it is not proportionate or justified to suggest as ComReg does that the FNI requires additional obligations beyond those provided for under the ECC Regulations. The FNI transaction involves the re-organisation of shareholding within Eircom Limited – **no assets have left the Eircom Group**. This type of intra-group restructuring is common in facilitating new investment to the benefit of the parent company which in this case is and will remain Eircom Limited.

325. Finally, Regulation 15, which Eircom does not accept has been triggered, provides that ComReg "15*(2)…assess the effect of the intended transaction on existing regulatory obligations under the Framework Regulations. For that purpose, the Regulator shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Regulation 27 of the Framework Regulations. On the basis of its assessment, the Regulator shall impose, maintain, amend or withdraw obligations in accordance with Regulations 12 and 13 of the Framework Regulations"* In other words, the triggering of Regulation 15 requires ComReg to conduct a fresh market analysis (Regulation 27) and may impose obligations as a result of that analysis (i.e. access, transparency, non-discrimination, pricing & cost accounting, and accounting separation). As such, the triggering of Regulation 15, does not allow ComReg to impose RGSoC obligations on Eircom. More generally, the specific transaction, which has already been subject

to intensive regulatory scrutiny and disclosure, cannot in and of itself, justify the imposition of a sweeping, ongoing obligation to report on the assessment of all types of regulatory risks, whether or not they are even related to FNI. ComReg has extensive powers to require the provision of information for the purposes of carrying out its duties, meaning that if it has specific concerns, it can request information relevant to them. Instead however, it appears to be imposing highly onerous new Statement of Compliance obligations as a means of recurring information gathering, but without identifying the 'nature of the problem' which this information gathering is meant to address, or assessing whether imposing such an onerous ongoing reporting obligation is an appropriate means to achieve it.

ComReg should not proceed with its PI proposals; regulation is unnecessary, unjustified and disproportionate

326. As set out above, ComReg's PI proposals are unnecessary, unjustified and disproportionate. ComReg should move to rapidly remove SMP-based obligations on eir to provide PI access.

327. Particularly in light of the costs and risks of distortions associated with inappropriate regulation, it is not sufficient for ComReg to rely only on general arguments about why it considers particular types of remedy (e.g., access, non-discrimination, transparency, etc.) to be appropriate or proportionate. It needs to demonstrate why the specific formulation of each of the remedies it proposes is necessary, justified and proportionate.

328. Furthermore, it is not sufficient for these justifications to be based solely on generic theoretical arguments made in the abstract. Rather, the specific justifications must be firmly rooted in the market circumstances in this particular case – for example, its justifications should not simply repeat those from other market review proposals.

329. ComReg's PI proposals fail to meet this basic standard. In many cases, for example, ComReg fails to justify why each of the specific forms of access it proposes are justified *at all*. While in numerous other places, its justifications are almost entirely 'cut and paste' from its WLA proposals without adequate consideration of the specific circumstances of the PI market. Furthermore, in other cases, such as its various proposals in relation to non-discrimination, its justifications are purely theoretical in nature with insufficient or no consideration or engagement with the PI market realities.

330. Given the highly intrusive and wide-ranging set of remedies that ComReg is proposing to adopt, such an approach is wholly inadequate. It also means that ComReg has failed to meet its legal obligations to demonstrate that its proposals in this case are proportionate.

331. To the extent that regulated access is required, operators will continue to have access to the provisions of the BCRD, which the European Commission is in the process of reinforcing. These provisions allow operators to access a broad range of

PI across the country on fair and reasonable terms enabling them to pick the PI that best meets their needs rather than relying solely on eir's PI, while also avoiding the discriminatory, competition-distorting elements inherent in singling eir out for SMP obligations while not regulating other operators with very similar characteristics. Furthermore, operators access PI via the BCRD/BCRR have the increased certainty of knowing the access is based on a long-term statutory footing, as opposed to SMP regulation which is reviewed regularly and therefore can be withdrawn.

332. There may be differences in the details of how access is provided via the BCRD/BCRR provisions compared to a SMP remedy, the assessment of the proportionality of imposing additional SMP-remedies needs to be based on the counterfactual that access seekers are already able to access PI on fair and reasonable terms under the BCRD/BCRR. Therefore, the costs and risks of additional regulation should be considered against only the incremental benefits of that regulation (over and above the BCRD/BCRR).

333. These incremental benefits from SMP-based regulation will be, at best, very small as there are no credible competition concerns for such regulation to address, particularly in light of the very limited demand outside the IA and the lack of competition between eir and NBI in the IA. Yet, the wide-ranging and highly intrusive proposed package of PI remedies will be highly costly and disruptive, at a time when eir wants to focus on delivering its FTTH ambitions.

334. The market conditions eir faces are largely the same as other PI owners, most notably ESB. Therefore, it is imbalanced and disproportionate that eir should face what is the most wide-ranging and intrusive package of remedies it has ever faced while owners of other PI in very similar circumstances do not face similar obligations. The inappropriateness and unreasonableness of such a proposition is further magnified by the absence of any credible competition concerns.

335. The removal of regulated access to PI (and the related dark fibre remedy) in such circumstances would be consistent with existing precedent within the EU. In particular, in 2019, the Luxembourg NRA withdrew access to ducts based on specific

national circumstances including limited demand and the existence of alternative statutory means to secure PI access.[172]

336. While eir does not consider any form of SMP-based PI regulation to be necessary, justified or proportionate given the market circumstances in Ireland, ComReg certainly should not be imposing regulation in this market review that expands the regulatory burden and imposes additional incremental costs on eir and its customers. In particular, it should:

a. Not proceed with the new regulatory governance obligation and associated statement of compliance.

b. Not take forward proposals to increase the EoI burden on eir. Applying EoI to PI is wholly disproportionate – ComReg should not go beyond a non-discrimination obligation based on wording consistent with the Access Regulations and the Code – but in any event it should not expand the scope of the existing EoI arrangements.

c. Not impose any obligations to develop new specific access products and services, most notably the self-remediation duct access product.

337. Furthermore, there are other important changes that ComReg should make to the proposals to make them less ambiguous, more targeted, less disproportionate or otherwise less harmful:

a. Align the grounds upon which eir is able to refuse a request for network access with the provisions of Recital 191 of the Code.

b. Refine and provide greater clarity on the process for withdrawing existing access.

c. Clarify the position on negotiating in good faith.

d. Provide greater clarity about the circumstances when redundant cables should be removed and how the costs of such activities are to be recovered by eir.

[172] See decision LU/2019/2137-2138, as referred to in footnote 198 of the European Commission's Staff Working Document accompanying the 2020 Recommendation.

e. Limit the list of specified access products and services to only those with existing demand or are expected to have material demand over the market review period.

f. Remove the obligation to provide a self-install sub-duct product.

g. Ensure that the use of Direct Duct Access is limited to where it is not possible to use sub-duct and enhance the protections in the event of damage arising from its use.

h. Clarify the scope of the Passive Access Records obligation

i. Ensure that the PI Co-location scope is not ambiguous.

j. Limit the PI access obligation to existing eir PI and exclude any new PI acquired by eir over the market review period.

k. Remove the dark fibre backstop.

l. Ensure that the product development process timelines are proportionate and are based on a detailed assessment of the underlying activities and dependencies.

m. Make a number of important changes to the SLA regime proposals.

n. Consult on all aspects of the proposed KPI regime at the same time.

o. Amend and clarify its approach to "*clear and unambiguous language*" in relation to transparency obligations.

p. Allow more time (i.e. 12 months rather than 7) for publishing eir's engineering, planning and design rules.

Q. 23: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment?

338. ComReg's preliminary conclusions on the Regulatory Impact Assessment ('RIA') are critically flawed. The assessment proceeds on the assumptions that:

    a. eir has SMP in relation to PI; and
    b. There are credible competition concerns in relation to PI.

339. However, for the reasons set out above[173], eir does not have SMP and there are no credible competition concerns. Therefore, SMP regulation of PI is neither necessary nor justified. This is particularly relevant to ComReg's assessment of "forbearance".

340. Notwithstanding this, ComReg argues that it has an obligation to impose remedies when it identified SMP. However, this ignores the fact that it is under no obligation to undertake a separate review of PI markets – undertaking the PIA market review is a choice ComReg has made. It is open to ComReg to conclude that market circumstances in Ireland do not justify undertaking a separate review of PI markets, as other regulators in the EU have concluded. Rather, it is open to ComReg to consider the need for, and appropriateness of, PI access remedies as part of the WLA market review.

341. As set out above, the RIA should be undertaken against the counterfactual that other existing regulatory interventions will remain in place. In this case, ComReg should assess the appropriateness and proportionality of its proposed PI remedies against the counterfactual that access seekers will, irrespective of the outcome of this market review, be able to access eir and other PI on fair and reasonable terms under the BCRD/BCRR. It has failed to do so (it does not even acknowledge the existence of the BCRD), and this is a serious flaw in its assessment.

342. ComReg's assessment in Step 1 focuses on the incremental burden on eir from the changes that ComReg is proposing to the existing regulatory remedies. It does not consider the burden and costs arising from the package of remedies as a whole that is being imposed, as it should do. Proportionality of a remedy package should

[173] For the avoidance of doubt, eir's comments on ComReg's underlying market analysis and remedy design also apply to its RIA to the extent the RIA relies on that market analysis and remedy design.

not just be based on the incremental changes, not least because changing circumstances can mean that a package of remedies imposed previously is no longer proportionate. In this case, given that existing package of remedies was already wide-ranging and highly intrusive, the scale of the incremental burden (which is very material as set out above) will inevitably be more limited that could otherwise be the case. However, that does not mean that the overall burden of what is an unprecedented regulatory burden is appropriate and proportionate. As set out above, it is unnecessary, unjustified and highly disproportionate given market circumstances.

343. In dismissing the scale of incremental burden from the additional measures, ComReg provides no evidence or quantification of the burden or costs its remedies (either in their entirety or incrementally over the 2018 CEI remedies) will impose on eir. This is an important omission as ComReg cannot be confident about its conclusions without such evidence. As set out above, the changes ComReg is proposing will require eir to make significant changes to its processes and systems. This will incur considerable cost and disruption.

344. Furthermore, there is no analysis or evidence provided to support why the existing package of remedies is deficient or inadequate and how the proposed changes will address those deficiencies.

Q. 21 Do you agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA? Do you agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.9? Please provide reasons for your responses.

345. eir welcomes the opportunity to discuss the relevant requirements with ComReg as regards the reporting of its PIA. However, ComReg must give consideration to what information is likely to be available, including its potential accuracy, the associated cost and in what form that information could be shared with ComReg.

346. At paragraph 7.306, ComReg notes *that "[t]o ensure the effectiveness of the price control obligations, ComReg considers that it is necessary to have a clear and comprehensive understanding of the costs of Eircom's provision of PIA services. Obligations to maintain appropriate cost accounting systems generally support obligations of price control and accounting separation and can also help ComReg in monitoring the obligation of non-discrimination."*

347. The changes proposed by ComReg are extensive and it is clear that there is an expectation that eir is required to make significant investments and upgrades in its operational, financial and cost accounting systems to implement the required changes. These changes will require significant resources and expenses to implement and will include changes which increase the scope and complexity of the statutory and regulatory audits. [✂]

348. Given the PIA price paths are proposed to be set by ComReg in tandem with a market analysis decision it is not clear to eir how any recovery of these substantial costs are capable of being recovered from access seekers – when the full cost will not be known at that time.

349. We set out below specific comments in respect of the following areas relating to the proposed cost accounting obligations:

   i) Data requirements for proposed cost accounting obligations

ii) Proposed reporting and the FNI / non-FNI split

iii) Timing and feasibility of required changes

Data requirements for proposed cost accounting obligations

350. At paragraph 7.309, ComReg notes that *"PIA prices i.e., the prices for Pole Access, Duct Access (including Direct Duct Access) and Sub-Duct Access, are primarily intended to recover the costs of duct and pole assets based on the relative usage of those assets by Eircom (to provide services in downstream markets) and by other Access Seekers (in the form of PIA prices). Hence, it is important that data on usage and costs can be accurately identified in Eircom's network management and cost accounting systems. This requires Eircom to separately identify the costs relating to duct and pole assets that are relevant to the PIA prices (set out above) from related asset costs such as cabling or network furniture."*

351. ComReg should recognise that it is not straightforward to manipulate existing operational processes and systems to be able to match the basis on which they determine appropriate to set prices. ComReg should also recognise the long-lived nature of these assets. While it may be feasible to develop systems and process to capture granular data for new assets, eir faces significant data challenges in respect of legacy assets. It is not possible to produce the granularity requested by ComReg for a lot of the data. This would also have implications for an appropriate audit opinion.

352. Where data does not currently exist, we would need to either incur significant costs in surveying the network or need to develop potentially subjective assumptions and sampling methods to determine cost attribution methodologies. As we have highlighted above, our auditors need to be comfortable that any cost accounting methodologies are consistent with ComReg's regulatory principles and meet the high bar of a fairly presents regulatory audit. They would therefore need detailed involvement in reviewing draft methodologies prior to their implementation so as not to jeopardise the audit opinion.

Proposed reporting and the FNI / non-FNI split

353. At paragraph 7.329, ComReg proposes that Eircom should produce a Statement of Average Cost and Revenue by Service with the details of the PIA related costs and revenues, disaggregated between internal and external use.

354. At paragraph 7.330, ComReg proposes that *"Eircom should disaggregate its PIA services between rental services, which relate to Eircom's RAB costs, and services for which the costs are not part of the RAB. These include:*

(a) Excess duct remediation payments;

(b) Upfront duct remediation payments;

(c) Ancillary or other charges such as one-off process charges, pole furniture, and tree trimming."

355. It is not clear, in respect of point c, whether ComReg expects ancillary charges to be reported individually or in aggregate. The requirement for average costs and revenues suggests a requirement to publish them individually as otherwise there would be an inconsistent volume measure. Eircom would benefit from the provision of a pro-forma statement to clarify points such as these.

356. We also disagree with the requirement to publish volume information and average costs and revenues for these services. This is a greater burden of reporting than is currently in place for BT in the UK, which is only required to produce total revenue and total costs for ancillary services.[174]

357. The introduction of volume information would increase the regulatory audit burden as the processes to review work orders and map activity codes to services would come under the scope of the audit.

358. At paragraph 7.331, ComReg notes that *"the proposal to report the information on the PIA market (specified at 7.333) in the same structure and detail as other regulated markets would require Eircom to report ducts and poles as separate network elements in the Statement of Network Costs in Eircom's HCA Accounts [...] These processes should facilitate the harvesting, analysis and reporting of the*

[174] Regulatory Financial Statements 2022 (bt.com), page 25

necessary PIA data to comply with the proposed reporting obligations without imposing an undue burden on Eircom."

359. At paragraph 7.333, ComReg notes that *"… all duct and pole costs should be allocated to the PIA market statement, with Eircom's internal use of ducts and poles captured by cost-based transfers to the other downstream markets in Eircom's HCAs. However, this may require an amendment to the cost allocation method that Eircom currently has in place for preparing its HCAs. As ComReg understands it, the existing network study process first allocates the costs relating to Eircom's internal use of duct and poles to the network elements associated with access copper, access fibre and core transmission. These costs are then allocated to the downstream services that are supported by those network elements. ComReg will engage with Eircom to assess how the cost allocations and transfers in the HCAs can be amended to facilitate the reporting of all PIA costs and revenues in a single PIA market statement, as part of the annual review process for the HCAs."*

360. In order to effect these changes, eir will need to redesign its cost model to define new network elements for all PIA services. It would not make sense to define transfer charges to reflect the use of PIA in downstream markets. Rather, the new PIA network elements should be set up with onward allocations to downstream services consistent with their current attributions along with the new PIA services.

361. ComReg should recognise that the definition of new network elements is an extensive task which will involve significant restructuring of the cost accounting system, amendment of cost accounting methodologies and overhead attributions and the development of new studies to ensure that it is possible to fully recreate and reconcile the HCAs with the new network element structure. This will involve significant time and effort and will need new data sources and systems to effect the changes. All of these changes will require significant internal review and review from our auditors, who will need to review and approve all changes before they are implemented.

362. At paragraph 7.315, ComReg notes that *"[a]nother consideration in the imposition of a cost accounting obligation on Eircom in the PIA Market is the recent Transaction between Eircom and InfraVia to create a dedicated fibre company*

called FNI." and at paragraph 7.316, that *"ComReg considers that the cost accounting obligation is an important measure to ensure PIA related costs and revenues for both Eircom (non-FNI) and FNI are being recorded appropriately in Eircom's financial systems and HCAs. The transfer to FNI of a significant proportion of Eircom's PIA assets should require revisions to how Eircom records PIA related costs and revenues, as the use of the PIA assets will differ between those PIA assets used by FNI and the remaining PIA assets in the NBP IA. This is because the FNI PIA assets will be used by Eircom's downstream wholesale fibre access services whereas the remaining PIA assets under Eircom's control will not be used to support Eircom's fibre access services."*

363. The requirement to split costs between FNI and non-FNI is a significant undertaking which will lead to a significant duplication of effort. Each of the pole and duct studies will need to be replicated in order to produce one set of network elements for FNI and one set of network elements for non-FNI. The attribution of these network elements will need to be established within the new studies and implemented in the cost accounting system. This will have a wide-ranging impact, e.g., each working capital balance sheet account will need two drivers. It may also be necessary to amend all the activity costing allocations. This will increase the complexity of fully recreating the HCAs under the new network element structure. The addition of new studies and a much greater level of cost separation to differentiate between FNI and non-FNI will have a material impact on the regulatory audit. The mapping of assets in the FAR will need to be reviewed along with the new studies and changes to the cost attributions. This will come at a significant expense.

364. The requirement to report and publish at essentially a sub-geographic level is not proportionate or justified or consistent with the competition concerns ComReg is seeking to address. In addition, ComReg has defined a single national market.

365. First, from a cost recovery perspective such a proposal is inconsistent with ComReg's market analysis definition which is national and ComReg's PIA prices.

366. Second, eir has **control** over FNI, and as such FNI will be accounted for as a subsidiary of eircom Ltd. From a statutory accounts perceptive FNI's revenues, costs, assets and liabilities will be **fully consolidated** (100%) into the Group

accounts, with non-controlling interest (NCI) shown separately on the income statement and the equity section of the Balance Sheet. This is also recognised by ComReg itself in the Consultation:

a. *"ComReg notes in this regard the position expressed by the European Commission that FNI was not a full function joint venture for the purpose of the EU Merger Regulation. On the basis of the Transaction Documents reviewed by ComReg, it is notably the case that FNI will be limited to an activity that is essentially auxiliary to one of its parents' (Eircom's) and it does not have its own direct access to, or presence on, the market. It is also does not appear that FNI will have sufficient resources to operate independently on the market, i.e., sufficient assets, staff and financial resources to perform its activity on a day-to-day basis".*[175]
b. *"a number of agreements mean that Eircom in practice retains operational control…"*[176]

Consequently, it is not proportionate or justified and inconsistent with accounting best practice to impose further administrative and cost burden on eir to report FNI separately. Third, in respect to non-FNI, ComReg is actually looking for eir to report on NBI activities. Additional regulatory oversight is not required and it is questionable what benefit undue regulatory reporting of such intervention brings to the regulatory price path (noting a national price path). Any reporting obligations that NBI has with the Irish Government as part of its contract are matters for it to discharge and cannot be delegated through SMP remedies on eir. ComReg's information gathering powers can be used to gather such information directly from NBI.

367. eir requests that in respect to the non-FNI i.e., IA, ComReg identify the nature of the problem it is trying to address by reporting this information and in particular the proposal that eir make public such information on its website.

368. eir has provided a significant amount of duct and pole data, both financial and statistical, to ComReg in terms of informing the PAM and DAM costing models. eir agrees to continue to provide information bilaterally to ComReg. However, ComReg

[175] Paragraph 3.32 of the Consultation.
[176] Paragraph 3.34 of the Consultation.

must take into account that some compromise may be required as to the level of information eir is able to accurately report and provide to ComReg. It is clear that further engagement is required to ascertain what is reasonably required and obtainable. This must be done in advance of ComReg making (if appropriate) a final determination and cannot be sought to be retrospectively imposed by ComReg on eir once a decision has been published. Again eir reiterates ComReg's obligations to only impose SMP obligations in accordance with the procedure in Article 68 in the Code.

369. ComReg is required to ensure that regulation is incremental, such that only those obligations which are necessary and proportionate to address the identified competition problems are imposed, as set out in Regulations 9 to 13 of the Access Regulations/Regulations 51 to 56, 58 and 62 of the ECC Regulations.

370. In the context of a national market with national prices the requirement to report separately FNI and IA revenue and costs etc is not the least intrusive remedy available to ComReg. eir submits that this further specification of the accounting separation obligation in addition to the cost accounting obligation is unnecessary, excessive and disproportionate.

Timing and feasibility of changes

371. It is not clear from the consultation over what time period Eircom is required to implement and deploy these changes. We consider that some of the requirements relate to costs which are not currently material and may not be material in the future and it may not be reasonable or pragmatic to make all of these changes within the space of a single year.

372. ComReg has acknowledged that work is required to understand the need for further analysis and work to ensure the appropriate cost accounting for PIA.

373. ComReg notes in paragraph 7.314 that " *…the cost of other PIA related network elements, such as street side cabinets that are only used by Eircom's copper- based services and are not relevant to the costs of duct related access, may also require further analysis depending on the materiality of the residual costs. Therefore, ComReg intends to explore this issue further with Eircom and its auditors in the*

tripartite engagements that support the preparation and production of the HCAs (also referred to as the Separated Accounts).”

374. In respect of this specific example, Eircom needs to undertake a deep dive into exactly what has been recorded against duct asset class, and the financial hierarchy (if any) underneath this.

375. More broadly, Eircom needs to scope out the cost accounting and reporting requirements in detail to fully flesh out the required changes to systems, data sources and cost accounting methodologies, transform these into a programme of work and secure funding and resources to implement them. This will need detailed consultation with ComReg to understand what is, and what isn’t possible, understand the full time and cost implications and agree a detailed implementation plan and pragmatic solutions to any challenges. This must be done in advance of ComReg making (if appropriate) a final determination and cannot be sought to be retrospectively imposed by ComReg on eir once a decision has been published.

376. As part of this, ComReg needs to be more specific in terms of what it is expecting, e.g. provision of pro-forma financial statements, and extensively engage with Eircom and its auditors to ensure that the changes are appropriate, robust and meet the audit requirements prior to their full implementation.

24/03 PIA – eir comments on the draft PIA Decision Instrument

Doubling of the length of the regulatory provisions

377. Under Decision D10/18, the current decision instrument regulating both wholesale local access and physical infrastructure access is 36 pages long. The new regulations now are proposed by ComReg, covering wholesale local access and physical infrastructure together are 69 pages long. This near-doubling of the length of the regulation imposed, illustrates the point made by Eircom in its Response to Consultation that the effect of ComReg's proposal is to impose the most onerous SMP regulation it has ever faced in respect of its business. The Code states as one of its objectives in Recital 29 that '*This directive aims to progressively reduce ex ante sector specific rules*'. The proposed legislation at almost double the length of the previous legislation clearly runs counter to this objective of the Code.

Necessity to comply with the Code

378. While the Consultation is being conducted on foot of the Access Regulations 2011, as a matter of established EU law the Code has been directly effective since 20th December 2020, when it was legally required to be implemented by all Member States, meaning that NRAs are legally obliged to comply with the principles, objectives and provisions it contains, regardless of whether or not, in Ireland, the implementing Code Regulations (which have been adopted by the Minister) have been brought into effect. The comments below refer therefore to the relevant provisions of the Code.

Section 2 Definitions

379. There is no definition of 'Access' in the Decision Instrument. Instead a reader has to go to a separate piece of legislation to find out what Access comprises. Given that 'Access' is one of the core definitions in the Decision Instrument, not including a definition in the Decision Instrument is inexplicable, making it more difficult and cumbersome for Access Seekers and any other interested party, including members of the public, to understand the scope of the Decision Instrument. It would be more transparent to define the term Access in the Decision Instrument. See also other key terms such as Electronic Communications Network, Electronic Communications Service and End User where again, a reader is compelled to go to other legislation to understand what these terms mean. This approach lacks transparency.

380. ‘Duct’: The definition of ‘Duct’ in the decision instrument must be updated by ComReg to include and recognise that any remedies imposed by ComReg are in respect to structured Duct only. Duct that is not structured or unstructured duct does not form part of eir's regulatory asset base.

381. ‘Chambers’: Eir’s concerns about the inclusion of the basements of eir building in the proposed definition are set out in detail in the response to consultation. Here, eir further notes that the proposed definition vastly expands the meaning of the term ‘Chamber’ from D10/18. In that document, Chamber is defined as an ‘*underground construction which is built to facilitate access to cables’*. The new definition massively expands what is caught by Chambers to *any ‘construction allowing access to the duct network regardless of its location and, for the avoidance of doubt, includes a chamber within, under or in the vicinity of an Exchange’*. So, instead of being a physical space designed to facilitate access to cables, as before, now it could be literally any building, above or below ground, as long as it could theoretically be used to access the duct network even if that ‘construction’ (i.e., building) was never built for that purpose. This would include, for example, the entry lobbies of building, eir office buildings, any building where in theory, ducts could be accessed from that building. eir does not believe it is ComReg’s intention to allow Access Seekers to install their infrastructure in eir employee offices, and would request that ComReg now revert to a realistic definition of chambers as that term is understood by network engineers, and was reflected in Decision D10/18. Otherwise it appears to be a covert attempt to mandate access to every part of eir corporate property as long as it could be used to access a duct.

382. ‘Physical Infrastructure’ is defined to mean ‘*physical facilities that are designed or used to house or carry the fixed elements of an electronic communications network.’* Again this new definition goes much further than the definition of civil engineering infrastructure in Decision D10/18. In that Decision Instrument civil engineering infrastructure was defined as ‘*passive access infrastructure means the physical access path facilities deployed by Eircom to host cables..’* So where PIA was originally narrowly defined to only include infrastructure specifically deployed to host cables, now the definition will expand hugely to include <u>all</u> infrastructure

that carries <u>any</u> fixed element of an electronic communications network. This would include for example exchange buildings, buildings that carry any part of eir's core network or data centres. It could extend to include employee buildings, where they also carry a part of eir's electronic communications network, and would apply regardless of whether the network is the core network or the access network. Again, eir understands that it is not ComReg's intention to grant access seekers such extensive access to eir's core network infrastructure or to eir's office buildings or call centres generally. Further such mandatory access goes far beyond anything that is permitted by the Code. eir must therefore ask that the definition of physical infrastructure revert to that of civil engineering infrastructure as it is currently set out in decision D10/18. It should also be noted the very expensive definition of physical infrastructure also has a knock on effect on other definitions such as that of the word duct. This is defined as a '*pipe or conduit that forms part of eir physical infrastructure and that is capable of carrying sub-ducts and/or cables.*' Because physical infrastructure is defined so broadly technically any kind of pipe in any eir building could conceivably fall within the definition of duct, if the building held any part of eir's network and if it was 'capable of' carrying a sub-duct. eir requests that ComReg revise these definitions to bring them into line with D10/18 and what it is permissible to regulate, under the Code.

383. 'Non-Urban Exchange Area is defined as the '*one of the Exchanges on the list of Exchanges set out in Schedule [2].*' However Schedule 2 is currently empty, meaning that is not possible for consultation participants to know the exchanges covered. Consultation participants are entitled to know and have the opportunity to comment on the areas proposed to be included in the Non-Urban Exchange Area. As noted by the High Court in the *Kennedy* case, when engaging in a public consultation, it is necessary for the consulting body to consult on the 'particular option' they actually decide upon – which ComReg does not appear to have done in not providing details of the Non-Urban Exchange Area.

<u>Section 7 Reasonable requests for Access</u>

384. The ability to impose Access obligations is derived from the Code, and, when adopted, the implementing Code Regulations. The Code is a harmonising Directive i.e. it sets the limits of the Access obligations that may be imposed. As Recital 5 of the Code notes '*This Directive creates a legal framework to ensure freedom to*

*provide electronic communications networks and services subject **only** to the conditions laid down in this Directive*'. NRAs have no legal authority to impose restrictions on SMP designated operators that are more restrictive than those laid down in the Code, other than by means of the exceptional provisions notification process. To do so would contravene the harmonising intent of the Directive. Section 7 of the draft Decision Instrument explicitly exceeds what is permitted by the provisions of the Directive and as such is not a valid proposal. In order for Section 7 to comply with the Code (and indeed the previous Access Directive) it is necessary to remove the provisions that go beyond what is permitted by EU law.

385. The first sentence of section 7.2 states that '*all requests for Access to Eircom's Physical Infrastructure in the Relevant Market shall be deemed reasonable, subject always to reasonable terms and conditions*". There is no provision in either the Access Regulations or the Code which would allow the imposition by an NRA of such a pre-emptive ruling on reasonableness. Indeed, this provision appears to directly contravene the Access Regulations and the Code. The final sentence of section 7.2 states that '*a request for Access may only be rejected, refused or otherwise denied for objective reasons such as where Access, as per the request, is not technically feasible or threatens network integrity **and** concerns in this respect may not be objectively mitigated satisfactorily by way of suitable terms and conditions.*' Again, the second half of this sentence is a new provision for which there is no legal basis in the Code or the Access Regulations, and which therefore exceeds the limits of the restraints NRAs are permitted to impose. As such, both this provision and the first sentence of 7.2 noted above are not enforceable under the established rules on harmonisation and transposition of EU law. It is particularly surprising that, as a secondary instrument, the Decision Instrument is explicitly departing from the language of the Code, when the Code Regulations adopted by the Minister carefully transpose only the terms of the Code and do not exceed it, in the relevant provisions. See also eir's more detailed submissions on this issue in the Response.

<u>*Section 7.4 Conditions for Access*</u>

386. Section 7.4 provides that '*Eircom shall at all times grant Access in a fair, reasonable, timely, transparent and non-discriminatory manner, as may be further specified by ComReg from time to time.*' Such a provision, whereby ComReg grants

itself the power to 'further specify' Eircom's obligations, is repeated six further times in the Decision Instrument. In seven other places, ComReg reserves for itself the right to impose further obligations by providing that it may a change to the terms of the Decision Instrument as may be 'directed' by ComReg from time to time. The cumulative effect of so many reservations of a power to 'specify' and 'direct' new terms, is that a significant percentage of Eircom's obligations in the Decision Instrument, including the core obligation to grant Access, are not fully set out, but rather, Eircom may be subjected to further, unknown obligations and some unknown future date. Eircom is also aware, further, that ComReg has previously taken the view that it does not have an obligation to carry out a public consultation before 'further specifying' or 'directing' Eircom, and that it can be done without updating its market analysis. This was the case in respect of two Directions adopted in 2021, once of which, Direction 21/60R, is currently the subject of a High Court appeal. However, no power to 'further specify' SMP obligations outside of the procedure in Article 68 is granted to NRAs by the Code. While the Code Regulations do contain a provision in section 104 allowing ComReg to 'further specify', there does not appear to be any legal basis in the Code for the granting of this power to ComReg in the context of SMP obligations. As such it does not comply with the terms and the harmonising intent of the Code. In particular, Eircom is aware that ComReg's has taken the view that its obligations under the Code to notify measures to the European Commission do not apply when it 'further specifies' or 'directs' SMP obligations. However, this would appear to be directly contrary to the requirements of Article 68(4) of the Code which stipulates that '*Measures taken in accordance with paragraph 3 and 4 of this Article shall be subject to the procedures referred to in Articles 23 [consultation] and Article 32 [notification of measures to the Commission].*' There is no mechanism to impose or amend SMP obligations outside of the process in Article 68 by simply 'further directing'. Separately, the imposition of 'further specifications' or 'directions' without public consultation also contravenes ComReg common law obligation as a public body to publicly consult on measures, as well as its statutory obligations to consult on measures, and to act impartially and transparently in exercising its powers. This obligation is not met where a public body engages in private communications with separate interested parties, but without making them public and giving other affected parties the opportunity to make submissions, as occurred with previous directions adopted by ComReg. In light of this extensive reservation of powers, eir

requests that ComReg confirm that it will only exercise them in compliance with the requirements of the Code and the common law rules on fair procedures and public consultation.

Section 7.5(i) fit for use obligation

387. There is considerable lack of clarity in the wording of section 7.5(i). By stating in general terms that eir shall ensure in providing access that '*Poles, Ducts, Sub-Ducts and Associated Facilities are fit for use by Access Seekers*' it risks creating the impression of a free standing obligation to positively go out and remediate eir physical infrastructure even in the absence of an approved Access request. eir requests that ComReg clarify that an obligation to remediate or to 'make physical infrastructure for use by Access Seekers only arises in respect of specific infrastructure, and only after an Access request has been agreed to.

Section 7.5(ii) Supervision

388. As set out in more detail in eir's Response to Consultation the effect of the blanket obligation in section 7.5(ii) '*to ensure that any supervision requirements are applied in such a way that they do not have the effect of delaying or preventing access seekers from commencing or continuing work in the absence of an eircom supervisor*, will have the effect in practice of unreasonably preventing eir from supervising highly intrusive repair work include including excavation and removal of its ducts and cables, in situations where as proposed by NBI, large scale remediation is undertaken where it would not be feasible to staff supervision of this activity. This greatly heightens the risk of damage and service outages, which is harmful not just to eir but to Access Seekers and the owners of the land where this remediation work is carried out.

Section 7.6(iv) passive access records – no obligations on access seekers

389. Eircom's concerns in relation to the obligations around passive access records have been set out in more detail in the response to consultation. Here we note simply that this provision does not impose any obligation on access seekers to provide the passive access records of the work they carry out on eir's network (e.g. details of sub-ducts they install, photographs of physical infrastructure). As long as the legislation remains silent on the issue there is no practical, effective means by

which eir can compel the timely supply of this information by access seekers, meaning that passive access records will remain incomplete.

Section 7.6(v) Co-location

390. Eircom's concerns in relation to the obligations around co-location have already been set out in detail in the response to consultation. Here we note simply that terms such as mast access and roof access are not defined, meaning that there appear to be no restraints on the nature or extent of the access that may be demanded. The issues with this have already been set out in detail. Similarly, with the provisions in relation to the accommodation of equipment in the co-located rack of another access seeker.

Section 7.6(c) Direct Duct Access

391. As set out in more detail in eir's response to consultation, this provision should reflect the limitations on and risks associated with Direct Duct Access acknowledged in the consultation document itself. As currently drafted the consultation position is not reflected in the Decision Instrument

Section 7.7(i) Sub-Duct Self-Install Duct Access Product

392. ComReg is aware that this product is currently the subject of a High Court appeal, and further that pursuant to an agreement entered into between eir and ComReg, ComReg has agreed not to enforce the provisions of Direction 21/60R until the High Court has ruled on the issue. In the circumstances the proposed provision In section 7.7(i) is not enforceable until the High Court has ruled. eir's objects to a provision mandating that eir be obliged to allow access seekers to carry out unblocking work on its ducts at eir's expense, in particular without any restrictions as to scale, on the grounds that it contravenes the requirements of the Framework Regulations and the Code and in particular the requirement that eir be able to recover its costs of providing an Access product as well as the provisions relating to proportionality. eir refers ComReg to the affidavits and legal submissions already provided to it on this issue, in the High Court appeal referred to above and which it is already has copies of.

Section 7.7(ii) Sub-Duct Self-Install Repair Duct Access product

393. eir has already provided ComReg with its detailed assessment as to why a repair obligation of the type envisaged, is not practically, technically, legally or economically feasible. eir refers ComReg to these submissions, which apply equally to the present proposal. From a drafting perspective, eir notes that the definition of repair is '*activities that are required to remediate a Duct's structure and/ or civil works including in particular Duct excavation and opening activities required to clear a blockage that cannot be cleared otherwise.*' it is inaccurate to characterise repair activity as 'remediation' of a duct structure - in fact what is involved is the removal of the existing duct structure and its replacement with completely new duct. As set out in more detail in previous submissions to ComReg, allowing repair in practice completely removes eir's property rights in its existing duct, contrary to the provision of the Charter of fundamental rights and the principle of proportionality.

Absence of any restrictions or obligations on Access Seekers

394. It is noteworthy that Clause 7.7 places absolutely no restrictions of any kind on Access seekers in granting these hugely intrusive rights. For example, there is not even a basic obligation to respect the rights of third party land owners whose land they will have to dig down on in order to carry out duct remediation. Similarly, there are no obligations on them to act in a manner that respects eir's property rights, or the integrity of its networks. Similarly, while Clause 7.10 mandates that eir provide access to PAR in GIS format quarterly as well to develop a user application to provide real-time information, there are no restrictions whatsoever on the use Access Seekers may make of this information, even though ComReg is aware that eir's competitors sign up as Access Seekers in order to be able to obtain confidential, commercially sensitive information, on foot of eir's SMP obligations. This illustrates the skewed nature of the proposed regulations, which is solely about granting rights to Access Seekers but with no corresponding obligation e.g. to respect the rights of others, whether of eir or third parties.

Equivalence of Inputs obligation on 'Access and information'

395. eir's concerns about the imposition of an Equivalence of Inputs obligation have been set out in detail in the response to consultation. From a drafting perspective eir notes that clause 8.2 imposes an obligation to provide 'Access and information" to all Undertakings. As the term information is not defined, it is simply not clear

what is meant by this provision and what information is caught by it. eir requests that this term 'information' in this clause be defined so that eir can understand what scope of information is meant to be regulated by the Equivalence of Input obligation in clause 8.2

Changes to access seekers IT systems

396. Clause 9.10 provides for a delay in the product development process and an obligation to provide a justification to ComReg, where changes to eir's IT systems mean that '*Access seekers will require to carry out development work to their own IT systems.'* Detailed concerns in relation to this provision have already been set out in the response to consultation. From a drafting perspective eir notes that this clause lacks practical provisions needed in order for need to work in practice. For example how is eir meant to know that work is required for IT systems of access seekers, where there is no obligation for Access seekers to inform eir of this fact in a timely fashion early in the product development process. Further it is not clear how abuse of this provision by eir's competitors can be avoided, without any obligation for Access seekers to objectively demonstrate the need to for changes to their IT systems. For example a competitor of eir could simply claim at a late stage in product development that they need to make changes to their IT systems, for strategic reasons to trigger the lengthy process in Clause 9.10, in order to delay the launch of eir's product, so that it does not have to face competition from eir, or from wholesale customers of eir availing of it.

PI rollout Plan Section 9.11

397. For the avoidance of doubt and as has repeatedly been submitted to ComReg in the past, an SMP obligation in physical infrastructure does and indeed cannot include infrastructure not owned by eir at all, but rather which is being installed by developers of new housing estates or commercial buildings. Consequently the provisions of section 9.11 do not apply to such third party physical infrastructure. Eir's detailed submissions on the rollout plan are set out in the main response to consultation. From a drafting perspective eir notes the provisions of subclause (iii), which stipulates that the '*Ready for Order date shall be set no earlier than one (1) month from the date on which the PI has been verified by Eircom as being completed in the field and can be ordered and utilised for the installation of cables, subducts and equipment supply. Neither Eircom nor Access Seekers may use or*

reserve such PI prior to the Ready for Order date.' What this means in practice is that new housing estates will have ducting ready for the installation of fibre, but Eircom and its wholesale customers cannot use that ducting to install broadband services for the people living in these new houses for at least a month. This regulatory-enforced delay is likely to cause very considerable customer dissatisfaction, given that customers want to install broadband as soon as possible after they move in. This appears to contradict ComReg's objectives of supporting the roll-out of broadband in the interests of end-users. It will also have the practical effect of granting a competitive advantage to non-regulated operators such as SIRO and Virgin Media. Clause 9.11(iii) will mean that developers are more likely to grant them access, including exclusive access to these ducts, instead of Eircom. Developers will now know that Eircom is barred by this clause from installing fibre for at least a month while no such delay will apply to either Siro or Virgin Media. Again from a competition point of view, this clause will therefore clearly distort fair competition in the market by granting a regulatory advantage to Siro and Virgin Media by preventing Eircom from competing on a level playing field with them.

<u>*Section 10.1 Obligation to accept or decline requests within one month*</u>

398. Under D10/18 clause 8.10(iv) there is a clear decision point for the granting or refusal of our request, in that it provides that eir shall '*confirm in writing to the undertaking that has made the written request whether it agrees to provide the requested product service or facility or amendment thereto.*' There is no equivalent provision in the proposed new decision instrument. Instead section 10.1 provides that '*save where the access request is not reasonable, Eircom having provided objective and adequate reasons therefor in accordance with section 7.2 as soon as reasonable and in any event within one month of receiving the access request here comes challenge sure that the request is met and a new product service or associated facility developed.*' The intent of this provision is not clear as it is not discussed in the main consultation document (i.e., there is no consultation on this provision). However, it appears to stipulate that eir must have completed its reasonableness assessment and notified the Access Seeker that it is either reasonable or not, within one month (i.e. approximately 20-23 working days). This is less than 1/4 of the time currently provided for, namely 85 working days. This shortening of the time frame for assessment of requests is not discussed in the main body of the consultation document and it is not clear whether this is the actual

intention of section 10.1. eir requests that ComReg clarify now whether it is in fact proposing to legislate that eir must complete reasonableness assessments within one month (20-23 working days) rather than within 85 working days as previously allowed, in order to comply with this provision? Such an obligation would simply not be feasible in many cases, given the very considerable commercial, technical, practical and legal feasibility issues that some product requests give rise to. As such, it is clearly not a proportionate provision particularly in circumstances where the measure has not been consulted upon at all and no analysis is given or justification provided for the reduction of the time period to less than 1/4 of the previously allowed.

Section 10.1(e)(II) Provision of information within 15 days

399. Detailed comments on the lack of proportionality and fairness of the proposed timelines set out in section 10.1 are set out in the main response. From a drafting perspective what is noted here is the lack of consistency between section 10.1(e)(II) and section 10.1. Section 10.1 appears to require a decision on the reasonableness of the request within one month, however the subsequent provision requires that eir provide an engagement timetable within 15 working days. What this means in practice is that eir is being required to provide an engagement timetable even before it has completed a reasonableness assessment of the product to determine whether in fact it constitutes a reasonable access request. It is neither fair, proportionate nor efficient to mandate that eir develop engagement timetables for products before they are even assessed for reasonableness.

Section 11 Service level agreements

400. Detailed comments on the proposed service level agreement provisions are set out in the main response. Eircom reiterate here that the proposed Section 11 provisions on what are termed 'service credits' go beyond what any commercial contract would provide for, by compelling eir to compensate for indirect losses. Per Section 11(b) eir is meant to set out '*an itemized list of the direct costs and other losses contributing to the service credit calculation.*' This appears to envisage a clause containing categories which eir must compensate rather than any actual pre estimated amount. This is simply not a service credit clause at all. It is also practically unworkable (how will these indirect losses be proven) and it goes

against the purpose of service credits, which is to agree predetermined estimate of loss which can be readily paid out where a service level is not met.

Section 11.6 on implementation of new SLAs

401. Section 11.6 requires Eircom to negotiate and implement new SLAs within 7 months of the Effective Date of the Decision Instrument. However, as noted, the High Court has previously ruled that Eircom may not be compelled to implement a Decision during the 28 day appeal window where that has the effect of depriving it of its right of appeal and to seek a stay. Given that Section 10.2.3(d) stipulates that SLA Negotiation Period may last 'no more than six months', this would mean that in order for Eircom to be able to provide for this six month period, it would need to have fully drafted and published all the proposed new SLAs within the first month after the Effective Date, i.e., during its 28-day appeal window, which contravenes the High Court's ruling. Eircom requests that this period be amended to a more feasible period that also complies with the High Court's ruling.

Section 12 Key Performance Indicators

402. As previously noted, the Code does not contain any provision entitling NRAs to 'further specify' SMP obligations outside of the process prescribed by Article 68, with public consultation and the notification of measures to the Commission. It is particularly concerning that ComReg states in Section 12.1 that Eircom develop KPI processes and KPI Metrics but both of which '*may be further specified by ComReg.*' While Section 12.2 says that *'by way of further specification, Eircom shall meet the requirements as set out in ComReg D04/22'.* This appears to leave open the possibility that ComReg may seek to introduce new and different KPI metrics and processes by means of 'further specifying' but without following the requirements of Article 68 including consultation or EU notification. Such an approach would be without precedent; all previous KPI Decisions have followed consultation procedures. ComReg is requested to clarify that section 12 does not meant that it is reserving the right to impose new KPI processes or metrics without public consultation and notification.

Section 15.1 Regulatory Governance

403. Section 15.1 introduces an entirely new regulatory obligation mandating the establishment of regulatory governance arrangements. It states that '*Eircom shall*

have in place transparent regulatory governance arrangements which facilitate effective and non discriminatory provision of access by Eircom to its Pole and Duct networks in accordance with the requirements of the Decision Instrument.' in the first instance ComReg is aware that Eircom already has detailed regulatory government arrangements in place on foot of the Settlement Agreement entered into in 2018. Consequently there appears to be no justification, given that ComReg retains its rights of legal enforcement under the Settlement Agreement, to also legislate for a regulatory governance model. It is in effect complete duplication with the effect of rendering the settlement agreement apparently meaningless, even though the work of the IOB continues and the regulatory governance model mandated by the settlement agreement is still in place. Further the clause in question is highly problematic because of its almost complete lack of specificity. In the Settlement Agreement, the precise parameters of the regulatory governance structure are set out so that it is clear for Eircom what it needs to do in order to secure compliance with the Settlement Agreement. No such clarity or specificity is consulted upon or provided in section 15.1 which consists of a single sentence. As a consequence, it is almost impossible for Eircom to know with any confidence what constitutes compliance with this requirement. Eircom is particularly concerned by this, given the highly subjective nature of regulatory governance, whereby a wide variety of different regulatory governance models are adopted by different companies. If ComReg wishes to legislate for regulatory governance models then it needs to consult upon and set out what constitutes compliance rather than simply impose an open ended, highly subjective obligation.

General comments on cumulative impact of obligations to notify ComReg, provide justifications to ComReg, and to seek ComReg approval

404. The draft Decision Instrument provides for a range of separate requirements for Eircom to seek ComReg approval, to provide a 'justification' to ComReg, as well as other separate obligations to formally notify ComReg, and further obligations to seek 'consent'. These notification obligations range from proposed amendments to products, to contracts. In most cases, these are open-ended notifications in that there is no requirement for ComReg to respond or provide feedback. There is no explanation as to the length of many of these pre-notification periods, and in particular why Eircom is required to wait many months before it can launch or amend products, in circumstances where it is not required to obtain ComReg

approval, but only to notify ComReg. The cumulative effect of all of these provisions on justification and notification provisions is to wholly 'bog down' the product development and amendment process in paperwork and rigid time-lines, and to significantly slow down the launch of new or amended products, even where there is clear demand or end-user benefit in launching them more quickly. This will inevitably have an effect on competition, in particular where Eircom is competing with other wholesale and retail providers who can launch identical, competing products but without any of these costs and delays. It is not clear how this complies with the statutory objective of promoting innovation, end-user benefits, as well as to act fairly and impartially.

Physical Infrastructure Access Market Review

Response to ComReg's Consultation and Draft Decision 23/04

NON- CONFIDENTIAL VERSION FOR PUBLICATION

3rd March 2023

BUILDING A LIMITLESS IRELAND

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1 Introduction

National Broadband Ireland (NBI) is pleased to provide its response to ComReg's market review consultation and draft decision on the Physical Infrastructure Access (PIA) market (the Consultation Document).[1]

In November 2019 NBI signed a Project Agreement with the Minister for the Environment, Climate and Communications committing it to roll out a full-fibre network to those areas of the country that had been identified as unserved by commercial broadband providers. NBI's Fibre to the Home (FTTH) network deployment is now well advanced – at end-February 2023, the NBI network had passed just under 119,000 premises, with in excess of 33,000 end-users connected to the network and availing of retail broadband services from a variety of Retail Service Providers (RSPs).

Under the Project Agreement, NBI has committed to completing the NBP network deployment within seven years. The deployment is now in its fourth year and NBI is on target to complete it in line with its contractual obligations.

NBI's NBP deployment plan involves extensive use of Physical Infrastructure (PI) assets, i.e. poles and ducts, under the control of Eircom Limited (Eircom). Regulated access to this infrastructure by NBI has, to date, been provided for under ComReg Decision D10/18, which designated Eircom with Significant Market Power (SMP) in the Wholesale Local Access (WLA) market and imposed a suite of remedies on Eircom including access to Civil Engineering Infrastructure/CEI (i.e., duct and pole access). Prior to signing the Project Agreement with the Minister, NBI concluded a long-term Infrastructure Access Agreement (IAA) with Eircom, guaranteeing it timely access at scale to Eircom's regulated duct and pole products within a Major Infrastructure Programme (MIP) framework.

Under this MIP arrangement, which is essential to the viability of the NBP, NBI expects to utilise approximately ✂ [███] ✂ Eircom poles and ✂ [███] ✂ km of duct as it rolls out its FTTH network to an estimated 565,000 premises within the NBP Intervention Area (IA). At end-February 2023, NBI was renting approximately ✂ [███] ✂ Eircom poles and in excess of ✂ [████] ✂ km of Eircom ducts. As ComReg notes in the Consultation Document[2], NBI is by far the most significant user of Eircom's PI assets and this will continue to be the case into the long-term.

NBI's response to this consultation is structured as follows:

- In **Section 2**, we provide an overview of our response to the Consultation Document, highlighting the key issues from NBI's perspective;
- In **Section 3**, NBI responds to each of the questions posed by ComReg in the Consultation Document.

[1] ComReg Consultation and Draft Decision, Document No. 23/04, 9th January 2023.

[2] Ibid., Para 3.20.

2 Overview of NBI's response

Introduction

The European Commission's Digital Decade initiative contains ambitious targets for the realisation across the EU of a 'Gigabit Society' by 2030.[3] By this time, the aim is that every premises within the EU will be able to connect to an ultra-high-speed broadband service via a Gigabit-capable network. The drive towards the Gigabit Society has seen the rapid deployment of Fibre to the Premises (FTTP)[4] networks across the EU27. Key to this deployment is the use by third-party providers of existing physical infrastructure, which, more often than not, is under the control of the incumbent fixed-line operator.

In this country, the Gigabit Society target is even more ambitious. The Government's Digital Connectivity Strategy[5] includes the aim that all households and businesses will be covered by a Gigabit-capable network by 2028, a target that is on course to be realised. The rapid deployment of full-fibre networks by Eircom, SIRO and NBI, combined with Virgin Media's plans to upgrade its Hybrid Fibre-Coaxil (HFC) network to full-fibre, means that the terms on which PI inputs are available for use by these operators has, from a regulatory point of view, moved centre-stage.

This means that ComReg's proposal in the Consultation Document to identify a specific market for PIA products and services is timely. Eircom's market power and vertical integration afford it the incentive and the opportunity to engage in distortive and discriminatory practices in the supply of PIA. Unless the PIA market functions efficiently and effectively, the nationwide deployment of FTTP risks being disrupted and delayed to the detriment of end-users. NBI submits that ComReg must use this opportunity to ensure that access to Eircom's PIA in future is effective, timely and non-discriminatory and is based on efficiently incurred costs.

NBI, as a result, supports the broad thrust of ComReg's proposals arising from its review of the PIA market. That said, NBI has significant concerns about certain aspects of ComReg's proposals which it fears could, in the extreme, imperil the viability and completion of the NBP network rollout. In the remainder of this section, we provide a broad overview of the main issues of concern from NBI's perspective in relation to ComReg's proposals in the Consultation Document.

Market definition and SMP

NBI supports ComReg's conclusions in relation to market definition. While PI under the control of other organisations, notably ESB's electricity network PI, has some capability of being used in limited instances for the deployment of FTTP networks, ComReg is right to take the view that non-telecoms-specific PI is not a direct substitute for Eircom's telecoms-specific PI. It follows that it is only the latter that should be included within the definition of the relevant market.

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[3] See: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en

[4] The terms 'FTTP' and 'FTTH' are used interchangeably in this response.

[5] The Digital Connectivity Strategy for Ireland, Department of the Environment, Climate and Communications, 8th December 2022, available at: https://www.gov.ie/en/publication/f1f85-digital-connectivity-strategy/.

NBI also believes that ComReg is justified in defining the PIA market at a national level, subject to our comments in this response on the need for geographically differentiated remedies.

Turning to the assessment of competition within the PIA market, NBI supports the findings of ComReg's Three Criteria Test, which demonstrate that the market is one in which regulatory intervention is warranted. NBI also supports ComReg's conclusion that Eircom holds a position of dominance within the relevant market and that, despite its significance as a purchaser of PIA inputs, NBI holds no Countervailing Buyer Power within the market, both due to the absence of a credible alternative source of supply and to the network deployment timelines laid down in the NBP Project Agreement. NBI supports ComReg's conclusion that, as a consequence, Eircom should be designated with SMP in the PIA market.

Non-pricing remedies

✂ [[6] [7]] ✂

Considering this experience, NBI is in no doubt that a full suite of non-pricing remedies should be imposed on Eircom's in respect of the provision of PIA products and services to access seekers. As a result, NBI supports ComReg's proposals to impose on Eircom non-pricing remedies in the areas of access, transparency, non-discrimination and cost accounting.

Equivalence of Inputs

NBI considers that Equivalence of Inputs (EoI) and non-discrimination more generally are key non-pricing obligations within the regulatory toolkit and that their imposition on Eircom in the PIA market is essential.

In NBI's view, there is a clear need for ComReg to ensure Eircom's strict compliance with non-discrimination and EoI principles in two key areas: (i) the manner in which it provides PIA products and services to itself compared to how it supplies third-parties, NBI included and; (ii) the arrangement it has concluded with Fibre Networks Ireland (FNI).

✂ [ ] ✂

[6] ✂ [ ] ✂

[7] ✂ [ ] ✂.

EoI and NBI's MIP

✂ [ ] ✂

✂ [ ] ✂

✂ [ ] ✂

NBI's SDSI access request

NBI welcomes ComReg's proposal to place a specific obligation on Eircom to make SDSI available to Access Seekers in a manner that will enable them to have end-to-end control of all blockage clearance and repair works. NBI first sought such an SDSI solution from Eircom, ✂ [ ] ✂

In this regard, ComReg's proposal to oblige Eircom to make the required SDSI facility available is very welcome. NBI remains concerned, not least in light of the inordinate delays it has already faced in relation to its own SDSI access request, that the proposed timeframe within which Eircom would be obliged to offer such access is too long. NBI requests that, in its final PIA Decision, ComReg should oblige Eircom to make the required SDSI solution available no later than one month following the publication of the final Decision.

Copper Switch-off

NBI is concerned that incentives aimed at encouraging Eircom to proceed in an efficient manner with Copper Switch-off (CSO) and, in particular, to remove redundant copper cabling from its poles, do not feature in the same prominent way in the current Consultation as they did in ComReg's 2020 Pricing Review. In NBI's opinion, ComReg could have done more to provide the correct pricing incentives to

Eircom in relation to CSO, in particular in relation to the removal of legacy network cabling from its poles. A revised approach to cost sharing in relation to Pole Access pricing (see below where we discuss Pole Access pricing) would, in NBI's view, go some way towards incentivising Eircom in an appropriate way in relation to CSO.

Pricing remedies

In light of Eircom's position of SMP within the relevant PIA market, it is clear that regulatory pricing remedies are also required. In this regard, NBI supports ComReg's proposal to impose an obligation of cost orientation on Eircom. NBI also supports the costing methodology proposed and the method by which reusable and non-reusable assets should be treated.

NBI agrees with ComReg's over-arching approach to cost modelling for PIA services – which ComReg initially developed for the 2020 Pricing Review[8] – but has some concerns it wishes to raise relating to specific inputs and assumptions used by ComReg in applying this approach. These are discussed in more detail later in this response.

NBI also has a number of concerns relating to certain factors that underpin the setting of regulated prices for both Pole Access and Duct Access, which are summarised below and which are also set out in detail at the appropriate points in this response.

Pole Access pricing

NBI is disappointed with ComReg's approach to Pole Access pricing, the net effect of which is likely to mean that the regulated price for Pole Access will be excessive and will, among other things, result in charges paid by NBI cross-subsidising Eircom's costs elsewhere.

In particular, NBI takes the view that ComReg's position on the following issues that underpin the proposed Pole Access charge warrant revision:

- *Cost sharing approach:* ComReg's proposal to retain the current 'per operator' approach to cost sharing is flawed. It fails to follow cost causation principles and to reflect experience on the ground where Eircom often has multiple copper cables deployed on its poles. In NBI's view a 'per operator per cable type' approach would be a much fairer method of cost sharing for Pole Access. Such an approach would also provide a clear incentive for Eircom to remove redundant copper cabling from its poles following CSO, which would also improve the resilience and quality of Eircom's network;
- *Asset life:* ComReg's proposal to retain a 30-year asset life for Eircom's poles is not supported by the evidence and, in combination with the proposed shift in the approach to depreciation to straight-line from tilted annuity, will cause a material increase in the Pole Access price (as acknowledged by ComReg). If the planned alteration in the depreciation approach is to proceed, this should only happen if accompanied by the adoption of a more sensible and evidence-based approach to the

[8] ComReg Consultation Document 20/81, 9th September 2020.

assumed asset life of poles, which NBI believes should be set at 40 years, as the UK regulator Ofcom has recently determined[9];

- *Nationally averaged Pole Access price:* while ComReg is able to demonstrate that the cost of Pole Access provision will converge nationally over the medium-term, for the coming 3-4 years (i.e., most of the price control period covered by the forthcoming PIA Decision) the cost will, as ComReg's own data show, be lower within the NBP IA than it will be everywhere else. By setting a nationally averaged price for Pole Access, ComReg is putting NBI at a disadvantage compared to other users of this PI (Eircom included). NBI is thus of the view that there is a strong case from a cost-orientation perspective for ComReg to set geographically deaveraged charges for Pole Access, thus reflecting the lower cost facing Eircom of providing Pole Access within the NBP IA.

Duct Access pricing

NBI is broadly satisfied that ComReg's proposals in the Consultation Document in relation to Duct Access pricing strike a reasonable balance. ✂ [ ] ✂

NBI also welcomes ComReg's approach to dealing with the liability for the cost of remediating ducts, as this issue has proven extremely contentious in recent years and is in urgent need of a definitive resolution. NBI believes that ComReg's proposal to set a threshold beyond which duct remediation costs are assumed not to be covered by the prevailing Duct Access charge is fair both to Eircom and to Access Seekers, with the level at which this threshold is set in the final Decision informed by real-world data on instances and costs of duct remediation.

✂ [ ] ✂

Cost accounting information

NBI welcomes ComReg's proposals in relation to the provision of additional cost accounting information from Eircom in relation to PIA services, although NBI would question if these proposals go far enough, in particular ✂ [ ] ✂

[9] Ofcom, Wholesale Fixed Telecoms Market Review 2021-26, Volume 4: Pricing remedies, Para. 4.57, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0025/216088/wftmr-statement-volume-4-pricing-remedies.pdf

The annual provision of additional cost accounting information more generally and ComReg's intention to use this information, to validate cost model assumptions relating to Eircom's capital expenditure on its pole and duct infrastructure and so inform the regulated prices, should help to ensure that the level at which regulated prices are set remains appropriate and that no over-recovery of costs is taking place.

ComReg's proposal to oblige Eircom to publish on its website additional cost accounting information relating to PIA services is a welcome one. This move should help to improve transparency in relation to Pole and Duct Access prices and to provide greater assurance to Access Seekers that these prices are being set at an appropriate level on an ongoing basis over the duration of the price control.

3 Responses to ComReg's consultation questions

In this Section, NBI provides its response to each of the questions posed by ComReg in its Consultation Document.

Q. 1 Do you agree with ComReg's definition of the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

NBI broadly agrees with ComReg's definition of the Relevant PIA Market. In particular, NBI supports the conclusion that the composition of the market should be restricted to "telecoms-specific" infrastructure and exclude, for example, the electricity and rail networks whose primary function is not dedicated to the delivery of telecoms services. NBI agrees that there are material limitations regarding the extent to which ESB's electricity network is capable of being used in a generic sense for the provision of telecoms services.

As noted by ComReg, there are limitations on the number of fibre cables that can be installed on the overhead electricity supply network, it is difficult to use underground portions of the network in isolation and there are more onerous health and safety requirements applying to personnel working with a live electrical network. NBI agrees that these and other characteristics suggest that ESB's PI is not a substitute for telecoms-specific PI.

With respect to the geographic definition of the market, NBI acknowledges that the case outlined by ComReg for a "national" market definition may not be unreasonable. NBI submits, however, that there is a sufficient variation in the competitive conditions between the NBP IA on the one hand, and the Commercial Areas[10] on the other, to justify geographic variations in remedies, even under a national market definition.

In relation to Duct Access, for example, it is clear from ComReg's own cost analysis (Table 10 in the Consultation Document) that there is a material difference between the costs of Duct Access in the IA (by all surface types) and corresponding costs for Commercial Areas. Consequently, while a national market definition may be appropriate, any geographic variation in remedies should reflect such clearly discernible sub-national characteristics (i.e., IA v Commercial) in order to ensure appropriate and evidence-based regulation. The classifications (e.g. Urban v Non-Urban) which ComReg has suggested adopting in the Consultation do not take adequate account of the lower costs in the IA. This is discussed in greater detail in response to Question 15 below.

With respect to other points raised in this section of the consultation, we note ComReg's analysis of the Infravia/Eircom Ltd deal announced in January 2022 which led to the transfer of a large portion of

[10] In the Consultation Document, ComReg makes a distinction between the Rural Commercial Area and the Urban Commercial Area, with the former equating to those parts of the country in which Eircom has deployed its fibre network. This is also commonly known as the "300k network area" or, in NBP parlance, the "Transit Area", in light of NBI's need to deploy the NBP FTTH network on Eircom infrastructure in this area in order solely to transit through it to reach the NBP IA, at which point NBI is permitted to connect end-users.

Eircom's assets to the newly-formed entity Fibre Networks Ireland (FNI). ✂ [ ] ✂

✂ [ ] ✂

✂ [ ] ✂

✂ [[11]] ✂

✂ [ ][12] ✂

✂ [

11 ✂ [ ] ✂.

12 ✂ [ ] ✂.

] ✂

Q. 2 Do you agree with the SMP assessment above and that Eircom is likely to have SMP in the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

NBI agrees with ComReg's SMP assessment and its conclusion that Eircom has SMP in the Relevant PIA Market.

As ComReg notes, because the PIA market is not included in the current list of Recommended Markets that the European Commission has concluded are susceptible to *ex ante* regulation, its first step is to establish if the national PIA market it has defined reaches the threshold for regulatory intervention, i.e. that it meets the Three Criteria Test (3CT) laid down in Article 67(1) of the European Electronic Communications Code (EECC).

ComReg's 3CT analysis

NBI considers that ComReg's 3CT analysis demonstrates clearly that the national PIA market meets the threshold for regulatory intervention. Specifically:

- *Criterion 1 – Presence of high, non-transitory barriers to entry:* NBI agrees with ComReg's assessment about the existence of structural barriers to entry and high sunk costs, which together ensure that existing PI is not easily duplicated. ✂ [ ] ✂ In the Consultation Document, ComReg states that Eircom's access network at this point is "*significantly amortised*" and so "*any potential entrant*" would face high sunk costs and higher risk of non-recovery relative to Eircom if it attempted to enter the market.[13] NBI welcomes ComReg's recognition of this fact and asks that, where there is evidence of Eircom's network being "*significantly amortised*", this is fairly reflected in geographically differentiated pricing e.g. given the Net Book Value (NBV) of Eircom's ducts in the IA is at or close to zero, the cost of consuming Duct Access in this footprint should similarly be at or close to zero.

  Likewise, the complex legal and regulatory barriers faced by potential PI entrants in relation to required Local Authority approvals for underground and overhead works mean that those in control of existing PI are at an enormous advantage compared to potential entrants. In addition, the European Commission's State Aid approval for the NBP Project was granted based on NBI using the least-cost option for the deployment of its fibre network, which meant using, where possible, existing telecoms-specific PI.[14] This underscores the point that high, non-transitory barriers to entry exist in relation to the relevant PIA market identified by ComReg.

- *Criterion 2 – Market not trending towards effective competition:* ✂ [

[13] Para. 4.50.

[14] European Commission letter dated 15th November 2019 (Commission Decision C(2019) 8069).

] ✂ Given that the market for telecoms-specific PIA services is one that is, in effect, dominated by a sole supplier, it is clearly not one that is trending towards effective competition.

- *Criterion 3 – Insufficiency of competition law to address market failure:* as NBI explains in its response to Q.3 below, it is obvious there are competition problems in the PIA market that persist even in the presence of regulation relating to Eircom's provision of Pole and Duct Access. As a result, there is no prospect that ex-post intervention would deter anti-competitive conduct within the relevant market. As ComReg points out, reliance on competition law alone would not provide the kind of regulatory certainty required for Access Seekers, nor would it create the conditions necessary for competition and investment in downstream markets through the use of PI.

ComReg's SMP assessment

NBI agrees with ComReg's SMP assessment, which confirms that Eircom holds an unrivalled position in relation to the provision of PIA services. ComReg's conclusion that Eircom holds a position of SMP within the relevant market is supported by the absence of any direct or indirect constraints facing it and by the lack of countervailing buyer power (CBP) on the part of purchasers, including on the part of NBI as the largest purchaser of PIA services from Eircom.

In terms of direct constraints, the local ubiquity and national reach of Eircom's PI network place it at a significant advantage compared to other providers, whose footprints are no more than piecemeal. ✂ [[15]] ✂

NBI agrees with ComReg's assessment of alternative duct infrastructure, which has limited geographic scope and is non-contiguous and skeletal in nature. ✂ [ ] ✂

[15] ✂ [ ] ✂.

As such, other duct infrastructure – where it exists - may be viewed as a limited complement to Eircom but in no sense can it be regarded as a direct substitute. As a result, NBI agrees with ComReg's conclusion that alternative PI networks, due to their limited nature, provide no effective constraint on Eircom within the relevant market. Likewise, the same limited nature of alternative PI means there is no prospect of downstream switching to alternative services that are not reliant on Eircom's PI. This means that no credible indirect constraints exist to Eircom's operations within the upstream PI market.

NBI also agrees with ComReg's assessment of constraints arising from potential competition and agrees in this respect that ESB, due to the national reach and capillarity of its PI, is the only credible candidate. As already noted, however, NBI's experience is that ESB ✂ [ ] ✂ infrastructure is not capable of supporting the kind of access required by operators deploying fibre networks, particularly in Non-Urban settings, not least given all of the technical and administrative requirements governing such possible access, which ComReg has discussed in some detail in the Consultation Document.

✂ [.

] ✂

Q. 3 Do you agree that the competition problems and the associated impacts on competition and end-users identified are those that could potentially arise in the related markets downstream of PIA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

NBI agrees with ComReg's assessment of the competition problems and associated impacts that could potentially arise in related markets downstream of PIA. NBI's focus remains, however, on competition problems arising in relation to PIA access itself. ✂ [.

] ✂

Non-Discrimination and Equivalence of Inputs obligation

✂ [[16]] ✂

When ComReg imposed EoI on Eircom in 2018 it qualified that it would consider this standard to still be met where there were *"very minor and insignificant system and process differences"* in instances where *"such differences could be objectively justified"*. ✂ [:

[16] ✂ [.] ✂

17

[17] ✂ [.] ✂

] ✂

Equivalence of Inputs and NBI's MIP

✂ [

.[18]

[19]

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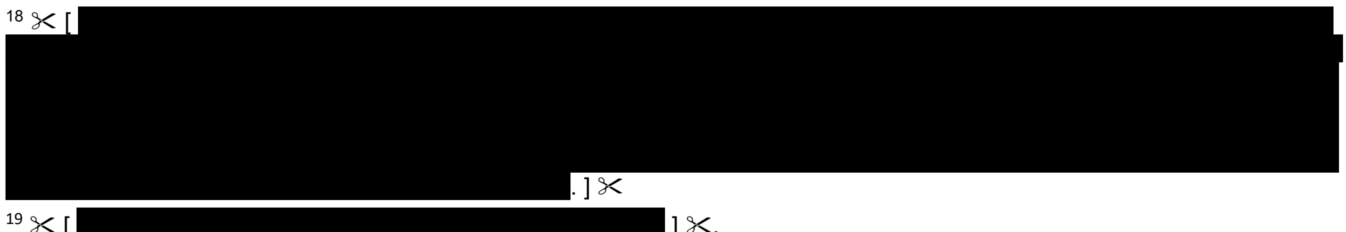

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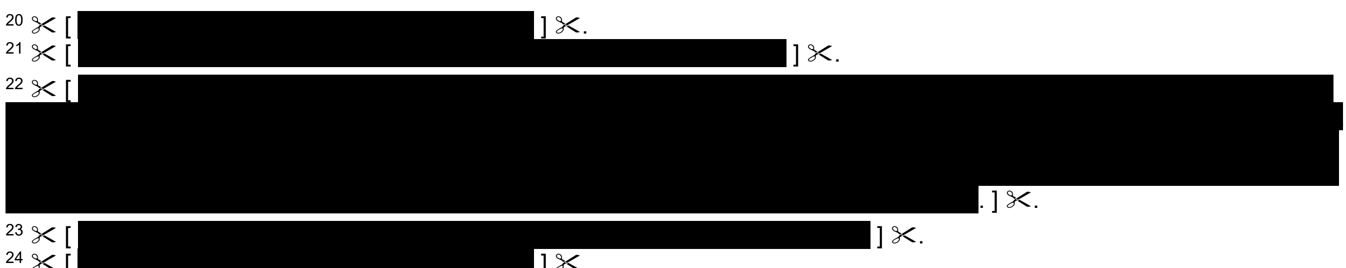


[20] ✂ [ ] ✂.

[21] ✂ [ ] ✂.

[22] ✂ [.] ✂.

[23] ✂ [ ] ✂.

[24] ✂ [ ] ✂.

[25]

.]✂

Network Maintenance

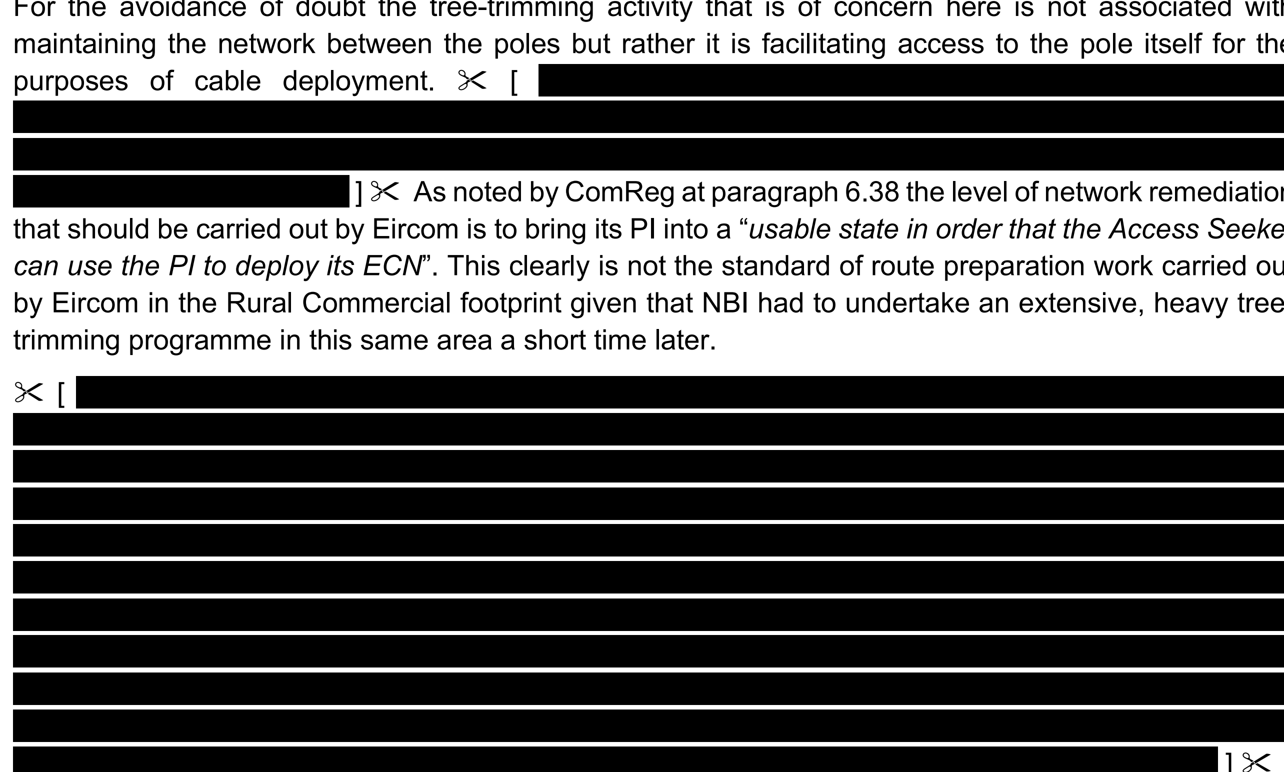
NBI notes ComReg's comments (at para. 5.37) that a SMP operator may be *"insulated from the need to innovate and improve or maintain the quality of its PI*". It is clear from the extensive work NBI has had to carry out in both the IA and the Rural Commercial Area, which NBI transits, that existing SMP obligations has not prevented this outcome. NBI has had, for example, to carry out a significant programme of tree-trimming even in the Rural Commercial footprint where Eircom has rolled out FTTH. In theory, given Eircom had recently rolled out its fibre network in this area, NBI should have expected to incur little or no expense in this regard. These costs would have been avoided if Eircom had been appropriately maintaining its network. ✂ [

] ✂

[25] ✂ [

.] ✂ ”

For the avoidance of doubt the tree-trimming activity that is of concern here is not associated with maintaining the network between the poles but rather it is facilitating access to the pole itself for the purposes of cable deployment. ✂ [



] ✂ As noted by ComReg at paragraph 6.38 the level of network remediation that should be carried out by Eircom is to bring its PI into a "*usable state in order that the Access Seeker can use the PI to deploy its ECN*". This clearly is not the standard of route preparation work carried out by Eircom in the Rural Commercial footprint given that NBI had to undertake an extensive, heavy tree-trimming programme in this same area a short time later.

✂ [ ] ✂

Redundant Cable

NBI welcomes ComReg's proposal that Eircom may not refuse to meet a PIA order on the basis of no capacity being available in a situation where there is redundant cable in its duct (para. 6.39). In this respect while redundant cables should be removed from poles as a matter of course (because failure to do so will negatively impact the asset's life) the same concern does not arise in relation to ducts. However, where redundant cables are the cause of raising the cost of installation, either because they increase the level of remediation work or require the installation of new sub-duct, the presence of redundant cable ought, at least in theory, to contribute to some portion of duct cost recovery. Under a "scorched earth/node" topology an efficient fibre network roll-out would not encounter such scenarios. One manner in which this may be fairly accounted for is to attribute some percentage of duct occupancy to redundant cable on a forward-looking basis. In this way Eircom would not have to contribute to the full cost of the redundant cable taking up space in its PI but would at least contribute to some portion of the costs created by its presence.

Furthermore, the majority of active copper cables on Eircom's network in the IA are expected to be redundant within a relatively short timeframe following roll-out of NBI's network in those areas. Eircom continues to enjoy the benefit of that cable (and duct) while it is still operational, while once it has become redundant it will enjoy the benefits of the higher costs its presence drove during that active period – because NBI will require a sub-duct to be installed where a cable installation may otherwise have been sufficient in a spare sub-duct. As these additional costs will have been caused by the presence of what is ultimately a redundant cable then under cost causation principles some contribution to PIA duct access costs might be viewed as reasonable. In this way, redundant cable sub-duct being apportioned at least some percentage of duct occupancy would seem a logical approach for doing this as it would notionally be recovered by Eircom from itself across its entire network.

Q. 4 Do you agree with ComReg's proposed non-pricing remedies in the PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

NBI agrees with ComReg's proposed non-pricing remedies but would suggest a greater degree of specificity is required in certain instances to ensure the proposed remedies are effective.

NBI strongly supports ComReg's proposed remedies in relation to Access, in particular its position that any requirement for network remediation is not a justifiable reason for the SMP operator to refuse access and that, if necessary, redundant cables should be removed from Eircom's PI to facilitate Access by a third-party operator.

✂ [

] ✂

Other issues of concern to NBI in relation to the proposed imposition of non-pricing remedies are as follows:

Obligation to provide SDSI

NBI welcomes ComReg's proposals around a specific access obligation for SDSI, under which the Access Seeker would have full control of all duct blockage clearance and remediation works. [26] NBI notes ComReg's position that this solution must be delivered within seven months of the effective date of the final PIA Decision.[27]

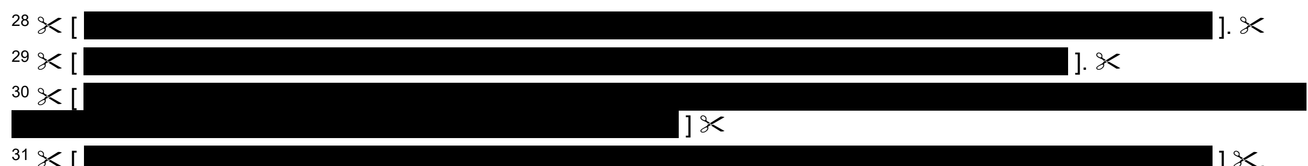
✂ [

[26] Consultation Document, Para. 6.68.

[27] Ibid.

[28] [29] [30]

[31]



[28] ✂ [ ]. ✂

[29] ✂ [ ]. ✂

[30] ✂ [ ] ✂

[31] ✂ [ ] ✂.

] ✂

There is no practical reason why it would take a further seven months following the publication of ComReg's final decision in relation to this market review for Eircom to deliver the product. As such we would request that ComReg substantially reduces its proposed timescale for delivery of this product to no more than one month following the publication of the final PIA Decision.

The same logic applies for Eircom making other PI solutions available to Access Seekers much more quickly . As ComReg notes (Para. 6.126), Eircom's RAP process works on a "one-size-fits-all" approach, with uncomplicated PIA requests being delivered using the same elongated timeframes which are required to deliver more complex active products. ✂ [

.] ✂

NBI therefore fully supports ComReg's proposal to shorten PIA product delivery timeframes and agrees that it should do this by setting up a separate product development stream purely for such requests. NBI further proposes that the delivery timeframes put forward by ComReg be tightened still further, with all such requests be completed in full within six months (unless IT changes for Access Seekers are required, in which case the request should be completed in full within nine months).

Access services implied but not explicitly called out

NBI would request that ComReg's final decision in this market review explicitly calls out the need for clear and non-discriminatory guidance to be provided by Eircom in relation to access services that are implied but are not explicitly provided for in Eircom's PIA product documentation. ✂ [

[32]

"Good faith" negotiation/engagement

NBI welcomes ComReg proposed continuation of Eircom's obligation to negotiate in "good faith" and notes that ComReg may draw adverse inferences on this point for a variety of reasons including *"the absence of effective controls to ensure that decision-making processes within Eircom…could not be influenced by concerns about the commercial impact on Eircom's downstream business"*. ✂ [[33]

It is notable that in the WLA/WCA Consultation[34] ComReg has redacted information in relation to FTTH roll-out plans by operators, presumably because this information is seen to be commercially sensitive. ComReg has also proposed exceptions to Eircom's transparency obligations that allows Eircom to restrict provision of information to infrastructure competitors unless there they have a "*demonstrable intention to*

[32] ✂ [ ]. ✂

[33] ✂ [ ]. ✂

[34] ComReg Document 23/03, 9th January 2023.

avail of Eircom WLA" (see Para. 9.165 of the WLA/WCA Consultation). ComReg suggested it would be inappropriate to require Eircom to share this information with competitors. ✂ [

] ✂

Service Level Agreements (SLAs)

NBI welcomes ComReg's statement on appropriate incentivisation in the context of service credits i.e. *"it should not be less costly for Eircom to pay the service credits than meet the agreed service levels"*. All SLA negotiations should be informed by this overarching principle if end-users are to derive the benefit this remedy seeks to achieve. As further noted by ComReg, Access Seekers should not be at a loss due to Eircom failing to meet SLA committed service levels (Para. 6.152).

Q. 5 Do you agree with ComReg's view that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA? Please provide reasons for your response.

NBI agrees that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA. PIA is a bottleneck service and, as noted by ComReg throughout the consultation, the physical infrastructure in question is very unlikely to be replicated, with only limited exceptions. A revision of the current price control governing pole and duct pricing is long overdue, as evidenced by ComReg's own analysis in this consultation (given the scale of the proposed price reductions). It seems likely that material over-recovery of costs on these services has contributed to Eircom's exceptional financial performance in recent years. Notably, Eircom's most recent regulatory accounts record a Return on Capital Employed (ROCE) of 11% for PIA, double its current regulated WACC of 5.56%.[35]

Over-recovery of costs on PIA has occurred as a consequence of Eircom's current prices being informed by a WACC of 8.18% (last updated in 2014), a failure to take account, within current pricing, of significant efficiencies realised by Eircom over the last several years (e.g. ,outsourcing of field services, significant staff reductions etc.) and underinvestment by Eircom in the network (particularly within the NBP IA).

This has resulted in a significant disconnect between actual costs incurred and those assumed in the cost models that underpin current regulated prices. Eircom has benefited enormously (financially) from a combination of the delay in updating PIA pricing and NBI's significant demand for access to such PI. While ComReg may be unwilling to compensate Access Seekers for this historical over-recovery by Eircom in the new PIA prices, ComReg should at the very least lend consequential weight to this factor when it deciding on finely balanced arguments, where the verdict has the impact of increasing or decreasing prices in the new PIA price control. In simple terms, ComReg is aware that, due to material over-recovery of costs historically, it is highly improbable that Eircom will be out of pocket if, for example, the duct remediation threshold were to be raised from €11k to €13k or if pole assets lives are increased from 30 years to 40 years, which NBI strongly advocates they should be.

✂[ ] ✂

It is also worth pointing out that the significant over-recovery of costs on PIA in recent years has occurred against a backdrop of Eircom being subject to a cost-orientation obligation throughout this period. This highlights the risk of not having sufficient checks and balances in place to ensure compliance in practice. There is a real risk that, where specific prices are not catalogued by ComReg in its final PIA Decision but where Eircom are ostensibly obliged to ensure "cost orientation", this will be exploited by Eircom. For

[35] Eircom's Historic Cost Separated Accounts to 31 December 2021.

example, in this consultation ComReg has only given generic guidance on what should be factored into PIA “Process Costs”. Apart from the fact that the lack of clarity around these charges increases the risk of excessive pricing (e.g., through inefficient/’gold-plated’ processes), it may also contribute to higher administration costs, disputes and ultimately delays to Access Seekers consuming PIA (which, as acknowledged in the Consultation Document by ComReg, Eircom may have an incentive to pursue).

Such ambiguity around cost orientation obligations must not ultimately be used as a tool by Eircom to engage in the type of activity SMP remedies are designed to avoid. At Para. 7.30 ComReg is clear that with *“cost orientation Access Seekers know in advance what costs/prices they are expected to pay over the price control period, thereby allowing them to make investment decisions and develop business plans with a greater degree of confidence”.* NBI would note that this principle must equally apply to costs (passed on to Access Seekers) that are not clearly defined in a final decision and cannot be easily verified. We refer to this issue in greater detail in response to Question 15.

Q. 6 Do you agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for Eircom's PIA? Please provide reasons for your response.

At a high level NBI agrees with ComReg's proposal that a combination of BU-LRAIC+ and TD HCA costs should be used as the basis for pricing Eircom's PIA. This is consistent with the EC's Non-Discrimination and Cost Methodologies Recommendation. Nevertheless, NBI continues to have concerns about a number of ComReg's modelling assumptions, particularly the PIA asset lives proposed by ComReg. These asset lives assumptions are not supported by the evidence and have a material impact on rental charges (See NBI's response to Q.9). This impact is amplified because the regulated cost of capital will be updated arising from this review, resulting in the WACC decreasing from 8.18% to 5.56%. This is discussed further in NBI's response to Q.8.

In addition, NBI is concerned about the implications of an overestimation of Eircom's starting Regulatory Asset Base (RAB) in the current review. In particular, the consultation is unclear about how ComReg plans to account for the significant duct remediation costs already incurred by NBI since it began the rollout of the NBP network.

This point is independent of ComReg's proposal to require Eircom to cover costs of remediation of up €11k going forward. Instead, what is at issue here is whether Eircom has been capitalising costs incurred by NBI in its regulatory HCAs and thus artificially inflating its RAB based on investment made by NBI. It would be inappropriate for Eircom to treat charges to NBI as sales revenue and book the expenditure on the associated remediation as a capital cost incurred by Eircom (Eircom's statutory accounts appear to treat these transactions in this way). As noted by ComReg at paragraph 7.172, "*expenditure above the threshold (€11k) borne directly by an Access Seeker* ***should not be capitalised by Eircom*** *and included in in its Fixed Asset Register. This is to ensure that…the RAB…does not include any costs directly charged to Access Seekers*" [emphasis added].

This principle should equally apply to remediation costs borne by NBI to date or otherwise it will effectively be '*double charged'* – once through upfront remediation charges and again through ongoing rental charges. With respect to the latter, other Access Seekers would also end up paying Eircom for a portion of capital expenditure incurred by NBI. Although it is NBI's understanding that these capital costs have not been included in Eircom's RAB, we would nevertheless, in line with the principle outlined by ComReg at Para. 7.172, welcome confirmation from ComReg that this understanding is accurate.

With respect to other points raised by ComReg in this section, the basis for ComReg's conclusion that "*copper-based services*" provided by Eircom in the IA are made available at "*negative margins*" is unclear. The implication of this assumption, as outlined at Para. 7.66, is that a higher portion of Network Rates should be allocated to the IA in the cost model on a forward-looking basis and/or that PIA should take on a greater portion of Network Rate costs than should downstream services.

NBI considers that such an assumption may feed into an over-estimation in "Non-Urban" pricing (or all PIA generally) in the final decision on PIA prices. However, the assertion made by ComReg at Para. 7.66 appears to ignore the extent to which there has been historical under-investment in the IA, where Eircom has "sweated" assets for years, and where the modelled copper costs (which assumes no such underinvestment) will by extension wrongly imply "negative margins" where there are none. Given the NBV of many PIA assets in the IA is at or approaching zero, it is hard to reconcile this situation with purported negative margins supposed by ComReg on copper-based services. Furthermore, a review of historical regulatory accounts suggests ROCEs on Narrowband and Unbundled Access were

consistently and materially above the regulated WACC (e.g. 2017-15%, 2018-14%, 2019-14%).[36] In addition, following the expiration of the 'sunset' periods in the regulation of the Fixed Access Call Origination (FACO) markets, all SMP obligations will have been withdrawn from Eircom in the provision of narrowband copper services and so it will be free to set pricing at a level that can ensure the service is only provided on a profitable basis (as it would simply stop providing the service in the alternative).

NBI would request that ComReg clarify the basis for its "negative margins" assertion from an Historical Cost Accounting perspective and to confirm whether or not such a purported "negative margins" argument was ever advanced by Eircom to Local Authorities for the purposes of calculating Network Rates. Given the 'on the ground' reality that Eircom's network is heavily or fully depreciated in the IA and that there has been no investment in this footprint by Eircom for decades, far from assuming "negative margins" on these services in the IA they may well be among the most profitable for Eircom. The evidence from Eircom's Historic Separated Accounts appears to support that view, at least at a high level.

[36] See Eircom's Historic Cost Separated Accounts for each of these years.

Q. 7 Do you agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready? Please provide reasons for your response.

NBI broadly agrees with the proposals put forward by ComReg with respect to Reusable and Non-Reusable assets. However, we would refer ComReg to NBI's comments already made in response to Q. 6 regarding duct remediation costs in the IA already paid for by NBI. We note that in its discussion on this issue, ComReg states that with respect to the Rural Commercial footprint Eircom "*had to undertake a significant programme of pole replacement and duct clearance in advance of deploying new fibre cables…As a result all PIA routes where Eircom has deployed FTTH can now be classified as 100% reusable for NGA*." Where this has occurred in the NBP footprint the significant programme of duct clearance to date has been undertaken by Eir but it has been paid for by NBI and so should not be capitalised on Eir's Fixed Asset Register.

We would also refer ComReg to NBI's comments made in response to Q.6 and Q.10, both of which set out further concerns regarding the specific approach used to estimate the RAB for PIA Reusable and Non-Reusable Assets.

Q. 8 Do you agree with ComReg's view that a straight-line depreciation approach should be applied in the context of Pole Access and Duct Access (including Direct Duct Access) while a tilted annuity depreciation approach should be used for sub-duct? Please provide reasons for your response.

As previously outlined by NBI, a straight-line deprecation methodology could be appropriate in a situation where an appropriate asset life profile is being considered. In October 2021, ComReg provisionally determined[37] that there was "*no convincing evidence*" provided by respondents to warrant changing the 30-year asset life for poles from those originally determined in the 2009 Asset Lives Decision.[38] That position ignores the fact that ComReg itself acknowledged that an "*asset life of 30 years is not consistent with the replacement rate that has been observed in recent years*". Despite this acknowledgement, ComReg continues to assume a pole asset lifetime of 30 years in the Pole Access Model (PAM) which informs the proposed Pole Access prices.

The implication of this approach would be to both reward Eircom for historical underinvestment and allow for an over-recovery of costs on a forward-looking basis. As noted by Frontier Economics in NBI's response to the 2021 consultation, all else being equal, using a straight-line depreciation methodology where a much lower WACC is (belatedly) being applied (5.56% now versus historically 8.18%) using unreasonably short asset life durations will result in a greater over-estimation of costs than under a high WACC scenario. Frontier also identified that the disconnect between the average life of poles in the PAM and the average asset life used to calculate annualised pole costs was material, i.e., 75 years versus 30 years, and this disconnect continues to be present in the PAM underlying ComReg's current proposals. As such the disparity simply cannot be characterised as being within a reasonable margin of error.

Unless asset lives are appropriately amended then a 'tilted annuity' is recommended

NBI would note that the structure of cost-oriented pricing set by ComReg in downstream wholesale services (e.g. FTTC VUA) is based on a 'tilted annuity' approach. Given that cost-oriented FTTC is considered (as it was in the 2018 Decision) to act as a constraint on Eircom's FTTH VUA pricing, the titled annuity approach also impacts (as intended) Eircom's FTTH pricing. In its 2021 draft Decision ComReg took the view that the underlying cost structure of inputs to FTTC (i.e. PIA) should also follow a tilted annuity approach in order to promote investment, through smoother pricing, in Commercial Areas where "*rival operators*" could "*extend their networks to compete directly with Eircom in downstream wholesale markets*"[39].

By opting to reverse the position taken in its 2016 Pricing Decision in favour of straight-line deprecation proposal now, ComReg is no longer aligning the cost structure of inputs (i.e. Eircom's PIA) to the cost structure of downstream services. This means prospective infrastructure investors will face higher input prices than Eircom did when it rolled out its FTTx networks. This reversal by ComReg appears to be contrary to the objectives of the EECC which seek to promote investment in Very High Capacity Networks (VHCNs) as it is clearly puts potential entrants at a competitive disadvantage to Eircom.

[37] Paragraph 504, ComReg 21/108

[38] ComReg Decision D03/09, 11th August 2009.

[39] Paragraph 459 of 2021 Draft Decision.

In addition, ComReg's current proposal to adopt a straight-line deprecation methodology nationally suggests it has lent more weight to what it previously considered to be the appropriate methodology in the IA (i.e. straight-line depreciation) than to what it considered to be the appropriate methodology in Commercial Areas (i.e., tilted annuity). Under the straight-line deprecation approach ComReg is placing a greater emphasis on the 'buy' signal associated with Eircom's PIA, which as ComReg points out, NBI has to purchase from Eircom in any event. In choosing a straight-line depreciation methodology nationally, ComReg risks placing undue emphasis on ensuring cost-recovery for Eircom even though it is entirely unclear why a tilted annuity approach would present a higher risk in this regard.

Indeed, as acknowledged by ComReg in the 2021 draft Decision, Eircom faced a lower risk on PIA investment in the IA than in Commercial Areas. The European Commission did not take issue with this observation by ComReg, merely noting that this lower risk should be considered in the context of a single WACC rate nationally (contrary to ComReg's proposal at the time for an IA-specific WACC rate).

NBI is of the view that this lower PIA investment risk in the IA materially mitigates the case for adopting a straight-line depreciation approach in the IA itself. A "buy" signal is simply not required because buying is NBI's only option. Therefore where the case for straight-line deprecation is undermined in the IA, the case for adopting it nationally based on the balance of the argument also falls away because the case in favour of a tilted annuity approach in Commercial Areas is already clear for reasons outlined above (and is supported and expanded on by ComReg in its 2021 draft Decision).

Where a straight-line deprecation approach is adopted, it will negatively impact on investment incentives in Commercial Areas for reasons ComReg clearly understands and has explained in the 2021 draft Decision. ComReg makes no objective case for why its observations then were wrong. If, despite this, ComReg nevertheless maintains its current proposal that this methodology should apply going forward, then it places a greater onus on ComReg on this occasion to ensure more appropriate asset lives are adopted in the cost models which account for:

a) The fact that fibre cables put less strain on poles than (often multiple) copper cables and thus should contribute to a greater asset life on poles, in particular in light of the anticipated removal of copper cabling from its poles once legacy services are decommissioned;
b) The widespread recognition, including by Eircom, that fibre networks require less maintenance that copper networks;
c) The significant mismatch between the actual life in service of Eircom's poles and the replacement rates proposed by ComReg. This can lead to significant pricing distortions of PIA infrastructure[40];
d) The recent regulatory review by Ofcom, which, underpinned by a policy to promote VHCN investment, has adopted a 40-year asset life for poles.

These points individually and cumulatively strongly suggest that maintaining the 2009 Decision by ComReg setting the asset life at 30 years, on the basis that there is "no convincing evidence[41]" to amend this figure, is no longer a credible basis on which to retain a clearly redundant cost modelling assumption. Instead, as we consider further in our response to Q.9, there is considerable merit to switching to a 40-year asset life for poles, aligning it with the prevailing asset life assumption for ducts.

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[40] See Figure 4 of Frontier Economics 2021 report.

[41] The justification offered by ComReg in the 2021 draft Decision at paragraph 504.

Q. 9 Do you agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30 years? Please provide reasons for your response.

While NBI is supportive of maintaining the existing regulatory asset life of 40 years in the case of duct, it takes the view that there is a strong rationale for the assumed asset life in relation to poles to be increased from 30 to 40 years.

In the first instance, ComReg itself sets forth in the Consultation Document (Section 7.4.6) a number of arguments in favour of setting the pole asset lifetime at a period longer than the current 30 years. ComReg notes (Para. 7.118) that, in reality, Eircom's relevant pole asset lifetime is significantly above 30 years, pointing to the fact that some poles last up to 50 years. ComReg also notes that the asset lifetime assumed for poles in the Irish electricity market is 45 years and it concedes that the physical lifetimes of electricity poles will be the same as for telecoms poles.

ComReg's arguments to support its proposal not to update the assumed lifetime for poles is unconvincing for the following reasons:

- ComReg argues that the lifetimes set out in Eircom's current pole database would not reflect future lifetimes, given copper cabling will be replaced with fibre. This development, in particular the lower loading on poles as a result of fibre-only deployment, would indicate that future asset lifetimes will be higher than they are currently, not lower. Taking account of the change in lifetime when moving from copper to fibre would be consistent with the EC Costing Methodologies Recommendation, which states that "*When setting the economic life time of the assets in a modelled FTTC network NRAs should take into account the expected technological and network developments of the different network components*" (para 41) [42];
- To the extent that actual pole lifetimes are influenced by Eircom 'sweating' its pole assets, setting a shorter lifetime in this regulatory review will set the wrong incentives for Eircom. All other things being equal, a shorter lifetime increases the Pole Access price so not using actual Eircom data effectively rewards Eircom for maintaining a lower quality network. Put another way, reflecting the actual pole lifetime would disincentive Eircom from sweating the asset;
- ComReg argues that the economic lifetime for telecoms poles will be lower than for electricity poles due to technological change, but it provides no evidence to support this. In particular:
    - The potential impact of future mobile/FWA services shortening the economic life of telecoms poles does not justify using a 15-year shorter lifetime than for electricity poles;
    - ComReg effectively assumes that FTTH/wired technologies could become redundant because of wireless technology, but ComReg provides no evidence to support why it believe wireless technology would become an effective substitute for wired services, let alone a replacement for these services;

[42] See Commission Recommendation 2013/466/EU https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:251:0013:0032:En:PDF

- Such a position is inconsistent with ComReg's market definition for broadband services in its WLA/WCA consultation, where it considers mobile and FWA services not to be an effective substitute for fixed broadband services provided over FTTx and CATV networks (e.g. due to greater actual speeds achieved over fixed services)[43];
- EU State Aid rules suggest mobile and fixed broadband networks will co-exist for a number of years: State aid for long-term investments in 5G is considered appropriate even in areas where FTTH has been deployed[44].

ComReg's proposal to maintain the pole asset life at 30 years is also inconsistent with the implied lifetime in ComReg's modelled Bottom-Up (BU) calculations of future pole replacement in the PAM, which NBI understands is 75 years (i.e. based on a 1.3% annual replacement rate).[45]

In addition, ComReg's proposed approach is inconsistent with relevant precedent. The UK regulator Ofcom recently altered its asset life assumption for poles in the UK, opting to move from a 30-year asset life to a 40-year one.[46] In doing so, Ofcom noted that historically poles had been recorded for accounting purposes as part of the cables along which they were installed and so had a much shorter assumed asset life but Ofcom has now aligned pole asset lives with other PIA assets and so has assigned a 40-year assumption to poles, as was already the case for duct and footway assets.[47]

The justification for increased asset pole lives associated with fibre versus copper cable deployments is not merely a case of comparing the impact on a pole's longevity of a single fibre cable with a single copper cable. Eircom's rural network is characterised by a pole network where there is extensive evidence of poles carrying multiple copper cables. As such replacing copper with fibre cables in the IA will not result in a "one for one" swap out but rather a "one for many" substitution which ought to materially increase the economic lives of poles in the IA from their current levels. Photographic examples showing Eircom poles loaded with multiple copper cables are provided in the Annex to this response.

As also noted in response to Q.8, the implications for choosing an inappropriate asset life for poles under a straight-line deprecation methodology has greater implications the lower the level of the regulated WACC, for the reasons outlined in Frontier's 2021 report. This is a mathematical fact rather than an opinion and so it is incumbent on ComReg to extend its analysis of an appropriate pole asset life beyond merely endorsing the 2009 Decision on the basis that there is "*no convincing evidence*" to alter the 30-year assumption contained therein. In reality there is far more evidence to support a longer duration pole asset life today than there ever was to support the initial 30-year assumption in 2009.

It is worth recalling that the 2009 Asset Lives Decision involved an amendment to the then 15-year assumption for poles to 30 years. However even in 2009 ComReg noted that *"Eircom's fixed asset register…indicates that poles can have a life in excess of 30 years with some even lasting up to 40 or 50*

[43] ComReg 23/03, Para. 4.96-4.137.

[44] See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7595.

[45] This is based on an average planned replacement rate of 0.8% (with a 12-year pole testing cycle and a 10% failure rate – see Consultation Document, Para. 7.148b) and an average unplanned replacement rate of 0.5% (from the draft PAM).

[46] Ofcom, Op.cit, Para. 4.57.

[47] Ibid.

years".[48] ComReg also cited evidence from independent third parties (PDM in Ireland and The North American Wood Council) that indicated *"a minimum of 30 [years] was appropriate and…consider that a useful life of at least 50 years is possible"* [emphasis added]. It is the "useful" or economic life of the asset ComReg should be accounting for in the context of the current exercise.

It is fair to assume that based on the evidence provided by ComReg itself in the 2009 Asset Lives Decision, it took an exceptionally conservative approach in settling on the "minimum" 30-year assumption (something it alluded to at the time when suggesting the then 15-year asset life was "a*t least half of what it should be*")[49]. This approach was understandable at the time given it meant a 15-year increase on the prevailing assumption and, critically, that no-one other than Eircom was using Eircom's poles during this period and so the direct impact of underestimating an appropriate asset life would be spread across a myriad of downstream services.

Some 15 years later, a more thorough examination of the data suggests the majority of poles have in fact continued to be in use beyond 40 to 50 years, precisely as predicted by PDM and the North American Wood Council. The justification for maintaining the ultra-conservative 30-year assumption has therefore been completely undermined and in these circumstances the assumption must be changed to reflect the evidence, in particular where the impact of under-estimation is no longer spread across multiple downstream services but rather hits NBI directly given its heavy reliance on Pole Access from Eircom.

Finally, NBI has its own pole deployment programme as part of the NBP network rollout and, as a result, it plans to install up to 75,000 poles over the full deployment period. NBI's accounting assumption in relation to its pole inventory is that they have a useful asset life of 40 years.

For all of the above reasons, NBI is of the strong view that ComReg should alter the regulatory asset life for Eircom's poles from 30 years to 40 years.

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[48] Para. 3.108 of ComReg 09/65.

[49] Para. 3.113 of ComReg 09/65.

Q. 10 Do you agree with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access, as described in section 7.5? Please provide reasons for your response.

NBI agrees with the overarching cost modelling approach in the PAM and the DAM as set out in Section 7.5[50] of the Consultation Document. In particular:

- NBI agrees with the approach to modelling costs separately for the three defined geographic footprints (Urban Commercial, Rural Commercial, and Intervention Area)[51], as there are a number of factors that drive differences in the unit cost of duct and poles that vary between these footprints (such as the extent of FTTH network roll-out to date and the profile of future FTTH roll-out).
- NBI also welcomes the use of actual data to inform the estimated costs (such as capital costs for Reusable Assets from Eircom's Fixed Asset Register (FAR) and data on Eircom's actual FTTH roll-out to date to inform Non-Reusable Asset cost estimates), and agrees with ComReg that the PAM and DAM should be updated to reflect the latest actual data before publishing its final PIA Decision, in order to ensure the cost estimates are as accurate as possible.

However, NBI wishes to make a number of observations regarding specific inputs and assumptions used in applying this approach, which are set out below. These relate to:

- The exclusion of appropriate costs from the duct asset capital cost base; and
- The specific data used to inform future pole replacement and duct remediation costs, including assumed price trends and the assumed speed of Eircom's FTTH roll-out.

The capital costs for duct assets should exclude all assets that are funded by Eircom, or which do not benefit Access Seekers

To ensure PIA access prices reflect the recovery of efficiently incurred costs by Eircom, the PAM and DAM should exclude all PIA-related costs that Eircom has not funded to date, or will not fund in future. In relation to duct blockages costs, the PAM includes future costs associated with clearing duct blockages, on the basis that duct clearance will now be funded by Eircom (up to a proposed threshold of €11,000 for duct remediation per kilometre of duct[52]), rather than being funded by the Access Seeker.

NBI agrees with the inclusion of the duct blockage clearance costs that will be funded by Eircom. However, to ensure Eircom does not over-recover its costs, NBI considers that ComReg must:

1) Ensure that any historical duct blockage clearance costs that were funded by Access Seekers are excluded from the PAM. As highlighted in NBI's response to Q6 and Q7 above, this may be relevant if Eircom chose to capitalise some of these costs, meaning that these are included in its capital cost base in the FAR.

[50] NBI's views on the elements of the modelling approach set out in other sections of ComReg 23/04 are provided in response to the other questions.

[51] ComReg 23/04, Para. 7.134

[52] ComReg 23/04, Para. 7.170.

2) Assess the magnitude of any future duct blockage clearance costs that will be funded by Access Seekers, and, if material, exclude these from the PAM. This is because the proposed duct rental prices reflect the estimated average duct remediation costs of €7,800 per kilometre[53], and therefore implicitly assume that all future duct remediation costs, including duct clearance, will be funded by Eircom. Whilst the €11,000 duct remediation cost threshold is set 30% above this average level, it is unclear how ComReg has determined this threshold, nor is it clear whether ComReg has undertaken an assessment of how frequently this threshold would be exceeded (and thus how much of the duct remediation work will need to be funded in practice by Access Seekers rather than by Eircom).

In addition, all costs relating to assets or activities that do not benefit Access Seekers should be excluded from the PAM and DAM. On this basis, ComReg has excluded from the DAM Eircom's sub-duct related capex in the Rural Commercial footprint over 2015-2019, which was incurred solely to support Eircom's own downstream FTTH services.[54]

However, it is unclear whether any equivalent sub-duct capex to support Eircom's downstream services in the years prior to 2015 has also been excluded from the DAM.[55] NBI expects that the level of this capex in the pre-2015 period could be significant, as this period included Eircom's wide-scale deployment of FTTC[56], which is likely to have driven the need for the addition or renewal of sub-ducts to house the associated fibre cabling. This capex should be excluded from the DAM, if it this has not already been excluded.

Any update to unit cost price trends for future pole replacement and duct remediation should reflect the specific circumstances of Eircom

ComReg currently assumes a price trend of 0% for unit labour and materials costs relating to future pole replacement and duct remediation, but states that it intends to update these trends as part of its final PIA Decision to reflect current macroeconomic conditions, and in particular to reflect "*emerging strong inflationary pressures*". It states that a price trend based on the Consumer Price Index (CPI) is an appropriate inflationary factor to apply.[57]

However, NBI notes that the price trends assumed in ComReg's final PIA Decision should reflect a specific assessment of the expected pole and duct price increases for Eircom, both for materials and labour. This should include a review of Eircom's agreements with sub-contractors, given external labour costs represent a significant share of the total cost of pole replacement and duct remediation. The trends should also take account of expected efficiency gains from renewing Eircom's PI network, that would offset any impact of inflation, which ComReg itself recognises is a factor that should be reflected in the

[53] ComReg 23/04, Para. 7.170.

[54] Cartesian, Civil Engineering Infrastructure Models, Specification Document, Para. 7.67.

[55] This is not highlighted explicitly within ComReg 23/04 or the associated Cartesian Model Specification document.

[56] This network covers approximately 1.2m premises across the Urban Commercial and Rural Commercial areas.

[57] ComReg 23/04, Para. 7.159.

assessment of price trends.[58] Only if CPI is considered a reasonable proxy based on this assessment, should it then be used.

In addition, based on the information available to NBI, it is unclear whether CPI is the appropriate metric to inform the price trends, and it appears that it may overestimate the appropriate trends for Eircom. This is because:

- NBI understands that Eircom has agreed long term sub-contractor rates for its FTTH roll-out in the Urban Commercial Area up to 2026, which should protect Eircom from inflationary pressures during this period. This is recognised by ComReg itself in its Consultation Document – it considers that these long-term rates would insulate Eircom's PIA costs from the effects of wage inflation, and in particular states that "*the risk of wage inflation for a significant cost component of PIA costs is borne by the contractor rather than Eircom*" (Para. 7.158). This, in combination with expected efficiency gains, was used by ComReg as justification for using price trends of 0% in its 2021 CEI Pricing Draft Decision.[59] It is unclear why the current macroeconomic conditions and inflationary pressures that ComReg refers to would justify a change in ComReg's position from its 2021 draft Decision, given the expectation that Eircom's sub-contractor rates are locked-in up to 2026, and that inflation would not impact the efficiency gains that could be made from PI asset renewal.
- Also, from a review of Eircom's quarterly financial Company Reports and Presentations for 2021 and 2022, NBI notes that Eircom has not explicitly mentioned the impact of inflationary pressures or wage growth as a key driver of its FTTH roll-out capex or other costs. In particular, whilst it experienced growth in capex over 2021 and 2022, Eircom noted that this was driven by the timing of its network investments, with no mention of inflation.[60]

Given the above, NBI would expect the future actual inflation experienced by Eircom to be below the level of CPI, at least during the period up to 2026. At a minimum, ComReg should offset its view of expected inflation (whether this is CPI or otherwise) with an assessment of expected efficiency gains.

The assumed speed of Eircom's FTTH roll-out should reflect Eircom's latest roll-out plans

The estimated annual volume of future pole replacement and duct remediation in the Urban Commercial Area reflects assumptions on the speed of Eircom's FTTH roll-out.

However, from reviewing the PAM and DAM, NBI understands that the estimated volumes reflect an assumption that Eircom will complete its FTTH roll-out within the Urban Commercial footprint two years earlier than NBI's FTTH deployment in the IA, with Eircom's roll-out completed in 2024, and NBI in 2026/27. Whilst we understand the specific roll-out timings in the PAM and DAM have been anonymised, NBI notes that the assumptions for NBI are generally consistent with its actual expected timelines for its deployment, whilst this is not the case for Eircom: Eircom currently states that its urban deployment will

[58] ComReg 23/04, Para. 7.158.

[59] ComReg 23/04, Para. 7.157, 7.158.

[60] For example, Eircom's June 2022 presentation highlighted that *"Growth capex driven by our fibre rollout and mobile network upgrade and expansion programmes, down 13% YoY driven by timing of network investments."* See slide 14, [PowerPoint Presentation (eir.ie)]

be completed by the end of 2026[61], rather than 2024 as reflected in the model. If the assumed speed of roll-out in the PAM/DAM does not match Eircom's latest plans, then this should be updated.

It is unclear whether the application of Eircom's sub-contractor rates for pole replacement is appropriate

To estimate the labour costs associated with future pole replacement, ComReg has used Eircom's subcontractor rates, with lower rates for "targeted" pole replacement programmes, and higher rates for "non-targeted" replacement. ComReg has applied the lower targeted rates for all poles replaced during an FTTH rollout (both planned and unplanned replacements), and the non-targeted rates for the poles replaced as in the "BAU" period post-roll-out.[62]

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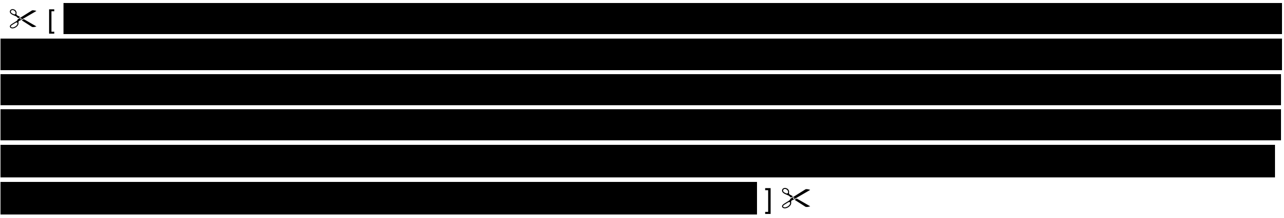
ComReg should therefore re-assess the application of Eircom's rates in the light of this, and make any required adjustments.

[61] See Eircom press release dated 22nd February 2023 at: https://www.eir.ie/pressroom/Ireland-now-one-of-best-countries-in-Europe-for-broadband-as-eir-fibre-passes-1-million-homes/

[62] ComReg 23/04, Para. 7.156.

Q. 11 Do you agree with the proposed financial threshold for duct remediation costs of [€11,000] per kilometre of duct? Please provide reasons for your response.

NBI welcomes ComReg's proposal to put in place measures to deal with financial liability for clearing and remediating duct blockages. The current arrangements, whereby in theory all costs relating to duct remediation costs should be borne by Eircom and recovered as part of its rental charges for Duct Access and Sub-Duct Access, but in practice where Eircom has passed on these costs to other operators, NBI included, for undertaking this work, clearly require clarification from ComReg and its proposed approach provides this.



It is both necessary and appropriate that ComReg puts a clear framework in place whereby financial liability for duct remediation costs is dealt with in a way that is fair to all parties. From the point of view of Access Seekers, it is important that only costs that are efficiently incurred by the SMP operator are included and that there is no 'double-charging' involved, which would occur if an Access Seeker is obliged to pay upfront for duct remediation and then pay rental charges which include an element compensating Eircom for the same remediation costs. From Eircom's perspective, it has a justifiable requirement to recover allowable costs it has incurred in the provision of access to its infrastructure.

In NBI's view, ComReg's proposal to set a financial threshold beyond which duct remediation costs are considered not to be recovered through the rental charge and so must be borne separately by the Access Seeker is a fair and proportionate one. NBI would add that such an approach is only appropriate, however, where ComReg estimates the costs exceeding the threshold and excludes these from the DAM. This is because the €7,800 average duct remediation costs included in the DAM reflect what ComReg regards as the "full cost" of remediation activities (i.e. including any costs above the proposed €11k threshold) and, as Access Seekers will be expected to fund these costs, it is appropriate to estimate them and exclude them from the DAM.

As ComReg notes, the level at which the threshold is set is key to driving the correct incentives – if it is set too low, there is a danger of over-recovery by Eircom but if it is set too high then there is a risk that Eircom will not be able to recover all of its long-run costs, in particular costs incurred on duct sections where the level of remediation greatly exceeds the normal rate.

NBI agrees that setting the threshold at a financial limit in the range of 30% to 50% above the average per-kilometre cost of duct remediation (which ComReg estimates at €7,800) would help to drive the correct incentives in relation to this activity. NBI understands that ComReg's resulting preliminary view that a threshold of €11,000 per kilometre may change due to updates in costing/financial data included in the DAM. NBI has already shared data with ComReg relating to duct remediation incidences and costs encountered to date in the NBP network build and it is keen to provide whatever further information ComReg requires as part of its planned update to the DAM, to help ensure that these cost estimates – and the threshold level – are based on the most accurate data.

NBI also agrees with ComReg's position (Para. 7.172) that duct remediation expenditure borne by an Access Seeker should not be capitalised by Eircom and included in its Fixed Asset Register, as to do so

would mean that Access Seekers are charged twice for the same cost, firstly in the form of upfront payments and secondly through ongoing rental charges.

✂ [[63]] ✂ As noted above, while NBI has been assured by Eircom that the rental charges it pays under the MIP include no elements relating to remediation of duct, it has no way of confirming whether or not Eircom has capitalised some (or all) of these costs and included them in its Fixed Asset Register. NBI would therefore welcome confirmation from ComReg as to whether or not this has occurred.

NBI's payment to date of all duct remediation costs (i.e. not simply those costs over and above ComReg's proposed threshold levels) have obvious implications for what ongoing rental charges it should pay under the price control that comes into place once the PIA market review is finalised. In this regard, NBI notes with interest ComReg's proposed pricing options for Duct Access, Direct Duct Access and Sub-Duct Access (Paras. 7.294 to 7.305). NBI's views on these various pricing options are set out in our response to Q.20 below.

✂ [[64] . [65]] ✂

[63] ✂ [.] ✂

[64] ✂ [.] ✂

[65] ✂ [ ]. ✂

Q. 12 Do you agree with ComReg's view that the 'per operator' approach should continue to be used to allocate / share the relevant Pole Access costs among all of the Pole Access Seekers, including Eircom? Please provide reasons for your response.

In the first instance, NBI would note that ComReg has not even considered a "per customer" pole cost sharing approach in this Consultation. This omission is difficult to reconcile with the fact that ComReg considered in certain instances (e.g., in relation to the IA at least) that a "per customer" cost sharing approach was the optimal approach in its 2021 draft Decision.

The main reason it ultimately rejected the proposal at that time was, ComReg stated, due to *"the absence of the relevant active customer line information from Eircom"* whereby *"Eircom confirmed that it does not have the location (Eircode) information for the majority of its active lines in the NBP IA"*. This was deemed to be problematic at the time because ComReg was proposing differentiated pricing approaches based on Commercial versus IA footprints and so needed accurate information on customer splits by geography if a "per customer" cost sharing approach was to be implemented. However, under the national pole pricing approach being proposed by ComReg, this issue does not arise and so the main impediment to adopting a "per customer" approach has been removed. Reliable data and accurate customer tracking does not pose an obstacle to adopting a "per customer" approach.

In the absence of adopting a "per customer" cost sharing mechanism then NBI regards a "per cable" approach to cost allocation to be the next best and fairest approach. In this regard, NBI is concerned that in many areas in both the IA and Rural Commercial footprint Eircom/FNI has multiple cables (copper and fibre) connected to poles. In such circumstances a "per operator" charging mechanism places a disproportionate burden on NBI. This will be particularly so if Eircom and/or FNI fails to remove copper cables when its copper network is decommissioned in the IA and Rural Commercial Areas (that NBI must transit), respectively. See photographic examples referred to earlier, of multiple copper cables on Eircom's poles, which is provided in the Annex.

Furthermore, while ComReg has proposed to treat the Eircom and FNI network as a single network, that approach may create inappropriate incentives under a "per operator" charging mechanism. For example, it is entirely unclear on whose balance sheet ownership of copper and fibre assets will sit where Eircom/FNI deploy fibre . If the copper assets sits on Eircom's balance sheet, while the fibre assets sits on FNI's, then under a "per operator" charging mechanism Eircom will have no incentive to remove copper cables from its poles, contrary to ComReg's objective as outlined in Para. 7.16. In this regard Eircom/FNI combined will not pay any additional contribution to the cost of pole whether it Eircom removes copper cables or not (in circumstances where there is a fibre-copper overlap on the Eircom/FNI network). This issue is of relevance in both the IA and the Commercial area transited by NBI.

Given that ComReg recognises that an incentive must be put in place to promote removal of unused cables, it is bound to consider how that incentive can be assured in circumstances where Eircom/FNI has both copper and fibre cables on the same poles. The current Consultation does not deal with this issue, nor does it address at all the pertinent issue of whether or not Eircom and FNI should be treated as separate operators under a "per operator" cost sharing approach, for those instances when they will have fibre (FNI) and copper (Eircom) cables on the same poles. Treating them as two operators would obviously incentivise Eircom to remove its copper cabling after Copper Switch-off, at least in the Commercial Areas.

There are also other issues which are important to consider in relation to the proposed cost sharing approach, as follows:

- Having multiple cabling increases the load and therefore weakens the pole, which results in increased costs and also reduces the lifetime of the pole (and thus increases pole replacement costs). Multiple cables also make poles more susceptible to damage during storm events, which increases maintenance costs for Eircom, but also for NBI (e.g. operational costs incurred in placing its cabling back on a damaged pole);
- The appropriate sharing approach should therefore (i) ensure that operators with multiple cables on poles contribute more to the cost of the pole than those with one cable, and (ii) incentivise operators to remove cabling once this is no longer in use (as this will help to minimise pole costs).

It is clear that the current “per operator" approach – which ComReg proposes to retain - does nothing in relation to satisfying the above factors, as an operator pays the same irrespective of the amount of cabling on the pole, which in turn does not incentivise operators to remove redundant cabling.

One manner in which such a concern might be addressed is to implement a “per operator” charge based on cable type (i.e. a “per operator per cable type” approach). For example, if an operator has more than one cable of the same type, e.g. copper, it would continue to be treated as a single operator in terms of contributing to the share of pole costs. However, where an operator is carrying services over both copper and fibre it should be treated as two operators. Under a “per operator” approach, where no such distinction is made, Eircom will benefit from either its copper service or its fibre service not making a fair contribution to the cost of poles. In addition, a “per operator per cable type” approach ought to promote efficient investment by helping to extending the asset lives of poles as it would provide Eircom with a clear incentive to decommission copper services and remove copper cables from its poles, in particular outside the IA. Providing such an incentive would be consistent with ComReg’s wider objective of promoting uptake of VHCNs, as well as incentivising an efficient migration from legacy to modern infrastructure.

Billing commencement

The Access Regulations (paragraph 9 (2)) require that services are “sufficiently unbundled” to ensure undertakings are “not required to pay for facilities which are not necessary for the service requested”. NBI consider commencement of billing on a “ready for use” basis arguably fails to observe this requirement as it bundles in a billing period when services cannot be provided and/or where fibre is not even present on the pole. This is no more reasonable than commencing the billing period on the placement of an order. In both cases the Access Seeker is paying for a block of time in which it is not consuming the service requested. Such a billing regime is also contrary to ComReg’s objective of promoting efficient investment (including outside the IA) where material capital costs (because they are preoperational) will be incurred by operators through what effectively amounts to upfront payments before service deployment.

ComReg should note that the issue of when billing commences is also germane to Duct Access pricing and so an equitable solution for both should be addressed by ComReg in the final PIA Decision arising from this market review.

Q. 13 Do you agree with ComReg's view that the 'per metre of duct access equivalents' approach should be used to allocate / share duct related access costs among all Access Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm? Please provide reasons for your response.

NBI agrees with the 'per metre of duct access equivalents' approach, as this better reflects the actual capacity that an Access Seeker uses within a duct. NBI also agrees with ComReg that the 25mm threshold should be sufficient to meet the needs of the majority of duct-related access requests. ComReg's approach is also consistent with that taken by Ofcom in its Wholesale Fixed Telecoms Market Review (WFTMR) in 2021.[66]

NBI notes that in practice, ComReg's approach results in each Access Seeker contributing a one-third share of the per-metre duct costs. This reflects ComReg's assessment of the average duct occupancy across the Eircom duct network in the long-run, when there is expected to be only FTTH-based access networks.[67]

NBI considers that this approach of defining a single sharing percentage across the duct network is in principle correct and notes that it is again consistent with Ofcom's approach in its WFTMR, where the pricing of OpenReach's duct access services reflected a fixed percentage contribution by each Access Seeker to duct unit costs across the OpenReach duct network. [68]

However, NBI considers that basing this percentage on the estimated occupancy for a forward-looking fibre-only access network is not appropriate. This is because this implicitly implies that Eircom will not contribute to ducting costs in the areas where it will not deploy an FTTH access network (i.e. the IA), even in periods when it continues to offer downstream services using its copper access network in these areas.[69]

Eircom will continue to provide a significant volume of copper-based services in the IA over the next price control period, given NBI's FTTH roll-out is not due for completion until the end of this period, and Eircom is likely to continue to offer copper services for a period after NBI has deployed its network. NBI therefore considers that the duct capacity occupied by sub-ducts containing Eircom copper cabling in the IA should be reflected in ComReg's calculation of duct occupancy, until Eircom switches off its copper services in this area and removes the copper cabling from its duct network.

NBI also considers this cost sharing assumption approach for duct to be correct in light of the characteristics of duct and the historic costing approach to duct pricing, and notes that it is appropriately different from the one that ComReg proposes to use for Pole Access, where rental charges would be based on actual occupancy and would thus vary depending on whether or not more than one operator

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[66] Ofcom, Wholesale Fixed Telecoms Market Review 2021-26, Volume 4: Pricing remedies, Para. 4.89, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0025/216088/wftmr-statement-volume-4-pricing-remedies.pdf

[67] ComReg 23/04, Para. 7.214.

[68] Ofcom (Op.cit.), Para 4.89.

[69] Applying the same fibre-only logic to poles means that, on a forward-looking basis, no elements of Eircom's copper network should remain on its poles once its FTTH rollout and the NBP deployment have both been completed. The consequent reduced loading on the pole network further strengthens the case for altering the pole asset life assumption in the PAM from 30 years to 40 years.

has cable on a pole.[70] ✂ [ ] ✂

NBI agrees with ComReg's assessment that the current 'per metre of cable' approach does not promote the efficient re-use of duct capacity, nor does it encourage Access Seekers to minimise their space requirements. This latter point is, however, counterbalanced in practice by Eircom's position of only installing 14mm sub-duct for operators using Sub-Duct Access, which, in effect, constrains the amount of duct capacity Access Seekers are allowed to use by Eircom.

NBI also agrees with ComReg that a 'per metre cm^2'approach is unlikely to be feasible given it would be complex to implement. Further implementation issues arise as capacity is not assigned on the basis of cable diameter under this approach.

By contrast, ComReg's proposal to move to a 'per metre of duct access equivalents' approach appears sensible. It would provide better incentives in relation to re-use of duct capacity and would be capable of being implemented in practice.

At an operational level, in order to ensure that Access Seekers have full flexibility in using Duct Access on the basis of a 'per metre of duct access equivalents' approach, there should be no arbitrary restriction on the diameter of sub-duct that is installed by Eircom on behalf of Access Seekers when providing Sub-Duct Access to them. Operators who currently use this product, including NBI, are restricted to using a 14mm diameter single bore sub-duct, which will often mean additional fibre splicing is required when an overhead route – where no such restrictions apply – transitions underground.

If Access Seekers are paying for Duct Access on the basis of sub-duct with a diameter of 25mm, then they should be able to request that Eircom installs a sub-duct with a diameter greater than 14mm if that is what they require and Eircom should be obliged to amend its Sub-Duct Access product offering to ensure that this flexibility is made available to Access Seekers. ComReg, in its final decision in this market review, should include such an obligation on Eircom.

[70] But note NBI's position (see response to Q.12 above) that ComReg should, instead of using a per-operator approach to cost sharing in relation to poles, it should consider a 'per operator per cable type' approach.

Q. 14 Do you agree with ComReg's view that Pole Access rental prices should be set as a single national price based on a national average cost of providing Pole Access in all three geographic footprints (Urban Commercial Area, Rural Commercial Area and Intervention Area)? Please provide reasons for your response.

NBI does not agree that, for the price control period that is put in place arising from this market review, ComReg should set a single national price for Pole Access based on a national average.

ComReg itself considers that the differences in cost profiles between different geographic areas may provide justification for access prices to be tailored to reflect these factors, despite the definition of a national PIA market (Para. 7.221). ComReg's own analysis (Figure 15) shows there is currently a material difference in the PAM in the estimated cost of providing Pole Access over the next price control period, with the cost in the NBP IA less than it is in the Rural Commercial Area (which is the most expensive) and the Urban Commercial Area.

Setting a single national price for Pole Access at this point in time would mean that NBI's significant use of Pole Access in the NBP IA is subsidising other operators' use of poles in the two Commercial Areas. Such a cross-subsidy would be both unfair and unwarranted and would not accord with cost-orientation principles, as Eircom would be over-recovering from Pole Access in the NBP IA and under-recovering from Pole Access provided elsewhere.

While it is the case (as Figure 15 also shows) that the estimated cost of providing Pole Access across the three footprints equalises over time, the key issue for ComReg to determine is when this is likely to happen. In this regard, NBI notes that the PAM (as well as the DAM for Duct Access) assumes that Eircom will complete its FTTH rollout by 2024 and that NBI's deployment of the NBP network will be completed by 2026.

However, it was reported over a year ago[71] that Eircom plans to complete its rollout of FTTH to 1.9m homes by end-2026 and NBI will not now complete its deployment until late 2026 or early 2027. The extent to which Eircom will complete FTTH roll-out to a further 900k premises (having recently announced it has passed one million premises[72]) is also far from assured. Unlike NBI, Eircom faces no contractual obligation to complete this deployment (either at all or within a specified timeframe) and its commercial strategy in this regard may be impacted by what its competitors do over the period covered by this market review.

ComReg also states (Para. 7.230) that a single national price provides stability and certainty to Access Seekers compared to a deaveraged approach. A single national price may provide more certainty where an Access Seeker takes Pole Access across multiple footprints, but this is not the case for an operator availing of Pole Access largely in one footprint (such as NBI in the IA). NBI's clear preference in this

[71] See "Eir to accelerate broadband rollout after deal with InfraVia, Irish Times, 28th January 2022, available at: https://www.irishtimes.com/business/technology/eir-to-accelerate-broadband-rollout-after-deal-with-infravia-1.4787778.

[72] See Eircom press release dated 22nd February 2023 (Op. cit.)

regard would be for the Pole Access price to reflect the underlying costs of providing Pole Access in the areas in which it mainly uses this PIA input.

NBI's position is that there is a strong argument, for the planned future five-year price control, for Pole Access charges to be differentiated between the NBP IA, the Urban Commercial Area and the Rural Commercial Area on the basis of the estimated differences in the cost of providing Pole Access in the three areas. A similar rationale exists for geographical deaveraging of Duct Access charges (see response to Q.15 below).

Q. 15 Do you agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the Non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively? Please provide reasons for your response.

NBI considers that some level of deaveraged pricing is certainly required given the pronounced disparity in costs across different geographies as identified by the DAM. However, given that the considerable effort has been put into identifying and disaggregating these cost differences as part of modelling exercise, the basis for the level of reaggregation of costs being proposed by ComReg into an arbitrary definition of "Urban and Non-Urban" exchanges is questionable. The convenience of this approach appears to be the sole motivating factor behind the classifications being proposed.

It is clear from the figures produced by ComReg in Tables 9 and 10 of the Consultation Document that NBI will pay over 80% more in Duct Access charges for infrastructure it uses within the IA if it is billed based on the "converted" rates compared to those calculated by the model (see Table below). It is not apparent to NBI why ComReg has opted for such an approach - one that will, in effect, amount to a subsidy from the IA to the Commercial areas and which also risks increased public subsidy costs for the NBP.

✂ [

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NBI would suggest that the "implementation issues" (Para. 7.250) alluded to by ComReg associated with Duct Access billing in the Commercial Areas and the IA are overstated. This is evidenced by the fact that when ComReg issued the 2021 draft Decision, after an extensive consultation process it concluded that it would not be unreasonable to require Eircom to bill for Duct Access on the basis of the "NBI MIP" (split between Commercial and IA) and Generic Access in Commercial Areas.

The European Commission's rejection of ComReg's CEI pricing proposals at that time did not appear to relate in any way to concerns about the implementation of billing based on these differentiators – if they had it would not have been appropriate to rely on the same DAM that considers exactly the same geographic splits during this Consultation period. Consequently, it is difficult to reconcile ComReg's considered opinion in the draft 2021 Decision that Eircom could bill on the basis of the geographic splits outlined in the DAM with its current suggestion that "implementation issues" militates against taking this approach now.

Surface Types

NBI agrees with ComReg's position in the Consultation (Para. 7.240) that "*cost orientation means the duct related charge is based on the surface type that existed when the duct was originally deployed*". In this regard, NBI considers that ComReg's final PIA Decision must make clear that Duct Access billing is based on the surface types recorded in Eircom's Passive Access Records (PAR). This appears to be the intent of ComReg's statement in the Consultation and so such a clarification would be welcomed in order to avoid unnecessary disputes which may arise if where there is residual ambiguity surrounding this issue.

In this regard, NBI notes ComReg's suggestion (also at Para. 7.240) that cost orientation requires the use of original surface for rental billing purposes "*where it can reasonably be determined that the current surface type does not correspond to the original surface*". ✂ [ ] ✂

One mechanism that could significantly reduce the administrative burden and scope for dispute around this issue is to apply a single charge for Duct Access rental in Rural/Intervention areas based on a weighted average of the surface type mixes presented by ComReg in Table 10 and the final pricing for Carriageway, Footway and Verge.[73]

This approach would ensure cost recovery for Eircom as rental payments it receives will be perfectly aligned to the DAM. However, if ComReg is not minded to support such a proposal, it is imperative, for the reasons set out above, that it makes clear in its final PIA Decision that the burden of proof does not sit with the Access Seeker in identifying the original surface type where it no longer reflects what is recorded in the PAR.

[73] ComReg would, though, need to give some thought to how flat-rate charging based on an average of the different surface types might be implemented in practice. This is because although this approach might make sense for a large-scale deployment where there is widespread use of PIA across the different surface types, small-scale PIA usage (for example, solely confined to urban areas) would result in the Access Seeker in that instance benefiting disproportionally from the lower flat-rate charge in a situation where it would be accessing duct laid under the more expensive footway or carriageway surface types.

Q. 16 Do you agree with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs? Please provide reasons for your response.

NBI agrees that PIA pricing should be fixed per year for a period of five years. In this regard, NBI notes that, in the Consultation, the maximum regulated prices for Pole and Duct Access are set to start from 1st July 2022 and run until 30th June 2027. With ComReg's final decision in this market review not anticipated to be published until early 2024, this should either mean that the new pricing takes effect from then and runs for a five-year period (i.e. until early 2029) or else the new prices should be back-dated to 1st July 2022.

If ComReg rules out the back-dating of new prices, NBI is of the opinion that the updated pricing should prevail for a five-year period from the effective date of the decision. In this respect, granting an additional period of three months to enable Eircom to "update billing systems" would be entirely unnecessary and disproportionate, given that PIA billing is not a 'real-time' activity such as, for example, interconnect minutes. Moreover, PIA pricing has not been updated since 2016 and, based on ComReg's proposals, the pricing that has prevailed for some time is materially above cost oriented levels. As a result, ComReg's suggestion that Eircom should be granted a further three months to charge excessive prices for PIA rental appears to be wholly inappropriate.

✂ [[74]] ✂

ComReg has indicated that "*intervention may be required in particular if there is evidence of a sufficiently material change in modelled costs as a result of changes to the model or changes to inputs such as costs and/or volumes or the WACC itself*".[75] NBI would recommend that ComReg should seek to quantify what it deems to be a "material change" e.g. one that would change prices by 10%, 20% etc. so that Eircom and Access Seekers have greater certainty around what would prompt/merit ComReg intervention. Simply providing guidance on this issue would not fetter ComReg's right to intervene in alternative circumstances and so we would invite guidance from ComReg on this in the interests of greater regulatory certainty and transparency.

[74] ✂ [ ]. ✂

[75] Consultation Document, Para. 7.256.

Q. 17 Do you agree with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.266-7.267? Please provide reasons for your response.

NBI agrees with ComReg's proposal that process-related costs should be recovered from Access Seekers by Eircom as an upfront payment. NBI also agrees with ComReg's proposal that such costs should be calculated and pre-notified in advance by Eircom.

✂ [

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Q. 18 Do you agree with ComReg's view that Eircom should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced, and calculated and pre-notified in advance by Eircom based on the template described at paragraphs 7.266-7.267? Do you agree that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, in its cost accounting systems? Please provide reasons for your response.

NBI agrees with ComReg's proposal that Eircom should recover, by means of a one-off charge, costs associated with replacing a pole with pole furniture placed on it. NBI further agrees that this charge should be calculated and pre-notified to ComReg in advance by Eircom.

As NBI stated in its response to a similar proposal by ComReg in the CEI pricing review consultation in 2020, NBI shares ComReg's view that pole furniture is an asset associated with the cable and not the pole. The nature and form of the furniture is determined by the cable configuration and not the pole. As a result, the cost associated with relocation of the furniture should be attributed to the cable and not to the pole. The approach whereby the costs associated with furniture relocation are paid to Eircom by way of a single upfront charge potentially allows the Access Seeker to capitalise these costs as part of its cable asset deployment.

As a result, NBI agrees with ComReg's position that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, thus ensuring that the cost is not treated as a pole-related cost that could be included in a future Pole Access price. Such an approach also ensures, as ComReg notes, where the furniture belongs to an Access Seeker, the costs involved should not be capitalised at all by Eircom.

In relation to the costs that might be levied on Access Seekers, it should be noted that where Eircom already has deployed staff to relocate its own furniture, the incremental cost to deal with an Access Seeker's furniture should exclude all mobilisation costs and would only involve the direct additional incremental effort. ComReg will therefore need to carefully scrutinise the costs proposed by Eircom for this activity and only allow recovery of relevant incremental costs.

Q. 19 Do you agree that (i) tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price and (ii) tree trimming costs to prepare aerial cable routes in advance of cable deployment should be recovered by means of a one-off charge (calculated and pre-notified in advance based on the template referred to at paragraphs 7.266-7.267)? Please provide reasons for your response.

NBI agrees that tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price. While it would make sense for tree trimming costs related to route preparation in advance of cable deployment to be recovered by means of a one-off charge, in NBI's case this is an activity it undertakes directly itself and it does not involve Eircom in the process. From NBI's point of view, it makes more sense for it to direct the location and timing of such works itself in a way that best aligns with its FTTH network deployment. This also enables NBI to have direct input to and exercise control over the costs involved in this work.

The tree trimming costs that NBI incurs directly to support its cable deployment programme are, however, also relevant in relation to network costs faced by Eircom more generally. Where NBI undertakes tree trimming along a pole route in advance of deploying its FTTH cable, this will have the effect of reducing the need for Eircom to carry out preventative maintenance related tree trimming along this route. In addition, it is likely that trimming associated with route preparation will also reduce in-life cable damage thereby improving Eircom's Mean Time Between Failure (MTBF) and reducing its overall maintenance costs.

While on a single route the sums involved might not be material, given the scale of the NBI, the savings accrued by Eircom in relation to costs avoided are substantial. Up to end-January 2023, NBI has incurred costs of ✂ [███] ✂ in relation to tree-trimming activities. NBI's view is that the tree-trimming costs incurred by NBI and the related costs avoided by Eircom in relation to preventative maintenance along routes where NBI has undertaken tree-trimming works should be taken account of by ComReg within the PAM and should feed into the calculation of the applicable Pole Access price.

Q. 20 Do you agree with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access? Please provide reasons for your response.

NBI agrees with the proposed pricing options that Eircom should make available to PI Access Seekers for Duct Access, Direct Duct Access and Sub-Duct Access. By providing a suite of different pricing options, Access Seekers will be afforded maximum flexibility in how they handle and pay for duct remediation works, bearing in mind which Duct Access product they wish to use, while at the same time Eircom will, under each of the options presented, still be in a position to recover efficiently incurred costs in this area.

✂ [ ] ✂

To NBI's mind, implementation of Option 2(a) should mean that for all duct routes it already has in use, the discounted rental charge should apply. This is because NBI has in every instance reimbursed Eircom in full for duct remediation works it has undertaken on NBI's behalf and so this means that NBI should be entitled to the 30% discount off the duct rental charge.

✂[ ] ✂

Q. 21 Do you agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA? Do you agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.97.9? Please provide reasons for your responses.

NBI agrees that Eircom should be subject to obligations of cost accounting and accounting separation. This is particularly important in the context of the Eircom-FNI relationship, as alluded to by ComReg.

While ComReg acknowledges these measures are "*important to ensure PIA-related costs and revenues for both Eircom (non-FNI) and FNI are being recorded appropriately*" there is no detail on how this will ultimately be implemented. The existing 2010 Accounting Separation Decision does not contemplate a corporate structure such as that which exists between Eircom and FNI today. Consequently there is an information gap that is potentially open to exploitation. It is important that ComReg clearly calls out what revenue and cost flows should be recorded in the context of this relationship. At present it is entirely unclear to NBI, where fibre is being deployed, whether the order has been placed by Eircom or FNI and who, ultimately, is the customer of whom.

Similarly, in cases where remediation work is being carried out on FNI duct assets, it is unclear to NBI how and in what manner will such transactions be recorded. While it apparent that the assets sit on FNI's books, it is unclear how the treatment of remediation costs should apply between the entities. For example, should FNI reimburse Eircom for all duct remediation costs up to the €11k threshold or is Eircom responsible for the maintenance of the assets and so the revenue flow is in the opposite direction? In turn, will costs in excess of €11k be billed by FNI to Eircom or vice versa?

It is critical that guidance with a high degree of granularity is provided by ComReg in its final Decision in this PIA market review in relation to these type of inter-company transfers to avoid the facilitation of discriminatory behaviour. For example, ComReg and Access Seekers should be able to easily compare the level of remediation charges Eircom incurs for work carried out on its own fibre deployments with charges levied or attributed to installations ordered by Access Seekers. The same should apply to "Process costs" which is also potentially an area that is open to exploitation.

✂ [ ] ✂

NBI would welcome greater clarification (in the form of schematics where possible) on how the revenue and cost flows (including the associated activities) will be catered for under Eircom's cost accounting and accounting separation obligations. The lack of detail on this issue in the current Consultation gives some cause for concern. Given Eircom's SMP designation, much greater detail ought to be published on precisely how revenue flows and activities between Eircom and FNI are currently handled and will be in future. It is only through greater transparency in this regard that the risks associated with Eircom's ability and incentive to engage in inappropriate behaviour can be mitigated.

Q. 22 Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

In NBI's view, the proposed Statement of Compliance (SoC) process does not go far enough to establish a strong determinable link between compliance, transparency and the measurement of activities that are indicators of compliance. An empirical approach to measuring compliance will provide an insight into the levels of compliance and possibly the performance of the PIA market. Measures could be volume, cost and/or time based and include the volumes of interactions with Access Seekers, the number of orders received, the length of time to fulfil an order, the cost of servicing PIA market requests and more. Each key compliance factor should be scored and Eircom's performance against Regulatory Governance Obligations then determined.

Risk identification and assessment processes as described in the PIA market review are not sufficient and an opportunity exists to build on the described approach and implement a more robust and transparent risk management framework as follows:

- Periodically (and at least annually) Eircom should be required to run a collective risk identification and assessment exercise with Access Seekers, possibly as an added component to Eircom's existing Product Development Workshop (PDW). Risk and opportunity are opposite sides of the same coin and so, depending on a party's perspective, they may see something as a risk or an opportunity. Within the context of regulatory oversight of compliance and competition, an issue that an Access Seeker sees as a risk may be seen as an opportunity by an access provider. The kind of exercise envisaged by NBI could be done in a manner that balances non-discrimination requirements and transparency. A confidential process for identifying risks could be employed for this purpose and then all Access Seekers could anonymously score the risks. The output from Access Seekers' risk identification and assessment could in turn be compared to the equivalent Eircom internal exercise, with comfort drawn from commonalities and clarification sought for differences;
- ✂ [ ] ✂

The regulatory governance structures and mechanisms employed to oversee Eircom must be robust enough to withstand scrutiny in order to have integrity. Regulatory governance structures that are not considered effective contribute to market malfunctions. The Independent Oversight Board (IOB) has an important role within the Eircom regulatory governance framework and must have adequate authority, powers and resources to effectively oversee Eircom's market activities. Furthermore, market participants must observe the IOB using those powers including active governance (as opposed to passive governance). A scenario where the IOB issues a second annual report that ComReg cannot fully rely upon must not be permitted to happen.

The profile of the Eircom personnel assigned to prepare and produce the SoC for authorisation should be carefully considered. The process for preparing the SoC should include the creation of a team of adequately accountable, skilled and experienced personnel from the Eircom functions required to compile, examine and assure the SoC. This team should have an appointed leader who is responsible for compiling a compliant SoC. The formation of a team of skilled and experienced personnel held responsible for compiling a compliant SoC is critical to supporting regulatory governance controls within Eircom.

The criteria for the selection of authorised SoC signatories should also be carefully considered by ComReg. An important consideration when determining the criteria is whether the designated signatory is (or could be) a member of a professional association that is involved in regulating professional standards and codes of conduct. Examples of professional bodies include the Institute of Chartered Accountants in Ireland and the Institute of Directors. The signatory may also be of a profession or hold an appointment within Eircom with statutory obligations, for example a solicitor or statutory director. For SoC signatories of this kind of profile, the professional consequences associated with authorising an incorrect or misleading SoC maybe severe enough to influence behaviours to an extent that the quality of authorised SoC will be maintained or improved. In this way, consequences influence behaviours and behaviours influence governance.

Q. 23 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.

NBI agrees that the new Access obligations imposed on Eircom pursuant to this market review are both proportionate and justified. In particular it is worth pointing out that the additional obligations being proposed are required if upstream network investment is to be encouraged, as to date (outside of NBI), and as noted by ComReg at Para. 3.106, there has been little or no activity in the PIA merchant market. NBI consider that this is because many of the PIA access products are currently "not fit for purpose" where difficulties associated with getting access to information and restrictions on product development are contributory factors (NBI's own experience with respect to its SDSI access request is evidence of this).

NBI agrees that non-discrimination obligations imposed on Eircom are both proportionate and justified as Eircom's failure to observe an EoI standard in relation to its existing non-discrimination obligations has lead to material competitive distortions. NBI's responses above, in particular to Q.3 and Q.4, refer in this respect.

NBI agrees that price control, cost accounting and separated accounting obligations proposed by ComReg in the Consultation Document are all required. However, as pointed our response to Q. 21, ComReg also needs to provide greater specificity on how cost accounting and separating accounting obligations will be effectively implemented by Eircom, in particular in the context of its relationship with FNI.

Greater clarity is also required around how ComReg proposes to monitor activity subject to a cost orientation obligation but where no specific prices have been called out, for example in the area of Process Costs. The current proposals do not appear to address Eircom's ability and incentive to price such activity excessively or to push up costs through inefficient practices such as 'gold-plating' or unnecessary administration. If Access Seekers have no option but to pay for these costs, Eircom's incentive to take the optimal, economically efficient approach will be significantly diminished. As such, NBI would recommend that ComReg considers whether or not a broad cost orientation obligation in relation to activities where a price is not specified goes far enough in terms of addressing the competition concerns this obligation is meant to deal with.

NBI is further of the strong view that ComReg's proposal to adopt a straight-line deprecation methodology, without at the same time making an adjustment to a more appropriate asset life in relation to pole pricing, will have a similarly adverse impact as those outcomes identified by ComReg in Tables 14, 15 and 16 where no cost orientation obligation being imposed is considered. As it currently stands, ComReg's proposed approach in this area will lead to a level of PIA pricing that will *"put upward pressure on downstream wholesale and/or retail prices...[and] limit the extent of competing networks deployment and hence the scope for…innovation"*. For this reason, NBI urges ComReg to reconsider this issue and, in particular, to give consideration to adjusting the asset life assumption for poles from 30 years to at least 40 years as ComReg's analysis strongly suggested would not be unreasonable as far back as the 2009 Asset Lives Decision (see response to Question 9) and as recently deemed to be appropriate by the UK regulator, Ofcom.

Annex : photographic examples

Examples of poles requiring heavy tree-trimming

Examples of poles loaded with Eircom copper/fibre cabling and equipment

Examples of poles loaded with Eircom copper/fibre cabling and equipment (cont'd)

Executive Summary

SFG welcome the opportunity to respond to ComReg's PIA market review consultation. Our response is laid out by way of this Executive Summary in addition to responses to the specific questions in the consultation.

Failure to comply and failure to enforce at the root of current PIA market problems

ComReg have identified that up to the end of 2021 there were just circa 150 records of duct rental on Eircom's network with the majority of these being historic in nature. This alone paints an unfavourable picture of a **Physical Infrastructure Access** (PIA) market that is not operating as it should. That market failure continues to persist despite years of Eircom being subject to multiple regulatory obligations on foot of its **dominant position** in the provision of the PIA services. That Eircom continues to hold SMP in the provision of PI on a 'national' basis is self-evident and so, at the very least, all of the remedies proposed by ComReg in this consultation are fully justified and proportionate. That must be a concern for ComReg too.

The reason for this outcome is substantially down to Eircom's **failure to comply** with its existing regulatory obligations in this market but equally SFG are concerned that there is no evidence of enforcement proceedings having been taken in relation to these issues. SFG cannot reconcile how for example then it is incumbent on ComReg to take enforcement action against Eircom and seek financial penalties in order to **incentivise compliance**.

If on the other hand Eircom are not clearly calling out their failure to meet its non-discrimination obligations, Eircom has been **aggressively and effectively rolling out a nationwide FTTH network** (excluding most but not all of the NBP) which is heavily reliant on duct access. By contrast Access Seekers may have to wait . If these sorts of discrepancies are being tolerated under existing regulations and obligations then the imposition of the same and/or with some additional remedies is not going to be sufficient to improve conditions for Access Seekers in the next review period without a 'sea change' by Eircom and ComReg in relation to **compliance and enforcement**, respectively.

SFG consider that failure to take account of the lack of compliance in the PIA market was also a key contributory factor to the **premature deregulation** of much of the leased lines market (under the **Modified Greenfield Approach** (MGA)) in 2020. As the current consultation rightly notes the **barriers to replicating** much of Eircom's PIA are simply **too high/uneconomic** and when it comes to the provision of leased lines, Access Seekers like SFG, are heavily reliant on either access to Eircom's PI or Eircom's downstream services in the leased lines market (now defined as **the**

Wholesale Dedicated Capacity (WDC) market in the last **EC Recommendations**). ████ ██ ██ ██████████████████████████ identified by ComReg in the consultation e.g. constructive denial, delaying tactics, lack of transparency etc.

Non-Pricing Remedies

Assuming that the proposed **non-pricing remedies** will be complied with, SFG are broadly supportive of ComReg's proposals in the consultation. We welcome in particular the recognition for the need to move to a stricter version of EoI and that "*under no circumstances shall differences be permitted between systems and processes that Eircom itself uses*". Strict adherence to this principle will be foundational to ensuring effective regulation of the PIA market. SFG also welcome conditions attached to the provision of **Passive Access Record** (PAR) information which is an issue that to date has been a source of frustration due to the current asymmetry of information between Access Seekers and Eircom under the current regime. Finally, SFG are supportive of proposals around SLAs and in particular the principle that **service credits need to account for losses to Access Seekers**. Given Eircom has little or no incentive to agree to 'fit for purpose' SLAs that reflect that principle however, it seems inevitable that future negotiations will hit an impasse or will end up before ComReg under dispute resolution. In the case of the latter, it is imperative that ComReg are committed to dealing with such disputes in an efficient and timely manner. Furthermore, SFG consider that ComReg should consider other mechanisms that incentivises Eircom to agree to fair and reasonable SLA terms without having to resort to dispute resolution procedures e.g., act as a mediator between the parties where an impasse in negotiations are reached. Ultimately this may also generate the benefit of reducing ComReg's administrative burden in the long-run.

Pricing Remedies

With respect to pricing remedies being proposed, SFG has some **serious concerns about some of the current proposals.** In particular, SFG are totally opposed to the current proposal around the treatment of **Process Costs**. The complete lack of clarity around how these costs will be administered, accounted for and can be monitored are variables that are ripe for being exploited by a SMP provider. SFG consider that the risk posed by this pricing proposal alone could **outweigh the value of improvements on remedies elsewhere**. At present Process Costs are included in the Duct Access pricing so maintaining such pricing structure is **neither novel nor unreasonable**. The current structure therefore at least provides Access Seekers with pricing certainty and **incentivises Eircom to carry out these activities in an efficient manner.** Access Seeker will face real challenges in providing price quotations for customers where a potentially key cost component cannot be factored in without first engaging with Eircom. An Access Seeker ought to be able to provide an accurate quotation/cost without first having to engage Eircom. This is a practical difficulty that does not exist today. Amendments to remedies should **seek to remove** such barriers **not erect** them. These are important factors to consider where an entirely new charging mechanism is being proposed.

The current proposals around Process Costs poses as a **real risk** in terms of creating a **barrier to competition** (that does not currently exist) ████████████████████████████ ██ While such a pricing approach may be appropriate for large infrastructure projects such as NBP, for Access

Seekers like SFG seeking to install fibre cables [redacted] it could prove to be very damaging. SFG would strongly recommend that at least **a per km pricing option** that includes Process Costs as part of the duct rental charges is included in the final proposals. We would note that ComReg's current proposal incorporates an option for Access Seekers to pay for remediation costs upfront with associated discount on annual rental charges **or** allow Eircom to incur the costs with no adjustment to the rental charge. Based on the same principles it is clearly possible to include an option where Process Costs are recovered through non-variable per km rental charges with no upfront element to provide pricing certainty to Access Seekers on the relevant PIA infrastructure required.

SFG are also concerned about ComReg's proposed **duct remediation cost threshold** (c€11.000 per km). Under a BU-LRAIC+ - TD HCA costing approach, SFG can see no basis for any threshold being imposed regardless of cost. This is because the model is designed to ensure full recovery of costs across the entire network i.e. it does not strip out historical instances where this threshold is breached (based on SFG's understanding). Without prejudice to SFG's view in this regard, if a threshold is to be imposed then it is clearly not appropriate that a 'flat rate' is imposed regardless of footprint and surface type. It is unreasonable that the threshold for a carriageway duct remediation in the Urban footprint could face the same threshold as for verge duct remediation in the Non-Urban footprint. Road closing licences, traffic management, reinstatement and night-time working costs are all differentiating factors in this regard. The necessary data is already available to ComReg to apply appropriate gradients to the 'flat rate' threshold to generate individual thresholds based on geographic footprints and surface types.

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For ease of reference SFG has adopted the glossary used by ComReg in the Consultation

Q.1 Do you agree with ComReg's definition of the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SFG agrees with the relevant PIA product markets defined by ComReg but have some reservations about the **geographic definition** of the market as being "National" in scope. To this end we would note that while ComReg has determined there is ostensibly just one network controlled by Eircom covering the NBP (through Eircom Ltd) and Commercial Areas (through FNI), it also acknowledges at p. 3.26 that "*Infraviva and Eircom together can be considered to have joint control of FNI, whereby they* ***each have the possibility to of exercising decisive influence*** *over FNI, that is, they each have the power to block certain actions which determine the strategic commercial behaviour of FNI*" [emphasis added].

It is difficult to reconcile this unequivocal assessment with ComReg's subsequent analysis that leads to the conclusion that that "*it is appropriate to treat the PI owned by FNI and Eircom as one PI Network*"(p. 3.35). The relevance of ComReg's "full function" merger analysis in the context of its assessment at p. 3.26 is unclear. Either Infraviva can exercise decisive influence over Eircom Ltd under the terms of the FNI JV, including influencing its commercial strategy, or it cannot.

SFG are particularly concerned about how appropriate **Equivalence of Inputs** (EOI) standards will be ComReg to explain in greater detail how order flows will It is unclear as to whether Eircom will be treated as an Access Seeker (from a pre-ordering, ordering etc perspective), vis-à-vis its relationship with FNI or vice versa. Furthermore, SFG would request greater clarity as to the boundaries of the FNI v Eircom Ltd networks given the former current covers part of the NBP (i.e. areas where Eircom has rolled out fibre into the NBP).

Independent of the FNI issue, there appears to be some differences in the competitive conditions between the IA and Commercial Areas. Eircom has already notified ComReg and industry of its **desire to switch-off its copper services** via its March 2021 "*Leaving a Legacy*" White Paper. In addition, in the WLA market review ComReg has concluded on a preliminary basis that the CG WLA Market should be fully deregulated. As such, if the final decision in that review maintains this position, Eircom can effect "copper switch off" at the conclusion of the relevant sunset set periods **without any recourse to Art. 81 of the EECC**. Thereafter in the IA, the only party that will require use of Eircom's PI is NBI as Eircom self-supply will no longer be required. Eircom therefore has a commercial interest in retaining NBI as a customer for its PI in a way it simply does not occur in Commercial Areas.

As noted by then Eircom CEO at an Oireachtas hearing on 25 June 2019:

"We make money out of copper customers on that network today. We will lose that revenue when those copper customers migrate onto NBI's fibre network. If that happens, we will be making no money in that intervention area to maintain those poles and ducts. We will make that money through

renting the poles and ducts to NBI and, over 25 years, we will get paid €1 billion and will spend €900 million, so we will make a small return[1].”

It is not necessary to lend credence to the exact figures quoted here, albeit it is instructive that Eircom regard a rate of return of 11% (almost double the current regulated rate) to constitute a “*small return*”. What is important to take from this statement, is that Eircom **must rely on revenue from NBI** if it is to continue to extract value from its PI in the IA. That reflects a **different competitive** dynamic than pertains in Commercial Areas where its incentive to facilitate access to PIA is materially dampened. ████████ but in the long run it will be reliant on NBI to make a return on these assets. ████████ (except for itself).

ComReg should give greater consideration to differences in PIA offerings as part of the current review based on location. In this regard ComReg will be aware that Eircom provides access to “*rapid response*” field resources[2] in relation to remediation/”*make ready*” work in the NBP ████████ this level of service differentiation also speaks to a differentiation in competitive conditions geographically.

SFG are concerned that ComReg may have proposed a “national” market definition purely on the basis of convenience having been deterred by the EC’s rejection of much of its draft 2021 CEI Pricing Decision. However, it should be noted that that EC’s reservations about ComReg’s proposals on that occasion was to do with the materiality of the proposed changes to the then existing pricing regime without conducting a full market review, which is what the current exercise is seeking to do. If nothing much turned on adopting a “national” market definition versus an IA and Commercial Area market definition **then this would not be of concern to SFG**.

However, SFG are concerned that the ‘national’ market definition is driving ComReg’s ‘one-size-fits-all’ proposals around duct remediation thresholds and Process Costs in a manner that is not appropriate given the different competitive conditions that pertain in the Commercial Areas as well as differences in the underlying costs of PI in this footprint. In the IA, imposing an upfront charging mechanism for Process Costs may be appropriate given the scale of the project and the amount of dedicated resources required to facilitate such an access request. However, applying the same approach to a single order (e.g. to install a leased line) is not justified on grounds of consistency as it does not involve applying equivalent conditions in equivalent circumstances. It is applying equivalent conditions in materially different circumstances. At the very least Access Seekers should be afforded the choice of whether they want to pay for Process Cost as part of the ongoing rental charge (which may require some adjustment to the currently proposed charge) or on an upfront basis.

[1] Oireachtas Hearing 25 June 2019

[2] E.g. See Joint Committee on Transport and Communications hearing – 27 January , 2022.

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For the reasons outlined above SFG would urge ComReg to at least **give greater weight to differences in geographic conditions** at the imposition of remedies phase of the current process. SFG consider that failure to do so could mean the current lack of activity in the merchant market (outside of NBP) will not materially improve from the levels recorded by ComReg at p.3.107.

For the avoidance of doubt SFG agrees with ComReg's product definition to be focused on "*telecom's specific*" PI for the reasons outlined in ComReg's analysis.

Q. 2 - Do you agree with the SMP assessment above and that Eircom is likely to have SMP in the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

SFG agree that Eircom has SMP in the relevant PIA market, whether that is defined as being "national" in scope or across both the IA and Commercial Areas in the event that ComReg are persuaded to define the relevant market along those geographic boundaries. Eircom's SMP designation would appear to be the least contentious issue up for consideration in the current consultation given the ubiquitous nature of its network as the traditional incumbent and for all reasons outlined by ComReg in the consultation.

Q. 3 - Do you agree that the competition problems and the associated impacts on competition end-users identified are those that could potentially arise in the related markets downstream of PIA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

The competition problems identified by ComReg in this section of the consultation in many respects reflect **what is occurring today** despite Eircom currently being subject to regulatory obligations. Of the non-price based leveraging behaviour identified in p. 5.16 there are plenty of examples in market today ████. SFG can provide ComReg with evidence of multiple duct access orders that still do not carry an order validation status several months after an order has been submitted.

Duct Ordering – (████)

Duct ordering is currently handled via an email process. Status updates are sporadic, manual and cannot be relied on in terms of accuracy ████. This results in unnecessary/avoidable delays for customers and is compounded by the fact that Eircom begin billing from the delivery date notification date.

Furthermore, ████

. A contributory factor to this issue is that Eircom **do not provide any handover documentation** and relevant imagery associated with duct orders which is an operational hinderance to SFG and constitutes a lack of transparency on Eircom's part.

SFG

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Another feature of the duct ordering process is that Eircom are content to allow Access Seekers to carry out much of the process and surveying work themselves. In many instances SFG

. Similar issues have arisen in relation to orders in (**see Annex 1**). In these instances Eircom could and should be progressing such issues of its own accord rather than relying on SFGs frustration and urgency to take up the matter on their behalf.

SFG also consider that if ComReg were to do an audit of the delivery of duct orders to Access Seekers

If this is the case it puts SFG at a significant competitive disadvantage to Eircom in the WHQA market. This is true **whether it is a Zone A or Zone B leased line** because notwithstanding SFG consider many of the Zone A lines were prematurely deregulated in 2020, even if ComReg do not consider this to be the case,

The current duct SLA is also problematic, not just from the perspective that the current level of service credits are wholly insufficient to create the right incentives to meet it but because virtually all duct orders fall into "non-standard" status which stops the SLA clock. Once orders go "non-standard" there is no incentive for Eircom to progress the order and much of the processing type activity described by SFG above is left to Access Seekers. ComReg must be mindful of this reality in the context of its troubling proposal around the treatment Process Costs (discussed in response to Question 17). It should be further noted that **duct orders in excess of 500m is currently automatically designated as "*non-standard*"**. There is simply no basis for this

. ComReg should clarify in its final decision that this is not permissible.

It is unclear to SFG how a range of the above issues can be allowed to pertain where Eircom are already subject to a non-discrimination obligation in the provision of the duct access service. Given that Eircom must satisfy ComReg through an annual **Statement of Compliance** that this very behaviour is not happening means

Either way the Access Seekers remain at a **significant disadvantage** and this situation must not be permitted to continue under the new obligations. Credible and effective oversight of Eircom's compliance with its obligations by ComReg will be critical during the new market review period which means a **significant overhaul of the current oversight and enforcement regime** or the same problems will persist.

SFG agrees that the imposition of capacity constraints will hinder an Access Seekers ability to provide "*a timely and quality service*". On this issue SFG would welcome some guidance in the final decision from ComReg on what constitutes a "**redundant cable**". For example, SFG may be denied duct access due to capacity constraints where the constraint is owing to capacity taken up by "inactive cables". In such a scenario Eircom may argue that although cables are currently inactive, they may be required at some future point. Given this argument could be made about any cable, however long it has been out of use, greater specificity must be put around the definition of "redundant cable" or a potential loophole for denial of access could exist on particular routes in perpetuity e.g. where the "inactive cable" in question is copper this **should be deemed to be redundant in all instances** and should be removed. SFG consider this would be consistent with the objectives of the Act and the EECC's objective to promote VHCNs.

On this topic we would note

Q. 4 - Do you agree with ComReg's proposed non-pricing remedies in the PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SFG are broadly in agreement with a range of non-pricing remedies proposed by ComReg. However, we would note that the majority of these obligations already sit with Eircom and yet as recognised by ComReg itself there remains virtually no merchant market activity for PIA in Ireland i.e. the market is not benefitting from existing regulations. In its **Regulatory Impact Assessment** ComReg observe that under the proposed changes "*Eircom faces a relatively moderate level of incremental burden from the proposed enhancements to the existing access obligations*" (p. 9.24). This combination of current regulations that are evidently not delivering and only moderate changes being proposed to those remedies, does not inspire confidence that much is going to change in the PIA over the next review period. However, as already outlined by SFG the current problems have not necessarily been one of the wrong remedies being in place but rather the **failure to comply with and enforce those remedies**. SFG also consider that certain remedies would benefit from greater clarification/details and/or less "moderate" amendments.

Firstly, SFG welcomes ComReg's recognition of the PI as a **key input to the WHQA market** at p.6.22. It is critical that greater focus is placed on this market than historically has been the case given that WHQA i.e. **Wholesale Dedicated Capacity** (WDC) under the next leased lines review, remains one of only 2 markets the EC still considers to be susceptible to *ex-ante* regulation at EU level. It is therefore critical to the analysis in the forthcoming WDC review that the remedies being proposed for PIA under this consultation aren't just imposed **but are in fact seen to be working effectively** or it will lead to the wrong conclusions being reached as part of the WDC review.

In this regard we also welcome ComReg's recognition at p. 6.24 (a) (and throughout the consultation) that for Access Seekers "*using or installing competing facilities to provide PIA is not likely to be economically feasible within the period of this review*". SFG agree entirely with this observation and yet it was central to ComReg's WHQA market review that Eircom's competitors had such capability simply because of their presence in a **Work Place Zone** (WPZ). Given the inextricable link between the PIA and WDC market reviews we trust that ComReg will be consistent in maintaining this position in relation to the latter later this year. Simply because competitors core network traverses a particular WPZ does not mean it is "*economically feasible*" to replicate Eircom's PI in that WPZ and so connectivity to end-users will be reliant on either Eircom's PIA service or where that service is not fit for purpose [redacted] This is the case whether or not a premises is in Zone A or Zone B. Where PIA is not 'fit for purpose' in Zone A it entirely changes the competitive complexion of that market. The problem is exacerbated by Access Seekers inability to access Eircom duct at break out points other than at existing chambers.

Access – Redundant Cable/Capacity Constraints

As already noted in response to Question 3, SFG welcome ComReg's proposal at p. 6.39 with respect to the removal of redundant cable but consider greater clarity is required around what constitutes a redundant cable. Without such clarity it is easy to see how Eircom can claim a cable is not redundant **simply because it is inactive**, even for a long period of time. Tangential to this issue is the proposal to continue to require Eircom to provide **dark fibre** where Access to PI is not available (p. 6.75). While SFG welcome this proposal generally we consider the current lack of specificity around this obligation could be problematic. For example, in many cases offering access to a single fibre thread **is not a workable alternative to PIA** where Access Seekers require multiple fibre threads in order to meet end-user requirements. As such we propose that this obligation is specified with the condition that where PI is not available that Eircom provide "***dark fibre equivalent to the Access Seekers original requirement***". Without such a provision Eircom will have an incentive to claim Access to PI is not available if it knows that provision of insufficient dark fibre in lieu of this will still not meet an Access Seekers requirements. SFG consider a **minimum of 4 fibre threads** should be offered in all cases.

With respect to remediation work SFG consider where orders go "*non-standard*" as a consequence of "blockages" on the route, that evidence of such blockages are provided by Eircom (including via its subcontractors). SFG would expect that Eircom do not simply accept claims for remediation by its sub-contractors **at face value** and that it requires evidence that blockages and associated incidences are provided by subcontractors for invoicing purposes. Under an EOI standard, Access

Seekers should have access to this same level information. This will be vitally important where claims that **remediation costs exceed Eircom's liability threshold**. If Access Seekers are not liable for any remediation costs (i.e. the threshold has not been exceeded) this is less of a concern (albeit it is still important from a transparency perspective) but where the threshold is exceeded Access Seeker should be provided with full details of the proposed remediation work to be carried out, including verification of the type and number of blockages to be cleared. Where such information is not provided by Eircom in advance of the remediation work then no threshold breach should be assumed **regardless of purported work carried out thereafter**.

Access - Threshold

SFG consider that the duct remediation threshold proposed by ComReg is not appropriate and without prejudice to that view, that a figure **€11,000/km is** too low. If ComReg wish to promote effective competition in the WHQA/WDC market, then the current proposal is not helpful. An €11k threshold may be sufficient where there is large scale rollout of network but it is simply too low where short route access is required for customer specific connectivity. This is particularly concerning where in tandem ComReg are proposing to disaggregate Process Costs from rental charges. Notwithstanding the proposed reduction in rental charges the combination of these factors i.e. too low a threshold and imposing upfront Process Costs on Access Seekers could well have the impact of **further deterring PIA take-up from its already low base.**

Firstly, no geographic distinction is made on thresholds which means it does not mirror duct rental pricing from a cost perspective. **The reason duct access in Urban areas costs more is because remediation costs in urban areas are higher**. Access Seekers are paying higher rental charges to reflect this cost difference yet they do not benefit from higher remediation thresholds to maintain that consistency. There appears to be no discussion on this issue in the consultation and ComReg must give it consideration before a final decision.

Secondly, based on the same logic that geographic cost differences should factor into the remediation thresholds, they should also be linked to the surface types encountered on the relevant route. ComReg currently calculate a national average duct remediation charge of €7,800 in the DAM and this is used to inform a **national threshold of €11,000**. While ComReg claims it does not have data "*on the distribution of duct remediation by route*", nevertheless, through the rental charges it has proposed for Urban and Non-Urban Areas and by three different surface types, **it effectively has the ideal gradients** against which a national €11,000 charge can be deaveraged to more appropriately reflect the costs of remediation in each geography and for each surface type. It is not contentious to say the cost of remediation for a blockage on a Non-Urban verge route is going to be considerably less than for an Urban carriageway route, yet **ComReg treat both these scenarios exactly the same** in proposing a nationwide-all surface type €11k threshold. SFG would strongly urge a reconsideration of this proposal in the final decision or it could have **material negative connotations for the leased lines** market in Ireland which is concentrated around the Urban footprint.

As an alternative to this proposal in instances where Eircom inform Access Seekers that remediation work is likely to exceed the proposed threshold of €11k **it should be required to offer a dark fibre equivalent to meet the original needs of the Access Seeker**. Such an approach will provide Eircom with incentive not to overstate its remediation costs and is consistent with ComReg's current proposals in relation to instances where duct access cannot be provided due to congestion.

Above threshold costs for remediation should by definition only occur on rare occasions. Regardless of the fact that ComReg proposes **not to capitalise this portion of remediation costs**, the fact remains that in such circumstances a 40-year asset will have been partially funded by Access Seeker who itself is not guaranteed a return on that expenditure (e.g. over a 2-3 year business contract). Eircom on the other hand is ensured a return on this "NGA ready" duct for the remaining 40 years of the assets life. As such if above threshold cost remediation were a common occurrence (particularly outside the IA) it would have a distortionary effect on the market because it amounts to an Access Seeker being required to invest in Eircom's network. Eircom will benefit from this investment for the remaining economic life of the upgraded asset but an Access Seeker's benefit is likely to be much shorter lived. By way of a practical example, consider a duct made "NGA ready" using partial funding from Access Seekers to provide leased line connectivity to an end user of the Access Seeker. The following year that end-user could switch to Eircom (or another Access Seeker) who will then reap the benefits of the initial above threshold expenditure incurred by the Access Seeker. Eircom will make no contribution to the costs of the same nor will they have to factor it into the particular project business plan (as the Access Seeker must which puts it at a competitive disadvantage). This example **does not however work in reverse** because ComReg allow Eircom to recover above threshold expenditure from other downstream services including regulated services in the WLA market where Eircom also have SMP (see p. 7.333).

Access - SLAs

SFG agree with ComReg's proposal that Eircom should be obliged to provide SLAs, including an **appropriate level of penalties** that incentivises Eircom to meet those commitments. The current Duct Access SLA is not '*fit for purpose'*. A major problem for Access Seekers in this regard is that the vast majority of orders are designated as "non-standard" and no backstop with respect to the SLA applies. Furthermore, **there is no transparency** on what efforts are being made by Eircom with respect to specific orders designated as being "non-standard" and there is no comfort that such orders are being delivered in the shortest timeframe possible. This raises concerns about how Eircom can demonstrate compliance with its non-discrimination obligation where this is such a lack of transparency from a reporting perspective. Access Seekers have no idea whether Eircom or indeed other operators' orders are getting more attention in terms of being progressed

SFG agree with ComReg that "meaningful" compensation needs to be given to Access Seekers where SLAs are not met. **Current caps on service credits fall abysmally short in this regard**. While SFG agree that Eircom should be obliged to engage in SLA negotiations in "good faith", given the proposed **Best and Final Offer** (BAFO) is still entirely within the gift of Eircom it is unclear what incentive it has to actually offer fair and reasonable terms **during the negotiation phase**. The fear in this regard is that dispute resolution would be the only recourse for Access Seekers to achieve a better outcome.

SFG proposes therefore that the BAFO clearly calls out the element of **service credits attributed to the costs incurred by the Access Seeker** ("*direct costs any loss of value*" p. 6.147) and how this was calculated and how **the totality of the proposed credit exceeds the costs of the Eircom meeting the SLA in the first instance** (e.g. through being adequately resourced). The latter principle is supported by ComReg at p.6.148. and therefore, should form part of how a BAFO is presented and assessed.

SFG recognise that the "loss of value" element to Access Seekers may vary materially from order to order. For example a delay of 2 or 3 months on an order may in certain circumstances see a loss of revenue/margin against a particular end-user contract while in other circumstances **it may result in the loss of a contract altogether**. In the case of the former a service credit that includes an element associated with each month of the delay may compensate the Access Seeker for loss of value, but in the case of the latter **this will materially underestimate such a loss**. SFG would therefore propose that SLA credits should include an undefined element **to be calculated post delivery where failure to deliver has resulted in loss of business** to the Access Seeker including recovery of any associated upfront costs paid by the Access Seeker (e.g. Process Costs – which SFG strongly oppose in any event). Such a requirement would also ensure priority orders are dealt with on a priority basis from each individual Access Seeker's perspective.

Access - Subduct Self Install (SDSI)

SFG support ComReg's proposals around a SDSI product but have some concerns about particular aspects of the proposal. For example, there is no clarity on how the "remediation threshold" costs are to be measured **when work is carried out by the Access Seeker** by comparison to where Eircom carries out the work itself. This lack of clarity could lead to unnecessary disputes between Eircom and Access Seekers and by extension ultimately pose an administrative burden to ComReg (as a result of complaints and/or disputes). We would therefore welcome further clarification on this point because if the current threshold is maintained at the, in SFG's view, **too low level** of €11,000 there is a high probability of difficulties arising for each PIA duct order linked to the leased lines market.

Furthermore, SFG have concerns about the proportionality of "liability and indemnity" associated with SDSI which we discuss further below.

RFP on PI for new infrastructure build

SFG support ComReg's proposal that requires Eircom to release details of new PI build a month before a "ready for order" date as this is how it should work under a proper functioning EOI standard.

Access - Chambers

Access Seekers are currently only permitted to break-out from Eircom duct at existing chambers. This restriction often adds significant/prohibitive costs to projects as connectivity cannot be provided in the most efficient manner - the shortest distance between Eircom's duct and the end-user. Dropping additional chambers on Eircom's network should enhance the value of its PI assets but at the same time will promote greater competition in downstream services which Eircom does not have an incentive to facilitate. Therefore ComReg should explicitly call out access to this service in its final decision. If such access is not permitted or is seen not to be working effectively, negative inferences should be drawn as to the true nature of competition in the leased lines market at the time of the WDC review.

Access – PAR

As noted by SFG in response to Question 3 [redacted] [redacted]. Therefore SFG welcome ComReg's proposals that requires Eircom to share significantly more information in relation

to the status of its PI. In particular, we welcome proposals around the requirement to provide "***Containment information***". This information will allow SFG to identify alternatives to sub-duct orders in a manner it cannot today e.g. availability of micro-duct on a route. We would propose that the information also clearly calls out where known blockages have been identified on a route. For example, where an Access Seeker has previously placed an order that was subsequently cancelled after Eircom had identified a blockage on the route this information should be available to the next Access Seeker prior to Eircom carrying out a new survey. In simple terms any surveying information that is gathered, even on cancelled orders should be updated on the PAR to avoid duplication of work (and thus the incurrence of unnecessary Process Costs).

Access – there should be no restriction on duct access with respect to network extensions

In the past SFG has had [redacted] Notwithstanding that this particular order was connected to providing service to an end-user, it is clear that denial of access on this basis should not be permitted. ComReg appeared to confirm this view in the position it outlined in Document 22/26 which related to a dispute between Eircom and BT on this topic. Of course, it is clear that NBI and Eircom are using Eircom PIA to extend existing networks and so purely on the basis of the non-discrimination Eircom's position is untenable and contrary to its regulatory obligations. Nevertheless, we would welcome ComReg's clarification on this issue for the avoidance of all doubt going forward.

Access – Poles

While it is apparent that access to pole infrastructure ought to be included for the purposes of deploying small cells this is not clearly called out in the consultation and we would ask that ComReg clarify its position on this.

Non-discrimination

SFG supports ComReg's proposed non-discrimination obligations while noting the existing EOI standard under the current D10/18 decision [redacted] Again, it must be reiterated remedies **can only be effective** to the extent that they are complied with and/or enforced. In particular, SFG supports ComReg's position that going forward "*under no circumstances shall differences be permitted between systems and processes*". This condition ought to substantially address the current failure to comply with EOI standard, albeit it is unclear how such an approach will be applied [redacted]

This is especially important where a **division between PIA and WHQA functions** are concerned because there is a far higher probability of an Access Seeker ordering PIA (ducts) to compete against Eircom in the WHQA market than there is an Access Seeker looking to rollout a large fibre

network to compete with Eircom's fibre network. As a consequence, there is a far greater incentive for Eircom to not deliver full EOI **where the ordering of PIA and leased lines** are concerned.

Transparency – PIARO

SFG agree with ComReg's proposal that a PIARO should be developed by Eircom and that the associated Terms and Conditions are reviewed by ComReg and deemed to be appropriate. As such we place particular emphasis on the limitations around "*liability and indemnity*" (p. 6.199) which have been a major barrier (disproportionate) to SFG availing of the existing Sub-duct Self Install (SDSI) product. In practice the liability clauses in this regard should be **no more onerous on Access Seekers** than on the **Eircom's sub-contractors** and ComReg are the only independent party that are in a position to assess the T&Cs that currently apply between Eircom and its subcontractors. If Eircom is not placing onerous liability clauses on its subcontractors, the same subcontractors are unlikely to accept such terms being passed on from Access Seeker that is subject to such provisions in the PIARO. That could put Access Seekers at a material disadvantage in negotiating in-the-field resources.

Q. 5 Do you agree with ComReg's view that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA? Please provide reasons for your response

SFG agree that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA and given the (potential) competition problems such a remedy seeks to address (e.g. excessive pricing, margin squeeze), it is imperative that a high degree of specificity is applied to what this entails, otherwise **the remedy can end up being deprived of its capacity to protect Access Seekers** in the manner intended. For example, ComReg's current proposals on treatment of Process Costs lacks the required detail to avoid a myriad of potential problems. (*Discussed in greater detail in response to **Question 15***]. SFG would further suggest that where cost-orientation is prescribed, given that Eircom are **assured cost recovery** under this condition, where possible, alternative charging options should be made available to Access Seekers to allow for the **greatest efficiency and flexibility** in deploying their business plans and/or meeting customers needs. For example, ComReg has proposed offering options with respect to remediation costs but no such option has been proposed with respect to Process Costs. SFG are concerned that undue attention is being given by ComReg to large infrastructure projects such as the NBP in relation to the combination of proposals around remediation costs and upfront process costs. What makes sense for such large infrastructure projects **does not necessarily apply** to smaller/single duct access orders and ComReg should have more regard for such a distinction in its final decision.

There is also a clear distinction between the IA and Commercial insofar as given that NBI are likely to be the only consumer of Eircom duct in the IA going forward, **from a cost causation** perspective, there is merit in it covering processing costs as an upfront charge. However, in more competitive areas the Process Costs that delivers an NGA-ready duct may benefit multiple Access Seekers (including Eircom's downstream arms) and so these costs should be shared across all users in the Commercial Area.

Q.6 - Do you agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for Eircom's PIA? Please provide reasons for your response.

SFG consider that this approach is consistent with the EC Recommendations. We further welcome ComReg's recognition at p. 7.51 that "*PIA is generally not replicable given the high fixed cost involved*" and the importance of bearing this in mind as part of the forthcoming WHQA/WDC market review. The 2020 review appears to **entirely ignore this reality on the ground**.

Q. 7 - Do you agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready? Please provide reasons for your response.

SFG agree with this proposal but would question why under this approach there is **any need/basis for imposing a duct remediation surcharge threshold** (proposed at above €11,000 km nationally). If non-reusable PIA assets are priced based on replacement costs of non-reusable duct **then by definition** Eircom are being permitted to recover the full cost of replacing duct and the basis for a surcharge above €11,000 is unclear. ComReg note that the average cost of remediation nationwide is €7,800 per km in the current DAM. There is no reason to believe that something similar to a normal distribution curve of instances above and below this mean is typical across the entire network. If so instances of non-useable remediation costing more than €3,200 **below the average** of €7,800 are just as likely to occur as instances where it costs more than €3,200 **above the average**, yet in the case of the latter Eircom is reimbursed by the Access Seeker while in the case of the former Eircom enjoys the benefit of charging full duct rental prices on a route that costs far less than the average "make ready" cost. Under this approach **over recovery of costs** is, at least theoretically, being permitted **contrary to the cost orientation obligation.**

At p. 7.169 ComReg suggest that in setting the threshold it should be "*sufficiently low to provide Access Seekers with an appropriate signal as to whether to rent access to duct from Eircom and incur the access charges or to explore alternatives to duct rental from Eircom, such as renting dark fibre or building its own duct infrastructure along that section of route*". However, ComReg has already expressed the view **that replication of Eircom's PI is unlikely to be economically feasible** for Access Seekers and so alternatives referred to by ComReg really don't exist with the exception of Eircom dark fibre. Therefore, access to the equivalent of dark fibre required by the Access Seeker **ought to be mandated** as an alternative where remediation costs exceed the relevant threshold as a first step. This would give the Access Seeker the choice of the most economically viable option and reflects the principle of **allocative efficiency** by ensuring resources are not wasted. Unless such a mandate is put in place Eircom's incentive may be to proceed with the order and thus pass on a portion of its capital investment costs to the Access Seeker.

Q. 8 - Do you agree with ComReg's view that a straight-line depreciation approach should be applied in the context of Pole Access and Duct Access (including Direct Duct Access) while a tilted annuity depreciation approach should be used for sub-duct? Please provide reasons for your response

SFG disagree with ComReg's view that a **straight-line deprecation** approach should be applied in the context of duct access. ComReg's proposal constitutes a **complete u-turn** from what it had proposed in the draft 2021 Pricing Decision insofar as the Commercial Areas covered by the DAM is concerned. There are no objective reasons given for this reversal but it would seem to be based on a desire to apply a consistent methodology across the IA and Commercial footprints despite material difference in the competitive conditions in both including in the associated downstream markets. In the draft 2021 Pricing Decision, ComReg reasoned that a straight-line deprecation methodology was appropriate for the IA because the focus was on ensuring cost recovery for Eircom where NBI were likely to be the only operator purchasing PIA. By contrast ComReg deemed that a 'titled annuity' approach was more appropriate in the Commercial footprints **because the underlying cost structure of regulated downstream services** (e.g. FTTC) **was also subject to a titled annuity approach** e.g. see p. 460 of draft 2021 Decision.

ComReg were of the view that a 'tilted annuity' approach was appropriate in the Commercial Area "*because prices needed to inform investors build-or-buy decisions to be consistent with the objective of encouraging infrastructure-based competition" (p.459 of draft 2021 CEI Pricing Decision).* ComReg has not explained in this consultation why that position no longer holds in Commercial Areas. SFG are concerned that ComReg's preference for defining the PIA market as "national" in scope is driving its preference on this occasion for a straight-line deprecation methodology. In this respect SFG would refer ComReg to its response to **Question 1**. Even if ComReg maintain its view that the market is national in scope there is nothing to prevent it applying different deprecation methodologies, as appropriate, to reflect the different underlying competitive conditions of the Commercial and IA footprints as it had reasoned in the draft 2021 Pricing Decision.

Q. 9 - Do you agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30 years? Please provide reasons for your response

SFG does not have specific comments on the proposed assets lives other than to note that ComReg ought to have gathered a substantial body of evidence since the 2009 Asset Lives Decision that better informs appropriate asset lives assumptions today. With respect to the 40-year duct asset life, we would ask ComReg to bear that duration in mind when it comes to market analysis in **the WDC market** because it underscores how difficult it would be for Access Seekers to make a return on such an asset. In order to meet the business case in building PI to an end-users premises, Access Seekers would either have to consider recovery of the costs of duct over a much shorter timeframe and/or hope the duct will continue to host downstream services over the remaining life of the asset.

Q. 10 - Do you agree with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access, as described in section 7.5? Please provide reasons for your response.

SFG are satisfied with the cost modelling approach in the PAM and DAM. We would note that these models can easily be modified to generate prices for inclusion of Process Costs in the annual rental charges (as is currently the case) and calculate appropriate thresholds for Urban v Non-Urban and for various surface types.

Q. 11 - Do you agree with the proposed financial threshold for duct remediation costs of [€11,000] per kilometre of duct? Please provide reasons for your response.

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SFG disagrees with the proposed threshold of €11k for duct remediation costs for reasons outlined in response to **Question 4** and **Question 7**.

In summary, **firstly**, SFG cannot see the basis for any threshold given Eircom ought to be fully compensated for the provision of duct access through rental charges that already ensure full recovery of costs. **Secondly**, if there is to be a threshold it ought to be deaveraged to reflect the geographic cost differences on the basis of **Urban v Non-Urban footprints and surface type**. **Thirdly**, the rationale for setting a threshold low enough so as to encourage Access Seekers to seek alternatives is misconceived given ComReg itself recognises throughout the consultation that replication of Eircom PI will not be economically viable. **Fourthly**, excluding the excess over the remediation threshold, which is paid by the Access Seeker, from Eircom's Regulatory Asset Base (RAB) for the purpose of future price reviews does not mitigate the fact that **real investment has been made by Access Seeker in Eircom's network** off which Eircom (or other non-contributing Access Seekers) can earn a return on via downstream services (e.g. leased lines) over the remaining life of the asset. Furthermore, if there is evidence that the true cost of duct remediation involves a significant number of incidences that are greater than €11,0000 per km then there is no reason why ComReg would exclude such excesses from the RAB for future price reviews.

Finally, SFG would also raise a concerns about the fact that it can see no basis for this approach based on EC Recommendations. The BU-LRAIC+ - TD HCA approach has been chosen to ensure cost recovery for Eircom on PIA. Levying Access Seekers a further "+" is a novel approach that will lead to market distortions and has not been objectively justified by ComReg in the consultation.

Q. 12 - Do you agree with ComReg's view that the 'per operator' approach should continue to be used to allocate / share the relevant Pole Access costs among all of the Pole Access Seekers, including Eircom? Please provide reasons for your response.

SFG do not have a [redacted] . However, **the per operator proposal is in sharp contrast** to the principles that has informed ComReg's view on the duct remediation threshold in terms of driving incentives. On the one hand it is obvious that more cables (particularly copper cables) will reduce the asset life of the pole yet in choosing a "*per operator*" approach there is no incentive for Eircom to remove unused cables – in fact there is arguably a long-term incentive to leave them in-situ in order to reduce the asset lives to accelerate cost recovery particularly under a straight-line deprecation methodology. In contrast the duct remediation threshold is, at least in part designed to incentivise Access Seekers to seek alternatives to using Eircom's PIA notwithstanding there are no economically viable alternatives (unless Eircom is required to offer an adequate "dark fibre" alternative in this scenario). In the duct scenario, Access Seekers **face a penalty** on "excess" remediation charges when it comes to duct pricing even where there is **no alternative**. [redacted] This does not seem fair or reasonable to SFG and is not reflective of a consistent approach to regulation.

Q. 13 - Do you agree with ComReg's view that the 'per metre of duct access equivalents' approach should be used to allocate / share duct related access costs among all Access

Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm? Please provide reasons for your response.

SFG are satisfied that the '*per metre of duct access equivalents'* approach is a reasonable approach to cost allocation and that the minimum threshold in terms of diameter of space should be set at 25mm. We note that ComReg estimates that 25mm sub-duct would represent about one third of the estimated occupied duct space in a fibre-only access network (p. 7.215). While the basis for this calculation is unclear (albeit it appears to be an output of the geospatial model), we would note that the vast majority of Eircom's network is unlikely to be "fibre only access" before the end of the review period particularly given the uncertainty around the timing of the completion of the NBP and the extent to which Eircom/FNI will cover the entirety of the rest of the country.

SFG consider that under this approach that an **incentive should be created for Eircom** to clearly identify spare duct in its PAR information, which it is obliged to share with Access Seekers. For every km that has been correctly identified as spare, these kms could be deducted as contributing to overall duct cost recovery (i.e. they would come out of the denominator and result in a marginal increase in duct prices). This would also create a definite incentive for Eircom to remove redundant cable on a forward-looking basis and SFG are concerned that no such incentives currently exist which appears to be an important gap in the proposals.

Q. 14 - Do you agree with ComReg's view that Pole Access rental prices should be set as a single national price based on a national average cost of providing Pole Access in all three geographic footprints (Urban Commercial Area, Rural Commercial Area and Intervention Area)? Please provide reasons for your response.

If the evidence suggests there is no material difference in costs across all three footprints, then the approach of setting a national average price seems reasonable.

Q. 15 - Do you agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the Non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively? Please provide reasons for your response

SFG agree that this appears to be a reasonable approach to setting annual duct rental charges. Without prejudice to SFG's view that no threshold should apply in relation to duct remediation charges for reasons outlined in response to Questions 4, 7 and 11, in the event that such a threshold is to apply we would note that ComReg has the necessary information in **Table 9** and **Table 10** to inform an appropriate geographic differentiation in duct remediation thresholds. Once ComReg has calculated the cost by surface type in each geographic footprint it can **calculate the relevant gradient** to apply to an average threshold of €11,000. By way of illustration only, see **Table 1** below. This analysis can be expanded to include relevant gradients to reflect differences between Urban and Non-Urban footprints as well as surface types (giving 6 gradients to apply to the appropriate average determined).

Table 1

Average threshold		€11,000		
	Footprint	Relative split	Gradient	Thresholds
Carraige	0.92	33%	1.33	€14,667
Footway	0.71	33%	1.03	€11,319
Verge	0.44	33%	0.64	€7,014
Average	0.69			€11,000

Q. 16 - Do you agree with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs? Please provide reasons for your response.

ComReg are obliged to carry out market reviews every five years and so setting prices for a period of five years appears to be a sensible approach. SFG consider that monitoring of Eircom's HCAs and AFIs will be critical to assess validity of certain charges and to ensure Eircom is not engaging in discriminatory behaviour. For example if there is evidence that orders for PIA by Access Seekers to deliver leased lines is experiencing duct remediation costs in excess of the determined threshold while at the same Eircom is rolling out FTTH in the same Urban footprint but experiencing **materially lower remediation costs** then this would be a red flag for potential discriminatory behaviour. Without prejudice to SFG's strong view that ComReg's current proposals on Process Costs is wholly inappropriate and potentially detrimental to the leased lines market, detailed monitoring of the costs and practices associated with such activity should be carefully monitored by ComReg **including pursuant to any complaints raised by Access Seekers.**

Q. 17 - Do you agree with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.267-7.268 [*sic*] Please provide reasons for your response.

See also response to **Questions 4, 5 and 16**. SFG strongly disagree with this proposal which could have a material detrimental impact on the WHQA/WDC market. There are significant risks that this pricing approach will give scope to Eircom in engage **in anti-competitive behaviour**, which as ComReg outlines in p. 7.322 it has "*the ability and incentive*" to engage in. Even where costs are particularised in a template as described in p. 7.263-7.264, [*ComReg's paragraph reference in the question appears to be an error*] the manner in which Eircom will seek to impose such charges **appears to be completely at its discretion**. Eircom has an incentive to claim higher than justified 'Process Cost' **activity** if for no other reason that than it generates more revenue for it. Pricing excessively can be achieved not just by **charging too high** of a unit price but also by charging an appropriate unit price **but for too many units.**

To this end, it will be extremely difficult (**if not impossible**) to assess whether the purported labour activity is actually required (or indeed subsequently carried out) when Eircom presents its Process Costs estimate to Access Seekers. There is also a much **higher probability for disputes** arising between Eircom and Access Seekers on the level of Process Costs which must be settled on before

progressing a duct access order (in order to inform the project business plan).

While this approach may work for PIA on larger based projects, such as NBP, it is clearly not appropriate for generic duct access orders which are critical to enhancing competitive conditions in the leased lines market. At the very least, SFG consider Eircom should offer Access Seekers **the option of cost-oriented pricing that is inclusive of Process Costs** (these are incorporated in current HCAs). This may require an upward adjustment to the proposed duct rental charges. This is similar to ComReg's proposal around scenarios where Access Seekers pay upfront for duct remediation (for a reduced rental rate) or alternatively allow Eircom to incur the cost and pay the full rental charges. **It is only fair and reasonable** that a similar option is offered to Access Seekers in relation to Process Costs i.e. upfront payment or rental charges inclusive of Process Costs. Allowing for such an option would also provide greater incentive to Eircom ensure upfront activity is efficient if they would prefer upfront pricing to be the Access Seekers preferred option.

It should also be noted that in the case of **field surveying activity** benefit from that activity can be derived by other Access Seekers and Eircom itself for a lengthy period after the initial order. Under new proposals Eircom will be required to share all this information on its Passive Access Records (PAR), on system, with all Access Seekers. Therefore from a cost causation perspective it is appropriate such 'Process Costs' are equally shared with all users of the PI network and not just the Access Seeker that placed the order.

SFG consider the current Proposal around Process Costs to be among the most troubling in ComReg's current proposals and should be reconsidered as a matter of urgency. Maintaining **the status quo** whereby the existing approach allows these costs to be recovered via rental charges **should be preferred** to the **high risk** (for reasons outlined above) approach now being proposed. The uncertainty inherent in the current proposal for Access Seekers cannot be overstated. What is critical to Access Seekers is **price certainty** even over the price itself i.e. it is better to have a somewhat higher price that is certain than to have uncertainty on pricing, even if in some cases where the uncertainty would have yielded a lower overall charge. SFG would further note that a proper Regulatory Impact Assessment should be carried out on this aspect of the proposal as this does not currently appear to be the case.

Q. 18 - Do you agree with ComReg's view that Eircom should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced, and calculated and prenotified in advance by Eircom based on the template described at paragraphs 7.263-7.264? Do you agree that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, in its cost accounting systems? Please provide reasons for your response.

SFG has no particular comments on this proposal other than to say no corollary should be drawn between this question and SFG response to Question 17. ComReg's proposal on Process Costs is self-evidently in no way analogous the proposed charging mechanism for pole furniture despite similarities proposed by ComReg with respect to "templates".

Q. 19 Do you agree that (i) tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price and (ii) tree trimming costs to prepare

aerial cable routes in advance of cable deployment should be recovered by means of a one-off charge (calculated and pre-notified in advance based on the template referred to at paragraphs 7.263-7.264)?

See SFG response to Question 18.

Q. 20 - Do you agree with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access? Please provide reasons for your response.

SFG agree that such options should be offered to Access Seekers. Provided Eircom are recovering its costs overall ComReg should promote pricing proposals that **encourages take-up of PIA** which facilitates investment in downstream services and promotes the rollout of VHCNs. Offering options to Access Seekers allows them to look at **alternative business strategies** which reflects a pro-investment/innovation outcome. It is for this reason that SFG consider the type of options proposed by ComReg in this section **should equally be extended to Process Costs**. SFG consider there are good reasons why Process Costs should not be charged as an upfront cost as explained in response to **Questions 4, 5, 16 and 17**. However, even if ComReg disagree with the reasons put forward, there is no good reason why an alternative to an upfront charging mechanism is not put on the table alongside ComReg's suggestion. As ComReg note at p. 7.303, these type of pricing options allow Access Seekers "*to decide on balance which option is most suited to their needs, taking into account the known risks*". What is important here is merely that Eircom recover its costs under a cost orientation obligation. Offering alternative charging mechanism that meets this condition will promote innovation and competition. The uncertainty inherent in ComReg's current Process Costs proposal risks doing the opposite. On this basis, SFG would strongly urge that a similar option to the remediation alternatives is provided to Access Seekers in relation to Process Costs in the final decision.

Q. 21 - Do you agree with ComReg's views that Eircom should be subject to an obligation of cost accounting (Section 7.8 above) and an obligation of accounting separation (Section 7.9 above) for PIA? Do you agree that Eircom should be subject to additional requirements to provide specific PIA information in its HCAs and AFIs to allow ComReg to monitor Eircom's price control obligations for PIA and to allow ComReg to assess differences between modelled PIA Prices and the average costs reported by Eircom, as set out at Section 7.9? Please provide reasons for your responses.

SFG agree that **it is imperative** that these obligations are placed on Eircom as the SMP provider. Given the lack of clarity around how the Eircom Ltd – FNI arrangement works in practice, **new and clearly defined reporting obligations** should be laid out in the final decision. [redacted]. Without such clarity neither ComReg nor Access Seekers can have certainty that cost and revenue flows are not being manipulated to generate better outcomes for Eircom as a whole and which are potentially distortionary at the expense of Access Seekers. For example, Eircom could charge ("*wooden dollars*") FNI at inefficient levels for **repair and maintenance** of its PI network simply to inflate the underlying costs of pole and duct access to Access Seekers.

Connected to this issue we would note that it has been intimated at various Oireachtas hearings (e.g. by the Chairman at the Committee of Public Accounts[3]) that the state, through NBI has **been paying for duct remediation as an upfront charge since roll-out of the NBP began**. If this is the case it is important that Eircom's **starting RAB excludes all such expenditure in Urban and Non-Urban footprints** or Eircom will be earning a return on capital it has not invested. Eircom has already been compensated (through a host of historical regulated prices) for carrying out BAU remediation work on its PI that it clearly failed to do as evidenced by the need to carry out accelerated upgrading programmes to PIA as captured by the PAM and DAM. Revenues that should have been directed towards the upkeep and replacement of PI instead was therefore used for other purposes. Therefore, Eircom's separated accounts should clearly identify any remediation costs on its network that has been paid for by Access Seekers.

Q. 22 - Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Proper **Regulatory Governance** will be critical to regulatory success on PIA in terms of ComReg meeting its objectives to protect end-users, promote competition and **encourage efficient investment**. However, many of the proposals put forward by ComReg e.g. annual Statement of Compliance (SOC) are obligations that already sit with Eircom yet failure to comply remains a serious problem.

Many of the issues identified in **Appendix 15 of D10/18** captured how Access Seekers did not enjoy the same level of service Eircom was providing to itself in the provision of PIA. ComReg has had this list for 4 years and yet there is no evidence it has carried out an **updated audit** to examine what has changed since that time. We would strongly encourage ComReg to carry out this task again prior to the publication of the final decision.

Anecdotally it is obvious to Access Seekers that Eircom's roll-out of its FTTH network (rurally and in urban areas) has continued apace with almost 1 million premises passed using its own PI that has required significant upgrading. As such, while theoretically requiring a SOC to be provided by Eircom on an annual basis makes sense, in practical terms there appears to be no implications for either failing to meet certain regulatory obligations and/or failure to disclose such potential breaches to date. This must change going forward.

[3] 2021 Report of the Comptroller and Auditor General - Chapter 9: Implementation of the National Broadband Plan, 13 October, 2022

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ComReg itself acknowledges at p. 8.5 that the **IOB has failed to carry out its function** as envisaged in the 2015 Settlement Agreement. Unfortunately, it would not be an overstatement to say, that industry has lost faith in the IOB in terms of adding value to the regulatory governance process. It would be only through a major overhaul of the IOB in terms of its role and how it carries out its functions that such faith can be restored.

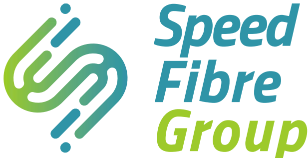
One proposal SFG have in relation to improving the SOC process is that a draft **version of same is first published on ComReg's website** that allows Access Seekers to respond to within a certain timeframe (month to six weeks). In this way ComReg can be alerted to issues Access Seekers have **identified as being inaccurate** based on their own experience and this in turn will allow ComReg to interrogate Eircom further in advance of final publication of the SOC. Such responses from Access Seekers may also prove to be useful to the IOB in carrying out its functions over the longer term.

Q. 23 - 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

SFG are of the view that there are gaps in ComReg's PIA particularly in relation to the proposed treatment of Process Costs. SFG would request that ComReg conduct a more detailed RIA of this proposal **in the context of the WHQA/WDC**.

We would further request that ComReg give consideration to, including through a RIA, SFG's proposal that an option to incur Process Costs upfront **or as part of the annual rental charge** should be considered.

Furthermore, SFG has raised significant concerns about ComReg's proposals in relation a threshold on duct remediation costs. We are particularly concerned that this proposal **will disproportionately impact on the WHQA/WDC market** in using a single threshold reference point (i.e. currently €11,000 regardless of footprint or surface type). We would therefore request that ComReg assess the likely impact of a threshold charging regime based on the format proposed by SFG in response to **Question 15** versus a flat charge that has no regard to footprint or surface type (and thus no regard to cost causation principles).



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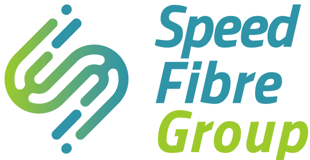

eir

Response to ComReg Consultation:

Physical Infrastructure Access (PIA) Market Review: Consultation, Questions 5 - 20

ComReg Document 23/04

3 March 2023

DOCUMENT CONTROL

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EXECUTIVE SUMMARY

1. Passive Infrastructure (PI), such as ducts and poles, plays a crucial role in providing telecommunications services to customers, serving as the backbone of Ireland's telecommunications infrastructure. Whether located in rural or urban areas, their functionality remains the same. Due to the high cost associated with deploying passive infrastructure, regulators worldwide have aimed to promote the use of existing infrastructure through policies like the Broadband Cost Reduction Directive (BCRD). The goal is to ensure that all passive infrastructure (regardless of ownership) is available at a fair and reasonable price, and that it provides a sufficient return on investment for both initial and future costs.

2. Based on its market analysis, ComReg has determined that eir has Significant Market Power (SMP) and that this warrants the imposition of cost-oriented pricing of PI. eir does not agree with the proposed SMP designation or that ComReg's proposed PI remedies are necessary, justified or proportion. However, notwithstanding this, eir agrees that, in principle, the use of cost orientation — provided that the methodology and assumptions used are appropriate — could be used to inform prices that are fair and reasonable.

3. In responding to Questions 5 to 20 eir has identified elements of the ComReg's proposal to which it both agrees and disagrees. In the following we provide a summary of our findings. Finally, we provide a way forward.

4. eir supports ComReg's conclusion that all access seekers contribute to common costs. This is necessary to enable full recovery of efficiently incurred costs.

5. ComReg proposes that eir should recover Process-related costs for PIA upfront and based on a pre-notified template. While eir agrees with the principle of recovery of Process costs upfront, it has concerns about the high-level specifications for the template and how it can be translated into a useful tool for determining Process costs. Additionally, eir questions whether NBI can be included within this template approach and suggests working with ComReg to assess its requirements. eir also suggests that the Process charge list should include cost items that will give operators incentives to behave efficiently.

6. eir agrees that a "per metre of duct access equivalents" approach is reasonable for allocating duct-related costs among access seekers, and applying a sizing limit is consistent with an efficient operator approach. However, eir notes that the key parameters used to implement this approach are not transparently specified (as they come from the Geospatial module) and that the potential interrelated assumptions that feed into the determination of the duct occupancy parameters make it difficult to assess the outcome of using a different sub-duct diameter.

7. eir supports ComReg's proposal of applying straight-line depreciation for PI assets (excluding sub-duct). While there are various trade-offs to consider, eir is on balance in favour of this approach. However, ComReg needs to update its price path to take account of the under-recovery eir faces with the move from its historic use of tilted annuities to straight-line depreciation. Further, ComReg should consider the risk that eir may not recover the permitted level of investment, as contracts with access seekers may end before the asset life is over. Finally, changing depreciation methodology is complex, hence ComReg should commit to refraining from revising it between pricing reviews unless there are very compelling reasons to do so.

8. The use of a pole asset life of 30 years by ComReg is appropriate as it is consistent with replacement rates found in the testing program. For duct and manhole assets, eir agrees that the appropriate life is 40 years. However, eir disagrees with the assertion that sub-duct asset life can be associated with the duct asset life. The economic life of sub-duct should be equal to the economic life of the fibre cable carried in it and set at 20 years.

9. In terms of the structure of rentals set by the cost models, eir agrees that pole rental should be set with reference to a single national price. eir concurs with ComReg's analysis that shows pole replacement costs are largely independent of geography. Moreover, eir's ability to identify whether a pole is Urban Commercial, Rural Commercial, or Intervention Area (IA) within any exchange is limited. Consequently, billing based on geography is impractical and vulnerable to errors. Given the material differences of pole occupancy between geographies (particularly in light of copper switch off in the IA) that will occur over the market review period, eir considers that it may be appropriate for ComReg to impose sub-geographic pricing

remedies. Regarding duct rental, however, eir disagrees with ComReg's proposal that duct access rental prices should be set as de-averaged (geographic) prices by surface type. ComReg should consider simplifying duct pricing by moving to a single national rate for the shared use of duct under all surface types.

10. eir broadly agrees with ComReg's approach of distinguishing between re-reusable and non-reusable duct assets and calculating their costs differently. However, there is a risk of under-recovery of efficiently incurred costs due to uncertainty in forecasting investment and estimating reasonable costs. ComReg's assumption of 3 blockages per km of duct is an underestimate and should be reviewed, particularly for grass verges.

11. eir broadly agrees with ComReg's approach of fixing prices over the price control period while allowing for annual monitoring and potential adjustment. The levels of charges for PIA services will be affected by factors such as investment in PI, changes in unit input costs and the required return on investment. eir expects that these elements can be projected with enough accuracy to ensure that charges for pole and duct access do not result in substantial over recovery or under recovery.

The way forward

12. As should be clear from the above, there are many ComReg proposals to which eir agree. However, eir has a number of more fundamental concerns with ComReg's proposed approach that need to be addressed.

13. In terms of pole pricing, we support a national price, but are very concerned with the proposal for the continued use of the 'per operator approach' across all geographies. Instead, eir suggests that a 'per customer' glidepath approach be used in the IA, progressively adjusted based on a projected assumed share of active lines. This 'per customer glidepath approach' allows eir's contribution to pole costs to decline gradually as its ability to recover costs from copper-based services declines. Specifically, eir propose that a glidepath be implemented that forecasts the change of active lines in the IA, which is used to adjust the pole price. eir sees several benefits to adopting this approach: (i) it reduces eir's exposure to a prolonged copper switch-off and therefore a disproportionate 50:50 (per operator)

cost share model; (ii) it increases certainty for NBI; and (iii) it incentivises NBI to beat the glidepath and improve their earnings (i.e., achieve higher penetration than assumed by the glidepath). This issue does not arise in the non-IA areas because even when eir undertakes its copper-switch off programme its fibre cable will remain on the pole.

14. Regarding duct pricing eir has serious concerns about the ability to capture remediation costs and hence suggest that operators who are seeking access will meet the full cost of remediation up-front, and rentals be adjusted accordingly. Such an approach would also help alleviate eir's concerns related to the development of a threshold for remediation costs. A potentially more important concern relates to duct occupancy. A forward-looking approach would find that NBI is the only tenant of the ducts in the IA. In this perspective NBI should bear the full cost of remediation as, on a forward-looking basis, there will be no sharing with eir, since eir would not have remediated any of its duct in the IA absent demand from NBI, whose demand is only occurring due to State-Aid intervention. This is a fundamental issue that has not been adequately addressed by ComReg.

15. Considering all these issues, and notwithstanding eir's view's on the appropriateness and necessity for asymmetric regulation of access to its PI, eir is exploring how a voluntary commitment can be structured in relation to charging for duct access in the IA. While it was not possible to develop a voluntary commitment within the timeframe of the consultation, eir plans to submit its proposal to ComReg in accordance with Article 79 of the Code once it has been reviewed and approved by eir's Wholesale Senior Management Team (SMT). The Code puts a strong emphasis on the importance for National Regulatory Authorities to be open to and take into account access offers on a voluntary basis.

RESPONSE TO CONSULTATION

16. In the following sections eir respond to ComReg's specific consultation questions.

Q. 5: Do you agree with ComReg's view that a cost orientation price control is appropriate for deriving the prices for Eircom's PIA? Please provide reasons for your response.

17. A cost orientation obligation is only one of a selection of possible price remedies that ComReg may impose following a market review. The specific remedies and their form should be determined based on the competition concerns identified in the market review.

18. In assessing the appropriateness of a potential cost orientation obligation, ComReg should consider several factors, including: (i) the extent to which the obligation addresses the competition concerns identified; (ii) its effectiveness in promoting economic efficiency; (iii) the level of certainty it provides to both eir and access seekers who would benefit from the regulation; and (iv) the cost and practicality of implementing the remedy.

19. A cost model has already been developed for PI, and the practical implementation of cost-oriented prices is already in place. Specifying specific charges will provide certainty in terms of pricing during the control period. In terms of promoting economic efficiency, ComReg appears to place greater weight on ensuring cost recovery (although eir submits that ComReg has not achieved this) than sending informed build-or-buy signals. eir supports an approach for PIA that adequately ensures both cost recovery and appropriate build-buy signals.

20. Access to PI is important for the continued development of active services in the market in Ireland. However, as evidence by ComReg, there are a number of PI-based infrastructure providers including ESB and Virgin Media and outside self-supply the demand for PIA (excluding NBI) is limited. As acknowledged by ComReg:

"*... regulation of the PIA market ... is unlikely to have a significant impact on competition within the [downstream] WLA and WCA (and related) markets ...*".[1]

21. A key component of the BCRD (and BCRR) are the provisions mandating access to existing PI. These provisions require that: "*Upon written request of an operator, network operators or public sector bodies owning or controlling physical infrastructure shall meet all requests for access to that physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of very high-capacity networks or associated facilities.*"

22. This suggests some form of price which is fair and reasonable. Cost-oriented pricing (based on an appropriate methodology and with the appropriate assumptions) should be capable of delivering fair and reasonable prices.

23. However, there are two main problems with the cost assumptions and the related issue of the recovery of costs in the DAM model used by ComReg to inform the charges that operators will pay eir for use of underground infrastructure. These apply to all geographies but are particularly significant in the Intervention Area (IA).

24. Historically, eir has largely deployed only copper cables in the IA. While recent investments in underground PI have been made, they have largely been limited to changes required by the removal of pole routes, damage repairs, and occasional extensions of capacity. As no sub-duct has been deployed within the IA during the FTTC, rural FTTH, or IFN FTTH deployments, there has been no extensive remediation of IA duct or manholes. Consequently, the ComReg assumptions in the DAM around the cost and extent of remediation in the IA are based on the experience of remediation in the commercial footprints (ComReg defines this as the Rural 340k).

25. More than 200k premises of the Rural 340k were served from parent exchanges that were already FTTC enabled. As a result, E-side and core duct were already remediated and could be re-used for the 340k FTTH sub-duct and fibre feeder cable. Therefore, much of the 340k FTTH sub-duct runs through duct and manholes that had already been remediated during earlier NGA programmes. The initial

[1] ComReg 23/03, paragraph 6.15

experience of the NBI rollout is that where their fibre crosses commercial areas between their OLTs and the IA boundary the remediation costs are similar to those seen for the Rural 340k. However, when NBI seeks to install fibre cable into duct that has only ever carried copper, within the IA, the number of blockages per kilometre is substantially above the assumption used by ComReg in the DAM.

26. A related assumption in the DAM exacerbates the effect of understating the duct remediation cost in the IA. This assumption concerns the parameter 'Average Trench Occupancy (Equivalent Subduct Cross Sectional Area)', which has a key influence on the annual rental rate proposed by ComReg for allocating costs between users of a duct route based on their 'Equivalent Subduct' share of the total occupancy of that duct. ComReg has set this parameter at 3 for trenches in all geographies. The many issues with the ComReg assumptions behind this parameter are laid out in more detail in our response to Question 15. In summary, a more appropriate set of assumptions around trench occupancy by geography would charge the operator using a sub-duct a lower share of the total cost in Urban Commercial, and a higher share in the IA. After completion of copper switch-off when NBI will be the only user of cable in IA trenches, the modelled rate for IA duct rental will rise above that for the commercial areas.

27. There is another area where eir disagrees strongly with ComReg in the treatment of costs in setting duct prices. This is the proposal by ComReg that operators should have the choice to pay a higher annual rental and require eir to meet the full cost of duct remediation necessary to allow the operator to deploy cable in the eir duct. While eir may benefit jointly in some of the investment in duct remediation in commercial regions, this is not the case in the IA. Once the NBI ODN is complete the copper services using the IA duct will be replaced by NBI FTTH access and, early in the life of the remediation investment, NBI will be the only party with revenue generating cable in that duct. Therefore, the existing Major Infrastructure Project (MIP) form of contract, where the operator seeking access meets the full cost of remediation up front (and pays a lower rental that recovers only historic investments in IA duct), should be the only price option for duct in the IA.

28. A third, and related point is ComReg's failure to consider a WACC premium in its cost model. Building significant new PI as required by NBI roll-out means, both in

terms of costs and expected revenues, a risk profile of investment higher than the risk profile associated with legacy PI. The price control obligations imposed regarding access to eir PI especially in the IA should adequately reward the investment made in these new PI assets and as such ComReg should consider a premium to the WACC.[2]

29. In the context of the issues raised above for duct and for poles as set out in our response to Question 20, eir is considering how a voluntary commitment can be structured in relation to charging for duct access in the IA. It has not been possible to develop these within the timeframe of the consultation. eir will submit its proposal to ComReg as provided for in Article 79 of the Code when the voluntary commitment has been approved by eir's Wholesale SMT.

[2] The Code provides for recognition in price control obligations of specific risk in particular for new investment network projects. According to Article 74 EECC, "*Where the national regulatory authorities consider price control obligations to be appropriate, they shall allow the undertaking a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.*" Recital 180 indicates in that regard: "*When considering whether to impose remedies to control prices, and if so in what form, national regulatory authorities should seek to allow a fair return for the investor on a particular new investment project. In particular, there are risks associated with investment projects specific to new access networks which support products for which demand is uncertain at the time the investment is made.*"

Q. 6: Do you agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for Eircom's PIA? Please provide reasons for your response

30. eir broadly agree with ComReg's view that a combination of BU-LRAIC+ and TD HCA costs should continue to be used as the costing methodology for determining the prices for PIA.

31. However, eir does not in principle consider that it is appropriate, as implicitly suggested by ComReg in their description of approaches, to adjust costs in eir's HCA for inefficiencies. There is a real danger that ComReg's level of efficiency adjustment could lead to unrealistic and unattainable levels of efficiency, resulting in under-recovery of efficiently incurred costs.

32. eir has undergone a transformative exercise to attain cost efficiencies and better working practices. ComReg cannot assume, without proper justification, that further levels of efficiency are attainable through a desktop exercise. In addition, when dealing with legacy copper technologies even in terms of duct and pole engineering ComReg should consider that the associated labour cost is likely to increase over time as knowledge and expertise in the field continues to decline.

33. eir notes that ComReg has considered the extent to which common corporate costs might vary (or scale) in the PAM and DAM for an operator providing PIA services, compared with an operator providing services in downstream wholesale markets. ComReg conclude that the PAM and DAM should include an allocation of common costs that are unavoidable with changes in downstream services in the NBP IA. This is to ensure that all access seekers make a contribution towards eir's common corporate costs.

34. eir supports the conclusion that all access seekers contribute to common costs. It is necessary to consider common costs to enable full recovery of efficiently incurred costs. As evidenced by ComReg's analysis, these costs are substantial and must be accounted for. However, attributing these costs in a non-arbitrary way is difficult. ComReg has opted for an EPMU approach, whereby each service is allocated a portion of the common costs in proportion to its share of total attributable costs. Given the circumstances eir supports this approach. It is also the method

traditionally used by NRAs (incl. ComReg) to allocate such costs and is supported by BEREC[3].

[3] In a regulatory environment it is accepted that all services should bear, in addition to their incremental cost, a reasonable proportion of the common costs. The preferred method of allocating common costs is Equal Proportionate MarkUp (EPMU)", ERG - Recommendation on how to implement the commission recommendation C(2005) 3480 – 2005

Q. 7: Do you agree with ComReg's view that PIA Reusable Assets should be valued based on a RAB which is set by reference to Eircom's HCAs and PIA Non-Reusable Assets should be valued on the basis of a RAB which is set based on replacement costs of non-reusable duct and poles assets to make them 100% NGA ready? Please provide reasons for your response.-

35. Overall, eir is in broad agreement with the approach of distinguishing between re-reusable and non-reusable assets and that these are subject to different costing approaches where reusable assets are valued based on a Regulatory Asset Base (RAB) and set by reference to eir's HCAs and that non-reusable assets are based on the current cost (CCA) of replacing / upgrading such assets each year.

36. While eir agree that data is reasonably available to project the level of investment in PIA that eir is expected to undertake each year as FTTH networks are extended, ComReg should be wary of the uncertainty inherent in any forecast of investment. It is challenging to accurately estimate the amount of reusable duct on any given route, the relevant share can vary significantly. In addition, it is difficult to determine (and there are associated time delays) on average, in a given year or over longer period pricing period, whether actual non-reusable duct was different than provided for in the regulatory price path. Hence there is a risk that eir will under-recovery efficiently incurred costs.

37. As such, for duct eir proposes (as discussed in response to Question 20) that operator's seeking access to underground infrastructure will be required to meet the full cost of remediation up-front and rentals be adjusted to reflect this. This is because operators will likely be the only beneficiary of that new investment. The rental charge would accordingly only recover a contribution to the historic investments by eir, including recent clearance of blockages and repair of manholes, and those charges should be set to reflect the share of benefit the operator derives from those investments. Any additional investment required in remediation for operator access will simply be a pass-through of external rates to the operator.

38. This an attractive approach where operators derive commercial benefit from the investment in underground asset remediation and eir would not have undertaken this investment at any scale for the remaining life of rural copper. No costing or

pricing decision that requires eir to share the risk of this remediation can be justified.

39. A potential alternative to this approach which eir would be open to consider is to split the valuation of ducts based on the potential for competition. In the Commercial Area, where the primary concern is sending the right build-and-buy signals, the duct would be valued at current cost (CCA). This value would reflect the forward-looking cost of duct replacement and reinstatement and provide the correct build-buy signal to other operators regarding NGA deployment without requiring upfront payment for remediation.

40. The French regulator ARCEP has, for example, implemented the concept of "Coûts Courants Économiques," or CCE method which refers to economic costs or current costs, as key tool for key tool for regulating the prices of wholesale access. Implementation of CEE by ARCEP involves a detailed and data-driven approach to costing that aims to provide a comprehensive view of the costs associated with providing wholesale access. Use of CCE would alleviate some of the concerns raised in our response to Question 8 as it is uses a tilted annuity approach. Further, the CCE approach also resolves issues related to "double recovery" as it does not assign a value to fully depreciated assets.[4] Therefore, for as long as the duct has a remaining asset life its Gross Book Value (GBV) is included in the RAB using a depreciation profile from the year the acquisition was made (i.e., it uses a tilted annuity on the GBV from the year of the investment). eir is open to meet ComReg and outline the benefits of this approach including if necessary, arranging a tripartite meeting with ARCEP.

41. In areas where cost recovery is the primary concern, such as the IA, the duct would be valued at historic cost (HCA), and upfront remediation costs would be charged to the operator seeking access. These remediation costs would, of course, not be included in the RAB for eir PIA. Only investments in duct remediation and pole replacement made by eir to be recovered from rental charges over the asset life will be included in that RAB.

[4] More information on the approach can be found here (in French): https://www.arcep.fr/uploads/tx_gspublication/consult-invest-cuivre_fibre-290311.pdf

Q. 8: Do you agree with ComReg's view that a straight-line depreciation approach should be applied in the context of Pole Access and Duct Access (including Direct Duct Access) while a tilted annuity depreciation approach should be used for sub-duct? Please provide reasons for your response.

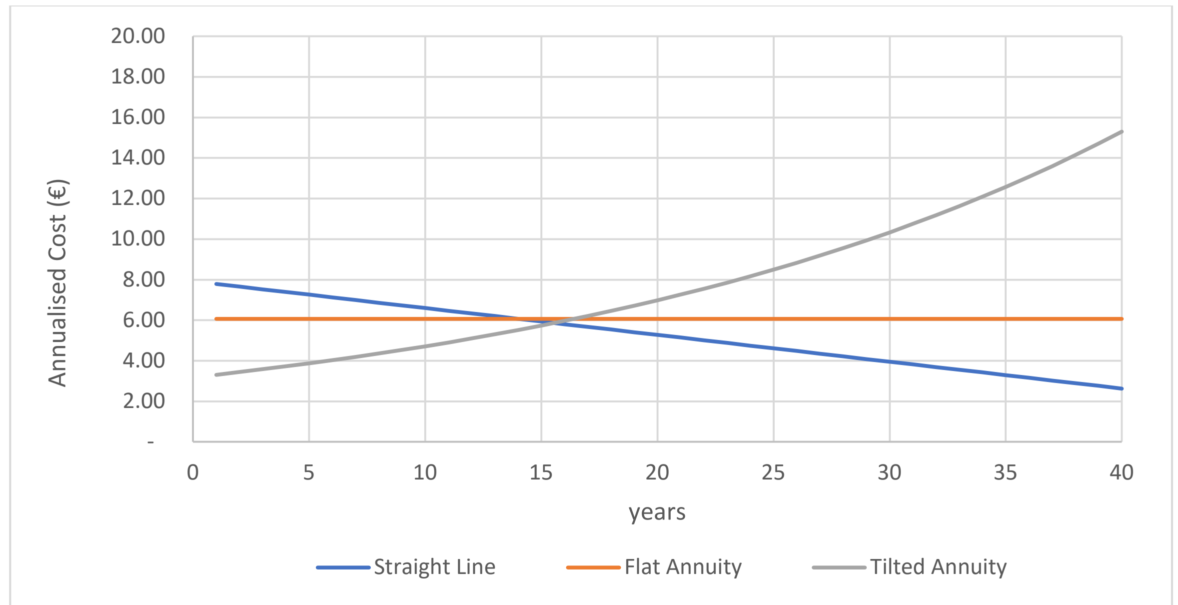
43. eir supports ComReg's proposal of applying straight-line depreciation for Pole Access and Duct Access (including Direct Duct Access) and a tilted annuity depreciation approach for sub-duct in the context of PIA assets. While there are various trade-offs to consider, eir is on balance in favour of this approach.

44. In the past eir has been supportive of the tilted annuity approach as it allows a smooth evolution of annual cost despite price changes and investment cycles. The tilted annuity method can even be a good proxy for economic depreciation if the output volume of an asset remains stable. However, it has become evident that this approach poses a significant risk for eir to recoup investments due to a positive price trend and use of an asset life that is longer than the contract period for rental.

45. The form of annuity chosen by ComReg for the Revised CAM has a lower annual charge in the early years of the asset life when the asset is projected to have a positive price trend over the economic life of that asset. In effect the recovery of the investment is "back-loaded" so that the annual charge increases over time.

46. The figure below illustrates this by contrasting the tilted annuity for duct with two alternative annualisation methods commonly used. For illustrative purposes assume an initial investment of €100. The WACC is set at the current regulated WACC of 5.29% and the asset is 40 years. For the price trend assume 4% per annum.

Figure 1: Implication of different annualisation methods



47. With a standard (flat) annuities methodology, the annualisation charge will be the same in each year of the asset's lifetime. This is because the fall in the capital charge which occurs as the asset becomes older is exactly compensated for by an increase in the depreciation charge. Therefore, the annual charge does not vary based on the asset's age. As shown in the figure, the annual charge would be approximately €6 per year over the 40-year life of the asset.

48. When a tilt is added to the annuity charge this will either back-load or front-load the annualisation charge. Where prices are increasing over time, the annualisation charge will increase over time, i.e., less costs will be recovered at the beginning of the asset life than towards the end of asset life. As shown in the figure above the first year the tilted annuity recovers less than €3.5 of the investment. This rises to above €12 per annum for the last five years.

49. The figure also shows straight-line depreciation. Here the capital charge is the sum of the straight-line depreciation of 1/40 of the initial investment and a capital charge. The capital charge is the net value of the investment (investment less accumulated depreciation) multiplied by the WACC. Using this approach, the annualised cost is highest in early years of the asset life and falls to the lowest levels at the end of that life. The depreciation charge is the same in all years whereas the capital charge declines. This approach is appropriate for setting

regulated rental prices where investments are regular and predictable, and where input prices are stable over time. As such it is appropriate for the PIA assets.

50. As can be seen from the figure, the tilted annuity approach delays the bulk of investment recovery and return until the last years of the asset life. This poses a significant risk for eir because contract terms with access seekers could end well before the asset is life is ended. If access seekers exercise their option to exit a PIA contract at some point before the end of the asset life, for instance by moving their broadband base to a wireless or satellite broadband solution, eir will never recover the permitted level of investment, never mind achieve a positive return on that investment.

51. In addition, eir submits that ComReg is required to update their price path to take account of the under recovery eir faces with the move from the historic use of tilted annuities to now straight-line depreciation. As can clearly be seen in the figure above, the PIA prices that are the output of the Revised CAM have been depressed in early years due to the positive price trend. Now that ComReg is proposing to change depreciation approach with no price tilt and in addition to one that has the effect of front-loading (even with a zero tilt) this must be taken account in the historic price path, i.e., adequately recognise this delay in cost recovery has occurred historically when setting a new price path. This is necessary to ensure that under-recovery in early years, where the tilt supressed the annuity, is reversed in later years.

52. While ComReg has proposed straight line depreciation be used, inspection of the PAM and DAM suggest a standard annuity is still used for certain assets (other than sub-duct). This can be seen by inspection of the Calcs_Capex tab for costs related to 'Duct NGA-ready CEI uplift', please refer to our response to Question 10 for more details. ComReg should ensure the PAM and DAM reflects the proposed methodology.

53. In summary, ComReg position that eir has enduring SMP in the PIA market, and that prices should be set to encourage efficient shared use of scarce CEI resources to deploy competing super-fast broadband networks, indicate straight line depreciation is the appropriate method for calculating the annual charge. However,

ComReg needs to adjustment the PAM and the DAM to ensure eir does not under recover costs given the annualisation approach proposed is different to the one implemented historically in the Revised CAM.

54. Finally, eir propose that ComReg commit to refraining from revising depreciation methodology between pricing reviews unless there are very compelling and good reasons to do so. As highlighted above, changes to depreciation methodology are complex and can create uncertainty for stakeholders.

Q. 9: Do you agree with ComReg's view that the existing regulatory asset lives for Eircom's poles and ducts should be maintained at 30 years and 40 years respectively, while the asset life for sub-duct should be set at 30 years? Please provide reasons for your response.

55. The pole asset life used in recent price controls at 30 years is appropriate as this life is broadly consistent with the replacement rates found in the testing programme from 2002 to 2014 and again in pole replacement for the accelerated programme of rural FTTH from 2015 to 2019.

56. In 2009, ComReg extended the eir duct asset life for accounting separation and price control purposes from 20 years to 40 years. The high proportion of reusable underground assets found during the NGA fibre cable deployment for FTTC and rural FTTH between 2012 and 2019 suggests that prior investments in trench, duct, and manholes have an economic life exceeding 20 years. For this reason, eir agrees that 40 years is an appropriate life for duct and manhole assets, provided that any annual charge on these assets implemented in a price control is not subject to any back-loading, as was implemented by the tilted annuity from the Revised CAM (see response to Question 8).

57. eir disagrees with the assertion that sub-duct asset life can be associated with the duct asset life. Sub-ducts are solely used to introduce fibre cable into a duct route. Initially, slightly larger bore sub-ducts were used, and the fibre cable was pulled into these. Although it was theoretically possible to recover the fibre cable while leaving the sub-duct in place, this has not been done in practice.

58. Smaller bore sub-ducts have been used for some time, where the internal bore of the sub-duct is only slightly larger than the external diameter of the fibre cable binder. External/internal bore sub-ducts of 14/10 mm and 10/8 mm are now frequently used, and the fibre cable is either pre-loaded into the sub-duct or blown in from a manhole after the sub-duct is in place. As a result, sub-ducts and fibre cables have essentially become a single element in the access network. It is not possible to remove one without removing the other from the duct.

59. The only exception is where there has been a multi-way deployed and it has a spare bore. However, this does not support an argument for a longer asset life for sub-duct. For instance, assume that a three-bore sub-duct is deployed because the Optical Distribution Network (ODN) deployment in that section of duct requires two fibre cables to be blown into separate sub-ducts. This ODN serves the target market and leaves one bore spare. If a second ODN operator seeks to put fibre in the same duct they may opt to use the spare bore. This may occur either where the operator is targeting the same premises as the first ODN or if they are NBI because they are running fibre from an Optical Line Terminal (OLT) site into the IA. When either of the first two fibre cables need to be replaced the third bore is not available and additional sub-duct is required. Even if the original spare bore was never used by a second operator when both original cables are replaced additional sub-duct is required. If a second operator has put fibre into the original spare bore, then the 3-way sub-duct cannot be recovered until the second operator takes their cable out of service.

60. The only part of the eir duct network where the deployment of multi-way sub-duct could have the effect of extending the economic life of the original investment is the small portion surrounding large exchanges where 7-way sub-duct is deployed. Here there may be sufficient spare bores after the initial fibre cables are installed that a fibre cable can be installed without a requirement for additional sub-duct. However, this will be rare, and the length of 7-way represents such a small share of total sub-duct, that it is prudent to treat the sub-duct as having the same life as the cable blown into it.

61. For these reasons the economic life of the sub-duct should be equal to the economic life of the fibre optic cable carried in that sub-duct. Where the asset life of the underground fibre cable is 20 years the asset life of the sub-duct that has been put in place to carry that cable is also 20 years.

Q. 10 Do you agree with ComReg's proposed cost modelling approach in the PAM and DAM to determine the per unit costs for pole and duct related access, as described in section 7.5 ? Please provide reasons for your response.

62. eir's position on the proposed cost modelling approach used by ComReg in the Draft PAM and DAM is laid out using the same headings as ComReg's consultation:

- Cost Modelling;
- Cost model structure;
- Cost modelling approach – Determining the RAB;
- Cost modelling approach – Reusable Assets;
- Cost modelling approach – Non-Reusable Assets; and
- Cost modelling approach – Non-Reusable Assets

Cost Modelling

63. eir recognise the changes made by ComReg to cater comments from the EC following from its serious doubts letter on the CEI decision and changes to the ANM based on ComReg Decision 11/21.

64. eir will make updated financial / costing information available to ComReg under a Section 13 (d). eir requests that ComReg allows eir sufficient time to respond to the information request — in particular, allowances must be made by ComReg to account for the fact that our finance teams are currently working with our auditors in respect to the financial year end.

65. ComReg has only made available the PAM and DAM for this consultation even though these modules are a subset of the ANM. eir understand that the other modules from the ANM have been "locked" and inputs from them feed into the PAM and the DAM. ComReg has not provided any documentation for the reasonableness of this approach. It assumes a linearity in the ANM model, i.e., that changes in the PAM and the DAM have no influence on the rest of the ANM. An example of this is the common cost mark-up. In addition, placeholder values can be observed in the PAM and DAM that eir has gained access to. It is not clear to eir how it is possible to have placeholder values for any inputs when ComReg has a fully working ANM given that

the PAM and DAM provide input to the Capex module in the ANM (as illustrated by ComReg's figure 13). While these placeholder values may not be important for results of the ANM it is impossible for eir to assess potential implications with only a subset of the ANM. Further, it is clear from the PAM and DAM that they use input from the ANM Capex modules, this is not illustrated in ComReg's figure 13 suggesting the potential for modelling feedback loops that need to be carefully dealt with.

Cost model structure

66. Please refer to response in previous section.

67. The Geospatial module and Opex module provide crucial inputs to the PAM and DAM. eir has in previous response to ComReg Consultation 20/101 expressed serious concerns with both these modules:

- Geospatial module: it was eir's contention that this module was not appropriate for dimensioning the access network of a hypothetical efficient operator with eir's network presence in Ireland. eir considered that ComReg had (i) provided insufficient transparency of the methodology and dimensioning tools used; (ii) failed to recognise the complexity of multiple demands for individual premise; (iii) modelled unachievable efficiencies in rural areas; and (iv) failed to provide evidence of meaningful calibration with eir's actual network.
- Opex module: eir agreed with the use of the AFIs as a starting point but raised concern with subsequent adjustments and allocations.

68. Many of these concerns were not adequately addressed in the ANM decision and hence remain. In addition, eir notes that ComReg would appear to have made several changes and updates to the both the geospatial and operating cost inputs in the version of the PAM and DAM that are subject to consultation compared to those versions of the same module that were made available for review leading up to ComReg Decision 11/21. A significant number of these changes have a non-trivial impact on the outcome of the PAM and DAM. None of these changes or discrepancies between the modules have been documented in detail by ComReg

and hence are impossible for eir to evaluate. In other words, ComReg has failed to consult transparently.

69. From a model structure perspective, the PAM and DAM as standalone modules are clear and transparent in their structure. However, ComReg's consultants have unfortunately at times used Excel methods and formulas that make review difficult.

70. Specific comments to the modules, their input and structure are provided throughout this hearing response as they relate to the questions asked. Observations to certain inputs and calculation flows that do not readily fall within any ComReg question are provided below:

DAM module

a. Input Parameters, cell F51, (I.Par.17). The costs incurred from offering wholesale service is set at €0.02 per meter. The source of this number is Cartesian. It is unclear to eir whether this will be subject to update. eir would appreciate if information can be made available to enable an evaluation of this number. For example, how has it been derived and is the number an international benchmark and if so, how has it been scaled to reflect the size and scope of eir?

b. Input_Parameters, cell F60, (I.Par.18). The investment year for the rural commercial is stated as starting in 2016, however this would appear to contradict the model specification and the Input_Capex sheet where the rural commercial ramp-up starts in 2017 and lasts for 3 years.

c. Input Parameters, cell F78, (I.Par.22). The core networks share of the duct capex is 28%. The source of this number is the ANM Capex Model. It is unclear to eir how this number has been developed and whether it is from the Geospatial analysis. In eir's experience the split between core and access is very different, indeed the number in the DAM does not even align well with ComReg's previous model the Revised CAM. For the period from 2000 to 2014 the level of new investment in underground Civil Engineering Infrastructure related to the access network included in the Revised CAM generally reflects just over 78% of the GBV additions (i.e. investments) reported in each financial year. In other words, approximately 22% of total underground CEI investment is allocated to the core

network in the Revised CAM. Recent network studies (used to prepare the eir separated accounts) that categorise duct as access, core, and shared suggest the weighting is closer to 10% core and 90% access by length. This is on the basis that shared duct is treated as 50% access and 50% core.

d. Input_Service_Demand, cells related to IA FTTH Availability. Compared to DAM model provided to eir for related to D11/21 the cells for years between 2020 and 2025 are significantly different. Specifically, the status indicator [0;1] has changed in 2569 cases. It is unclear to eir if this simply reflects an update due to more recent information or some other more fundamental change.

e. Input_Geo, cells G54:I57, trench by surface type. ComReg has not provided documentation for these splits. According to background file Ducts_I.Cap.3_InputUnitCosts.xlsx, tab 'ICAP 3 Inputs' these splits are based on eir data and the Revised CAM, but that is insufficient information to understand how these splits where calculated.

f. Calc_Capex, rows 103-157, Total Costs (excl. sub-duct). This section calculates (or summarises) the total annual costs for duct by geography (and leased lines). Common costs are calculated as mark-up on annual costs related to BAU, blockage clearance and other renewal costs. It is unclear to eir why the costs related to NGA-Ready CEI uplift are not included in this calculation.

g. Calc_Capex, rows 308-369, Duct NGA ready CEI uplift. This section calculates that additional costs required to make duct NGA ready. It is only calculated for the Urban Commercial footprint and IA. The starting point is the remaining duct measured in meters to be made NGA ready within each geographical footprint. The cost of the cumulative remaining meters to be made NGA ready in each year to is then calculated. This cost is split by blockage clearance and other renewal. This capex is then annualised using a standard annuity (refer to our response to Question 8 for more detail on annualisation). These annualised values flow directly to the 'Calc_Cost_per_Metre' sheet without further correction. This would appear to be an error. First, the annualised values are based on the cumulative (remaining) costs not the actual capital expenditure of the year. Second, these costs are annualised in the year in question but are then zero in all future years.

PAM module

a. Input Parameters, cells F38 (I.Par.11) details the future asset retirement obligation per pole installed. This number would appear to differ significantly from the Revised CAM.

b. Input Parameters, cells F40 (I.Par.12) details the future asset retirement obligation per pole installed. eir has recently conducted a small-scale test of 100 poles that had to be shipped to UK for environmentally friendly disposal, the unit of cost of that was substantially higher than indicated in the PAM.

c. Input Parameters, cell F44, (I.Par.14). The costs incurred from offering wholesale service is set at €0.07 per pole. The source of this number is Cartesian. It is unclear to eir whether this will be subject to update. eir would appreciate if information can be made available to enable an evaluation of this number. For example, how has it been derived and is the number an international benchmark and if so, how has it been scaled to reflect the size and scope of eir?

Cost modelling approach – Determining the RAB

71. eir broadly agrees with the principles to modelling the Regulatory Access Base (RAB). See also eir's response to Question 7. However, given the flexibility in charging approaches and cost recovery options suggested by ComReg there will be a need to carefully consider how to update the RAB going forward.

Cost modelling approach – Reusable Assets

72. The PAM and DAM use eir's Fixed Asset Register (FAR), with adjustments made to derive the capital value of Reusable Assets. For poles, adjustments include excluding material costs related to eir furniture and incremental labour costs associated with replacing poles with furniture. For ducts this includes the costs of street cabinet assets for ducts. In addition, the remaining FAR capital costs are apportioned to the three geographic footprints. eir broadly agrees with this approach for reusable assets.

Cost modelling approach – Non-Reusable Assets

73. Pole replacement capital costs by footprint are calculated in the PAM by multiplying the volumes of poles replaced each year in each of the geographic footprints by the replacement capital costs per pole.

74. The approach to determining the value of non-reusable pole assets is consistent with data supplied by eir to ComReg under 13D requests and with treatments in the FAR. The approach to projecting the replacement of poles for a combination of accelerated deployments of FTTH for the eir IFN in urban areas and the NBI FTTH in the IA, together with BAU replacement during and after the accelerated deployments appears reasonable.

75. ComReg proposes a very different treatment for the valuation of non-reusable duct assets from the valuation of the equivalent pole assets. This is understandable as ComReg correctly identifies that most investments in existing duct infrastructure only occur at the time of deployment of new cables.

76. The DAM assumes that the driver for duct replacement or renewal is the length of the underground route being intervened in advance of deploying FTTH. The model identifies several cost categories that are relevant to remediation such as chamber reconstruction, path and carriageway re-instatement and blockage clearance. The treatment by ComReg is reasonable based on the information supplied by eir from our financial analysis of the Rural FTTH deployment that passed more than 300k premises between 2015 and 2019. However, the report supplied by eir is not sufficiently detailed to support a robust model for the differences between duct remediation investments by surface type. The report provided the total length of duct remediated as well as the total number of blockages cleared to remediate this duct. This indicated that the average number of blockages per kilometre was 3.

77. This number is not appropriate for more general application in modelling duct remediation costs for duct where no fibre has previously been deployed. In the particular case of the ODN built to serve the Rural 340k premises, the homes are passed by overhead fibre cable and are served from fibre distribution points (FDPs) at those poles. The Rural 340k OLTs, however, are located in provincial town, and

rural, exchange buildings. To reach the first pole mounted FDP on each route the feeder fibre cable traverses duct routes where new sub duct was installed. In general, the E-side proportion of this duct had already seen the installation of older sub-duct and fibre cable for the earlier FTTC programme. It is important to note that the spare capacity in the fibre cable and associated sub-duct was not utilised in the Rural 340k FTTH program, as it will be needed for the IFN FTTH over-build of FTTC. Consequently, a considerable amount of the Rural 340k sub-duct was installed into ducts that had previously been remediated for the FTTC. While not all E-side duct is used for the Rural 340k sub-duct, even in the case of small provincial exchanges, because 300k routes do not pass all street cabinets, a significant proportion of duct used for Rural 340k had already had blockages located and cleared during the earlier FTTC programme. The outcome of this finding is that the average of 3 blockages per kilometre used by ComReg in the DAM represents a substantial underestimate of the actual number experienced when remediating duct that has not new cable deployed in the recent past.

78. More recently, as eir has undertaken further remediation, granular analysis of remediation costs shows that there is an occurrence of blockages in duct under grass verge that is higher than the average across surface types and there are correspondingly lower rates in footway and carriageway duct. This is in line with the experience from small urban projects that involve remediating duct in suburban housing developments where ducts are often situated under grass verges between the footpath and the carriageway. This finding is also consistent with the fact that road and footpath surfaces provide more physical protection for plastic duct in trenches than is provided by grass verges.

79. For example, a study of the costs incurred in preparing the duct network connecting the Cavan OLT site for NBI to run fibre past IA premises in Cavan and nine surrounding exchanges revealed that, where the duct network had not been remediated for the eir rural FTTH programme, nine blockages were cleared for every kilometre of duct fitted with new sub-duct. As the NBI programme moves into more rural areas, higher and higher proportions of the duct that NBI seek to access has only ever contained copper. This duct will be characterised by substantially higher number of blockages than were reported for the Rural 340k FTTH programme. The duct will largely be under grass verge that has the highest rates of blockages

(albeit the cost per blockage cleared is less than for footway or carriageway blockages).

80. Finally, it should be noted that current forecasts for the NBI IA programme and the eir IFN programme in the Urban Commercial and Rural Commercial geographies show that virtually all duct in the eir access network will have been subject to remediation for some form of NGA deployment by mid-2026. The use of the DAM to set duct access prices must recognise this commitment by eir and NBI to these programmes and that the forecast RAB that will be the basis for rental charges will reach a stable position during 2026.

81. Based on the above it is clear that ComReg must review the blockages assumption carefully in their update of the DAM. The assumption of 3 blockages irrespective of geography does not reflect reality. The number of blockages in the IA will be significantly higher than in the Commercial Areas. Additionally, ComReg should review their assumption that the cost of clearing blockages is the same across all geographies.

82. In paragraph 7.183, ComReg state that the access seeker should not pay for additional length of sub-duct it did not request and no additional charges are required for such sub-duct "sterilisation". eir fundamentally disagrees with this view. The costs of sub-duct access can only be fully recovered in a situation where sterilisation has been considered.

83. The economic decision to install a certain type of sub-duct reflects an expectation for current and future demand on that route and the availability of different modularity of sub-duct. It is especially prudent and efficient to cater for additional spare capacity given the economics of trenching and ducting. When an access seeker gains access to this spare capacity, it should pay the efficient costs of that access. Since it is efficient to install full and continuous lengths of sub-duct and access to sub-duct can result in sterilisation, it is also efficient that access seekers pay for both portion the sub-duct they use and that which is sterilised by its use. Were the access seeker not to pay for sterilised sub-duct, the access seeker and eir would not be contributing to the cost of the shared network on equivalent terms nor would benefits be distributed equally or fairly. Failure to recover the cost of

sterilised sub-duct would therefore not allow eir to continue to recover its efficiently incurred cost plus a return on capital employed over the long run.

84. Where an access seeker uses a spare bore in a subset of the full multiway sub-duct section it will in some circumstance cause the remaining lengths to be uneconomic for use by other access seekers or eir. Hence eir must have the ability to cover the cost of the full length of the full multiway sub-duct. If the access seeker is only covering a fraction of cost of a full section which is rendered uneconomic to use with the presence of the access seeker, then eir is subsidising the access seeker.

Q. 10 Do you agree with the proposed financial threshold for duct remediation costs of [€11,000] per kilometre of duct? Please provide reasons for your response.

85. The rental rates proposed by ComReg are predicated on eir meeting the costs of duct remediation subject to a threshold, or financial limit, of €11,000 per kilometre. Any excess incurred by eir in preparing the route for operator cable or sub-duct above this limit will be payable as an up-front charge before access is granted. eir understands that this charge has been derived from the draft DAM based on information on the average investment per kilometre of sub-duct required by eir to make duct routes ready for the Rural 340k FTTH fibre cable to reach the premises to be served in the Rural Commercial geography. At paragraph 7.171 ComReg finds this to be close to €7,800 per kilometre. €11,000 is selected to be above this average by 30-50%.

86. eir is concerned that this proposed approach will distort competition in the commercial area, as we explain below.

87. The costs eir incurs for remediation below €11,000 per km are recovered from the rental charges for PI. These costs are recovered across eir's entire network footprint. The consequence of this is that the costs associated with remediation in the IA will be recovered from both the charges incurred by NBI but also from eir and other access seekers in the commercial area. Therefore, the costs of remediation below €11,000 per km in the IA will be, in part, recovered in the IA but also from the Commercial Area. Not only is it inappropriate that operators and customers outside the IA should be cross-subsidising build in the IA, it also risks distorting competition in the commercial area.

88. Due to this cross-subsidy, wholesale and retail services provided outside the IA using eir's PI will face a higher cost base than if NBI were to bear all the incremental remediation costs, thereby subsidising the deployment of NBI in the IA. SIRO and Virgin Media will not be required to pay this cross-subsidy as they are using self-supplied PI. Wholesale and retail providers outside the IA who do not use eir PI will be at an unfair cost advantage which risks distorting competition on the merits.

89. Similarly, eir is required to make the capital investment up-front for the use of its duct by NBI — this diversion of capital expenditure from the commercial area to the

IA would not otherwise occur absent the state-funded FTTH roll-out programme. The use of an €11,000 limit for remediation in the IA is distortionary and should be eliminated.

90. The effect is not trivial. NBI will be deploying an extensive network in the IA over the next charge control period, inevitably resulting in considerable demand for remediation.

91. In addition to this important competition concern, eir has several other concerns related to the threshold: (i) practical implementation; (ii) determination of the threshold itself; and (iii) operational challenges.

<u>The lack of clarity on the practical implementation of the mechanism limits eir's ability to comment on it</u>

92. It is useful to recall that the sub-duct deployed for Rural 340k FTTH used a combination of E-side duct that had previously been remediated for FTTC fibre to serve VDSLAMs at street cabinets, and D-side duct that only carried copper cable. The remediation for the former was close to zero and for the latter above €7,800 per kilometre maybe even above €11,000.

93. Now consider the following example, an operator seeks access to a number of duct routes that total 10 kilometres of which 5 have been previously remediated by eir, and 5 kilometres that cost €78,000 to remediate. The average cost per kilometre for the entire project is €7,800 but the average cost for the 5 kilometres requiring remediation is €15,600. Assume one particular stretch of the routes sought required very substantial remediation such that the most costly kilometre needed investments totalling €58,000, while the other four kilometres averaged only €4,000 each. This not a typical profile, but it raises questions as to how the threshold limit would apply: (i) If the assessment applies to the entire project then the threshold has not been breached and no excess charge applies; (ii) If the assessment only applies to those parts of the project with a non-zero cost of remediation the 5 kilometres requiring remediation have a combined limit of €55,000 and an excess of €23,000 could be charged; (iii) If the assessment applies separately to each

kilometre of duct then the costliest kilometre in the project could result in an excess charge of €47,000.

94. eir can make no meaningful comment on the concept of a threshold and excess charge until there is greater clarity on how it will be applied. This is complex. For instance, if ComReg intends the threshold to operate in a manner similar to (iii) above it could be possible that eir or the requesting operator will game the starting point for the assessment of each "kilometre".

<u>ComReg has not based the threshold on robust statistical analysis</u>

95. With regard to setting the threshold ComReg has assumed 30-50% above the average is reasonable. eir understand that ComReg has done this without specific information that would allow it to formally set such a threshold — or allow eir as the operator who will be most impacted by this proposal to provide comment or assessment of those calculations. In principle, a detailed data set along with a standard deviation and a desired level of confidence (such as 90%, 95%, or 99%) is required to set a threshold and determine whether observations fall within or outside an acceptable range of variation from the average cost. Further, this data should ideally be available at cost category level, for example, blockage costs, chamber remediation/expansion, re-instatement etc. since each cost category will have its own cost distribution. Initial discussions within eir suggest such information is not readily available.

<u>The proposed mechanism raises operational challenges</u>

96. At paragraph 7.173, ComReg notes that "*to maintain equivalence and to ensure non-discrimination between PIA requests from external Access Seekers and Eircom's internal use of duct, ComReg considers that the same threshold should apply to Eircom when it is remediating routes. To this end, any expenditure on route remediation to facilitate Eircom's cable deployments that is above the threshold should not be capitalised under the duct asset class but instead should be capitalised against the cable asset that is being deployed by Eircom.*"

97. ComReg also notes at paragraph 7.174 that it "*is aware that the introduction of a threshold may require Eircom to enhance its network systems and financial/accounting systems to be able to record and report on the incidence and costs of duct remediation activities.*"

98. ComReg proposals raise several operational challenges which will increase the complexity of systems and accounting separation methodologies, impacting the scope, costs and time required for Eircom's regulatory audit in addition to the costs of making the required enhancements to operational and financial systems.

99. First, eir will need to collect, manage and provide quality assurance on three different levels of detail: (i) the activity types - duct blockage, cable removal, repair etc.; (ii) the split between internal and external costs; and (iii) costs incurred above and below the threshold. Systems and processes will need to be reconfigured to collect and manage this data, as well as mapping the remediation work to specific duct assets (which may involve some degree of subjectivity). This would require labour intensive review of work orders which could be subject to error. These processes and systems would need to be audited as part of the regulatory audit, impacting its scope, complexity and cost. The ability to then map these costs to specific assets would then need to be developed. Duct remediation does not easily convert into length, a large share of remediation is repair of boxes or clearing blockages. The IFN currently records data on a 'homes passed' basis so it will not be possible to see any detail of what is been remediated. This would need new processes and systems to be developed to capture, manage and validate the data.

100. Second, there may be timing differences between duct remediation and cable deployment which could complicate efforts to link the two activities on the same route. This would involve eir having to maintain detailed records and apply the accounting treatment following the deployment of cable assets, mapping deployments to the remediation.

101. Third, it is not clear on what basis eir would treat these remediation costs if the work was related to the deployment of multiple cable assets in the same duct, or if the remediation work was not related to the deployment of new cable assets. eir would need to attribute the costs across the cables although ComReg has not specified on

what basis this should be done. This would bring significant complexity to the accounting treatment if this were to occur.

102. In summary, the allowance and excess regime proposed by ComReg is complex, unworkable, and distortionary. In the commercial area, eir considers that ComReg must either remove the threshold and thereby require operators to pay the entire remediation cost upfront – with a resulting lower rental or reduce the cost accounting/accounting separation obligations to be more pragmatic.

103. eir is considering how a voluntary commitment can be structured in relation to charging for duct access in the IA. It has not been possible to develop these within the timeframe of the consultation. eir will submit its proposal to ComReg as provided for in Article 79 of the Code when the voluntary commitment has been approved by eir's Wholesale SMT.

Q. 12: Do you agree with ComReg's view that the 'per operator' approach should continue to be used to allocate / share the relevant Pole Access costs among all of the Pole Access Seekers, including Eircom? Please provide reasons for your response.

104. eir does not agree with ComReg's preliminary view that the 'per operator approach' should be used as a means of determining the pole access rental across all geographies.

105. Use of the 'per operator approach' is reasonable in the Commercial Area, but problematic in the IA as explained below. eir submit that the cost sharing methodology for poles in the IA should be based on a 'per customer approach' that is progressively adjusted based on an assumed glidepath that reflects the projected share of active lines.

106. A 'per customer glidepath approach' allows eir's contribution to the pole costs to decline gradually as its ability to recover costs from copper-based services declines. This is not the case of the 'per operator approach' where eir's contribution to pole costs only declines once the copper has been decommissioned. As such, the 'per customer glidepath approach' is a fair allocation rule as the proportion of costs borne by NBI increases gradually as the number of customers switching to fibre grows. It also allows eir the opportunity to recover its efficiently incurred costs.

107. The approach eir suggests for the IA is similar in many regards to the 'per customer approach' introduced by ComReg in consultation 20/81. It involves allocating shared network costs and common corporate costs in proportion to the relative number of copper and fibre customers served off the relevant pole. The issue with ComReg's methodology at the time was that it was attempting to be very precise in its definition of active lines. For the reasons set out in response to consultation 20/81, eir did not believe that it was the correct approach to use. Now, given to the uncertainty related to copper switch-off, eir now believes it would be proportionate and appropriate to implement a 'per customer glidepath approach' using a gradual pre-defined path for projected active lines.

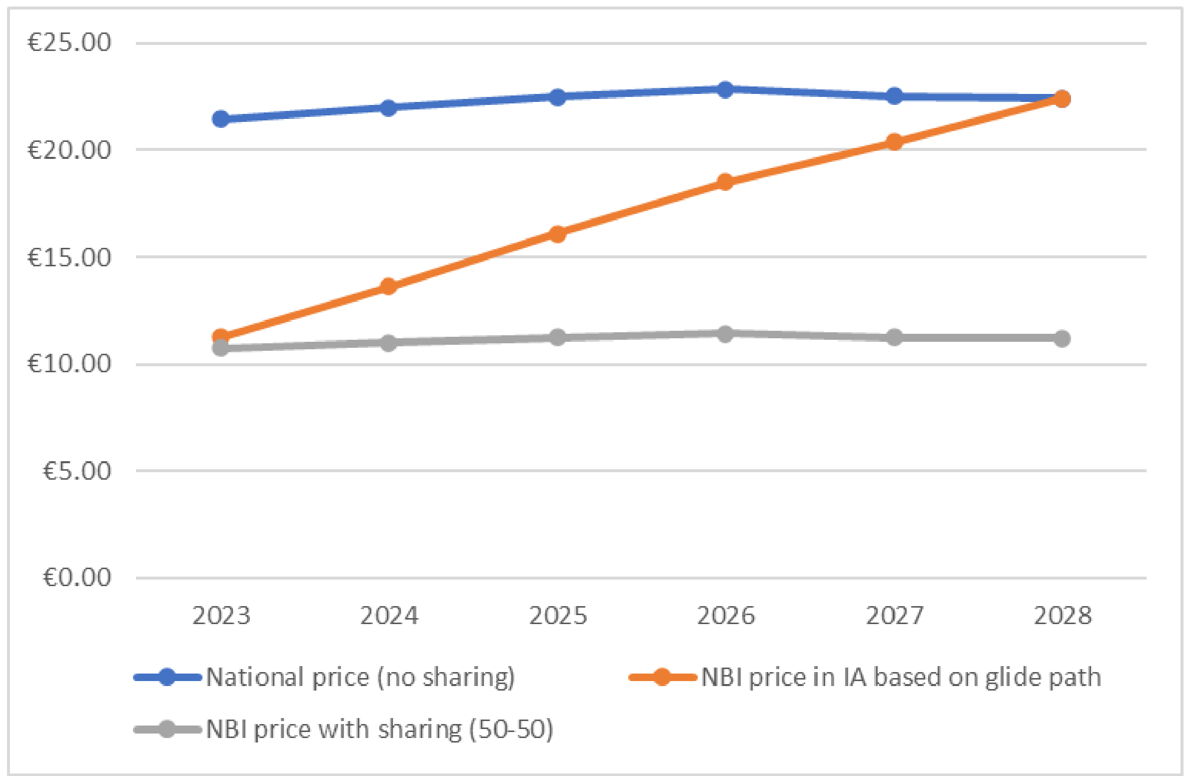
108. For the purpose of the glidepath, it is assumed that eir in year 2023 has 95% active lines. These are gradually reduced over a 5-year period to zero with equal incremental amounts every year. This is shown in the table below.

Table 1: Forecast share of active lines in IA

Year	2023	2024	2025	2026	2027	2028
Share of active lines	95%	76%	57%	38%	19%	0%

109. Based on the draft prices in the version of the PAM that has been made available to eir this would result in the following changes in prices over time, as illustrated in the figure below where the national pole price with and without sharing is also shown.

Figure 2: Changes in pole price over time using the glidepath



110. If P_{share} is the NBI price with sharing in the IA, L_{active} the share of active lines in the IA and $P_{non\text{-}share}$ the national pole price without sharing, the NBI price based on the glidepath is calculated as:

$$P_{share} \times L_{active} + P_{non-share} \times (1 - L_{active})$$

111. As the share of assumed active lines approaches zero, the pole increases, and at the point where there are no more assumed active lines, it will be equal to the national pole price without sharing.

112. eir sees several benefits to adopting this approach: (i) it reduces eir's exposure to a prolonged copper switch-off and therefore a disproportionate 50:50 (per operator) cost share model; (ii) it increases certainty for NBI; and (iii) it incentivises NBI to beat the glidepath and improve their earnings (i.e., achieve higher penetration than assumed by the glidepath). In addition, it allows eir eir's opportunity to recover its efficiently incurred costs —as the decline in copper services demand ahead of switch-off will heavily constrain its ability to recover a fixed pool of pole costs. Regulatory decisions that are inconsistent with eir having a reasonable opportunity to recover efficiently incurred costs risk undermining eir's broader incentives to invest (because it can be expected to be more concerned about its ability to recover its investments in the future). The glidepath approach by profiling the allocation of costs more closely with eir's ability to recover the costs from copper is more consistent with ensuring that eir has a reasonable opportunity to recover its efficiently incurred costs (and therefore maintaining investment incentives).

113. In order, to provide protection to NBI at the end of the glidepath (where eir could have a remaining residual amount of copper customers at the wholesale level), eir commit to starting the copper switch-off programme to decommission one year after either: the glidepath of active lines reaches zero; or, NBI finishes its roll-out — whichever comes later. eir considers this ensures that the pole price for NBI using the per customer glidepath approach is proportionate and reflects the appropriate sharing of costs between NBI and eir.

114. eir is cognisant that this view differs from views presented by eir in response to ComReg consultation 20/81. However, since then there has been considerable discussion of copper switch-off and there is more clarity in the roll-out plans of NBI. eir therefore has a more complete picture of how NBI plans to roll-out. However, crucially, ComReg are now also taking a leading role in copper switch-off, which represents a regulatory risk. Unlike ComReg consultation 20/81, it is now apparent that eir will have less flexibility in its ability to set the direction and control copper-switch off. Concretely, eir could be facing very long lead times in the IA and a pole

price, using the 'per operator approach', where eir and NBI share the pole cost 50-50 for a small and declining number of customers for an extended period of time. As such, a more fair and proportionate approach, at this point in time, is a 'per customer glidepath approach' or assumed active lines methodology. For avoidance of doubt, eir submits that the 'per operator approach' should be retained in the Commercial Area also for NBI.

Q. 13 Do you agree with ComReg's view that the 'per metre of duct access equivalents' approach should be used to allocate / share duct related access costs among all Access Seekers, including Eircom, and that the minimum threshold in terms of the diameter space should be set at 25mm? Please provide reasons for your response.

115. eir broadly agrees that a 'per metre of duct access equivalents' is a reasonable approach to allocate duct related to costs among access seekers, incl. eir. Applying a sizing limit is consistent with an efficient operator approach and cost recovery and increases transparency in pricing.

116. eir note that the key parameters used to implement this approach are from the Geospatial module (I. Par 25 Average Trench Occupancy). These are specified by geographic area and rounded to nearest integer, which is 3 in all cases. It is not possible to confirm the accuracy of these estimates, but eir understands from the model specification that these are expressed in terms of equivalent 25mm sub-ducts, i.e., sub-ducts with a cross sectional area of 490 mm^2. eir has consulted the model specification provided for the ANM which specifically covers the Geospatial module, but it does not mention this approach or provide additional information that can help evaluate the input numbers used in the DAM. ComReg should provide the additional detail necessary and consult on this issue transparently as it is required to do.

117. It is also unclear whether this approach is consistent with the cost input used, noting of course that this will be reviewed in the update of the model. The cost input used for sub-duct is stated as a "*mix of sub-duct predominantly used in the IFN (14/10mm)*" in the DAM source tab.

118. By and large the assumption that one third of the estimated occupied duct space in a fibre-only access network is consumed by a sub-duct is not unreasonable. eir generally use a wide variety of sub-ducts and has in compliance statements submitted to ComReg suggested that a maximum external diameter of sub-duct of 18 mm. This is also the size of sub-duct currently used at scale by NBI in their NBP rollout. However, given the potential interrelated assumptions that feed into the determination of the trench occupancy parameters it is not possible assess the

outcome of using a different sub-duct diameter, simply increasing the number of sub-duct equivalents would clearly be inappropriate.

119. According to paragraph 7.214 of the Consultation, ComReg anticipates an increase in duct occupancy due to fibre cables being deployed in ducts alongside existing active copper cables, and no large-scale retrieval of redundant copper cables during the price control period. However, ComReg does not propose to reflect expected variations in duct occupancy and instead proposes to set the duct occupancy based on a forward-looking fibre-only access network.

120. eir notes that this will require duct occupancy to be adjusted in the IA for NBI within the control period (see also discussion of this in our response to Question 15). A forward-looking fibre only approach would necessarily find that NBI is only tenant of the ducts in the IA. If an operator were to build a network today in the IA, there would be only one and that would be NBI. In a forward-looking perspective NBI should therefore bear the full cost of the duct remediation and there would be no sharing with eir, because eir would not have remediated any of its duct in the IA absent demand from NBI – whose demand is only occurring due to State-Aid intervention. eir's wholesale legacy copper customers in the IA do not require large scale duct remediation to continue consuming their legacy services. Equally, those legacy services will migrate to NBI's State-funded FTTH network.

121. An alternative would be to consider (as per our response to Question 14) that the number of active lines in the IA will decrease over time and that should be considered in the duct prices for NBI through a glidepath. Where a line becomes inactive it is no longer used by eir and generates no revenue to cover its cost. This will result in NBI, over time, bearing the full cost of the duct.

122. In paragraph 7.217 of the Consultation, ComReg propose that an access seeker that deploys cable or sub-duct that results in occupancy above the minimum proposed of 25 mm, will face a higher duct access price, which will be proportionate to the relative increase in occupancy above the standard allowance. eir supports this approach.

Q. 14 Do you agree with ComReg's view that Pole Access rental prices should be set as a single national price based on a national average cost of providing Pole Access in all three geographic footprints (Urban Commercial Area, Rural Commercial Area and Intervention Area)? Please provide reasons for your response.

123. eir agrees that pole rental should be set with reference to a single national price. eir concurs with ComReg's analysis that shows pole replacement costs are largely independent of geography. Moreover, eir's the ability to identify whether a pole is Urban Commercial, Rural Commercial, or IA within any exchange is limited. Consequently, billing based on geography is impractical and vulnerable to errors.

124. However, given the material differences of pole occupancy between geographies (particularly in light of copper switch off in the IA) that will occur over the market review period, eir considers that it may be appropriate for ComReg to impose sub-geographic pricing remedies to allow the imposition of a 'per-operator' approach in the non-IA and the "per customer glide path' approach in the IA.

Q. 15 Do you agree with ComReg's view that Duct related access rental prices should be set as deaveraged (geographic) prices to reflect the geographic costs in the DAM and converted into the geographic footprints of the Urban exchange area and the Non-Urban exchange area scheduled to the Decision Instrument at Schedule 1 and Schedule 2, respectively? Please provide reasons for your response.

125. There is no longer any basis for charging separate rates for access to Dublin and Provincial duct. Between 2005 – 2019 the main external contractor did charge higher rates for civil engineering jobs undertaken around exchanges in, and close to, Dublin.

126. However, [✂]. Before 2005 new build and remediation of eir duct was carried out by eir construction staff and the pay and non-pay costs of this investment were the same for Dublin and provincial exchanges.

127. There are also many issues of practicality in charging different rates by surface type that ComReg should consider the option to charge a single national rate.

128. For example, eir's network records and information systems for PI. Where cables are carried in duct the mapping tool shows the location of duct and manholes but with limited accuracy whether the duct running along a road is under the carriageway or an adjacent footway or verge. Consequently, there is no IT system available to eir staff that will allow automatic billing of duct rental by surface type. See also eir's response to Question 4 – "F. ComReg's proposed Passive Access Records obligation is too expansive".

129. Further, in paragraph 7.240 ComReg considers the issue of changes to the "original surface type". While this is not widespread issue it could give rise to significant billing errors over the life of the long contract that will characterise NBI use of eir duct. Even if the full extent of the duct shared by NBI in the Urban Commercial and Rural Commercial areas and ultimately used exclusively in the IA were surveyed to establish the initial surface type this will change over time as roads are widened, or footpaths laid over existing verge. The administrative burden to record changes in surface type and to charge according to the access that occurred at that time is

disproportionate and inconsistent with ComReg's objective of cost recovery and build/buy signalling.

130. The price signal reflected by higher rates for access to duct under carriageway, and lower rates for duct under grass verge, are appropriate where price levels and structure were designed to encourage efficient "build or buy" decisions by potential competitors in the PIA market. Now that ComReg wishes to prioritise efficient use of eir's network, the granularity of past investments is less relevant to the price structure. Consequently, the price path should correctly reflect the HCA investment cost but also the forward-looking CCA remediation cost – in this, example, the pricing signal is correct for the surface type (as it is now a carriageway – regardless of its historic origins).

131. While the cost of remediating duct under carriageway (clearing a blockage, traffic management, reinstatement) is higher per blockage than for footway and verge per blockage, there is strong evidence from the NBI deployment to date that there are more blockages per kilometre for duct under verge than for duct under carriageway. This is consistent with the only substantial instance of sub-urban duct access sought by another NGA network provider in Dublin. The housing development has a high share of D-side duct that was under the grass verges between the path and road. These verges generally have one tree per house planted by the local authority in a way that the roots often damage the eir duct. In this development the blockages per kilometre were between 10 and 20 – rather than the average of 3 derived by ComReg from 340k data.

132. Further analysis of remediation costs per kilometre by surface type for the NBI deployment is required by ComReg but there is a high probability that different occurrences of duct blockages across the various surface types will find that the separate surface type average remediation cost per kilometre closer to the overall average. If this proves to be the case then the main argument for charging separate rental rates by surface type is undermined and ComReg must consider charging a single national rate per metre regardless of geography, or of surface type.

133. [✂]

134. All in all, the combined effects of these features is a further reason that ComReg should consider a simplification of duct pricing and move to a single national rate for the shared use of duct under all surface types.

135. At paragraph 7.242 ComReg states that historic investments in eir duct in the IA would appear to be substantially depreciated and proposes that "no material allowance" is required for the recovery of historic NBVs in the IA. This statement is highly problematic as it disregards changes made to duct asset life in 2009.

136. Take the example of an investment in duct for a small rural housing development in 2004 of the type that subsequently was subsequently characterised as a "ghost estate". In 2004 this investment had a 20-year life and depreciated at 5% per annum. By 2009 this was 25% depreciated. At that point the asset life changed to 40 years and the NBV at 75% of GBV had a remaining life of 35 years so the annual depreciation fell to 2.14% (=35/75). At 2023 the NBV of this investment is 45% of GBV. This is certainly a level that requires a "material allowance".

137. Of almost €400M that was invested in eir duct between 1989 and 2008 almost €250M was for duct that was deployed between 1998 and 2008. These investments had been depreciated by 50% or less at 2009 when the extended asset life was implemented and is all still being depreciated at 2023. There is no way of knowing at this point which investments took place in what is now the IA but given the amounts involved to set this charge to zero has serious risks of distortion and fails to meet ComReg's requirement to ensure regulated prices allow for cost recovery including an allowable rate of return.

138. While investments since 2012 have largely been to remediate duct in commercial geographies to deploy fibre first for FTTC, then rural FTTH, and most recently urban FTTH, there has always been an underlying investment to upgrade underground infrastructure across all geography. This is best illustrated by the level of asset register additions during the years between the financial collapse that stopped all housing development in 2008 and the beginning of the eir FTTC programme. In each of these years the duct additions were very close to €8M. This underlying investment has been made in duct across all geographies and should be added pro-

rata with duct length by geography in any legitimate cost model for eir duct every year.

139. There is one further factor in the modelling treatment of eir duct in the DAM that when corrected will bring the rental rates for the three geographies into much closer alignment. As noted in our response to Question 13, ComReg define Average Trench Occupancy (I. Par 25). These are specified by geographic area and rounded to nearest integer, which is 3 in all cases. eir understand these values are from the geospatial analysis and reflect a forward-looking approach. However, these need a fundamental review and rethink.

140. Almost by definition the value of the "Average Trench Occupancy" for the NBP IA after NBI has deployed their ODN will be 2. The IA is that part of the eir access network currently served exclusively with copper cable. The Rural 340k does not pass IA premises; IA duct does not carry eir fibre, and the trenches carrying the duct are sufficiently remote from eir exchanges that it is very unlikely that they carry two copper cables. After NBI deployment they will have one NBI fibre cable and one of the smaller varieties of underground copper cable.

141. ComReg must also consider the position once copper switch-off starts. With both IFN and NBI roll out due to finish in 2026, ComReg should therefore anticipate copper switch-off ramping up during 2027. The effect of copper switch-off on trench occupancy in the IA is very clear. It will fall to a value of 1 as the only revenue generating cable in those trenches will be NBI fibre. The implications of this for the structure and levels of duct pricing are considerable and ComReg should consider them in the current consultation.

142. In contrast, the trenches in the Urban Commercial geography are likely to have an average occupancy measured in the "Equivalent Subduct Cross Sectional Area" that is greater than 3. E-side Urban Commercial trench contains multiple ducts with several large copper cables required to serve downstream street cabinets, as well as 24-fibre feeder cables for FTTC (that are being re-used for the IFN FTTH deployment). Even D-side trench will often have two 110 mm bores each carrying at least one moderately sized copper cable. Increasingly the D-side trench will also carry several sub-ducts carrying 12-fibre feeds from IFN splitters located at the

street cabinet onwards to FDPs located close to premises to be served with urban FTTC.

143. While eir has not undertaken a detailed study of "Average Trench Occupancy", it is clear that it differs substantially between geographies and will change over time.

144. eir find at present time that a more reasonable set of inputs would be 4 for UC, 3 for RC, and 2 for IA. If these values are implemented in the DAM, then the key verge rates for duct rental align more closely across the geographies.

Q. 16 Do you agree with ComReg's view that PIA prices, should be fixed per year for a period of five years, but monitored annually with reference to Eircom's HCAs and AFIs? Please provide reasons for your response.

145. Disregarding the recent norm of ComReg for significant delay in market review processes, eir broadly agrees with the approach that on the one hand give certainty over the price control period but at the same time allows annual monitoring and potential adjustment.

146. There are four main drivers that will affect the levels of eir charges for PIA services over the next five years where these are subject to price control by cost orientation. These drivers are i) the level of investment in civil infrastructure caused by IFN and NBI FTTH, ii) the changes in unit input costs represented by materials and contractor charges, iii) the return required to match eir's cost of capital incurred making those investments, and iv) treatment of different pricing options.

147. In principle it should be possible to project the first three inputs with sufficient accuracy over that period to ensure that charges for pole and duct access do not give rise to any substantial over recovery or under recovery over that period.

148. The eir IFN program for urban FTTH, which serves premises previously covered by FTTC, is already in progress, and the length of the remaining projects is well-defined. [✂]. Similarly, the NBI program to serve IA premises is aligned with contractual commitments to the Irish government. Combined, these represent the quantum of investment by duct length and pole numbers in the eir access network civil infrastructure. In other words, the timing and physical extent of this investment should be well understood, and both programmes will conclude near the end of the control period, making it unlikely that any significant new programme will commence before the control period's conclusion. In any case, with the PI works elements of the IFN and NBI contracts due to finish by mid-2026, virtually all the eir access network duct routes will have had blockages cleared as well as other remediation undertaken since 2012.

149. After remaining constant for some time, the last two years have seen two major renegotiation of contractor charges for PI works. These will see a substantially

different starting point from the inputs used in the Revised CAM in 2015 in two ways. [✂]

150. eir expects that similar positive price trends could occur in other key material inputs, such as poles and manholes. However, it should be feasible to predict these changes over the control term with enough accuracy to inform prices within acceptable margins. This is partly due to the elimination of the tilted annuity previously used in the Revised CAM, which made the annual charge overly sensitive to price trends.

151. Finally, in terms pricing options, ComReg's suggested flexibility will require ongoing and careful review of the inputs to the PAM and DAM to ensure that they accurately reflect how eir recovers its costs over time from various operators, i.e. whether certain costs should be expensed versus annualised.

152. See also eir's response Question 12 and the proposed glidepath for NBI pole prices in the IA. If implemented the glidepath will provide both NBI and eir with greater predictability and certainty over the five-year period. It will also give NBI additional incentives to roll out services to the IA, which would ultimately benefit the consumers in that area. At the same time, it would also reduce eir's exposure to the risks associated with prolonged copper switch-off.

Q. 17: Do you agree with ComReg's proposal that the process related costs for PIA should be recovered by Eircom as an upfront payment, which should be calculated and pre-notified in advance by Eircom based on the template described at 7.267 - 7.268 ? Please provide reasons for your response.

153. ComReg propose that process related costs for PIA should be recovered by eir as an upfront payment, which should be calculated and pre-notified in advance by eir based on a template.

154. eir agrees with the principle of recovery of process costs upfront. In addition, it is important to note that costs related to setting up a PIA product, but which do not result in an agreement to rent a PIA product be recovered. For example, where the operator decides, after submitting a duct access order to open eir, not to proceed with the project and cancel their order. If the order has not reached actual implementation in the field, then open eir would issue a bill to recover the costs of the account manager and other open eir staff as appropriate.

155. However, eir is concerned that ComReg has only provided high-level specifications for the template and has not leveraged the significant amount of information already provided in the ANM process to be more specific in its requirements. While eir can provide information on the various steps involved in managing PIA orders and any associated unit costs, it is unclear how this information can be translated into a useful template for determining process costs.

156. Additionally, various scenarios of access for PIA services will need to be assessed in terms of scope and scale. Indeed, it can be questioned whether NBI can be included within this template approach. NBI use of pole and duct access for its FTTH service to customers in the NBP IA is larger by several orders of magnitude. NBI requires access to several thousand kilometres of eir duct and will hang fibre optic cable on hundreds of thousands of eir poles. eir's network and wholesale division, open eir, is supporting this deployment with a rolling team of engineering, design, product, and finance specialists. The cost of this team is dedicated to the NBI programme.

157. ComReg should work with eir to ascertain what is reasonably required and obtainable for the purpose of developing a template. In particular, the ability and

reasonableness of including NBI within such requirements, which may already be more efficiently met through existing arrangements, need to be assessed. Further, any compromise required in the level of information eir can accurately report must be considered by ComReg in advance of making a final determination. Imposing requirements retrospectively on eir after a decision has been published is not acceptable.

158. In addition, the process charge list should also incorporate cost items that will give operators the incentives to behave efficiently. For example, consider an operator has planned work on the open eir network on a day/time (via Whereabouts submission) which open eir then intends to supervise, but the operator does not show up. This must be chargeable by eir. Similarly, where there is a wasted truck roll, i.e. the operator reports a fault that is subsequently not found, open eir costs must be able to charge for these costs.

Q. 18 Do you agree with ComReg's view that Eircom should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced, and calculated and pre-notified in advance by Eircom based on the template described at paragraphs 7.263 -7.264 ? Do you agree that the cost of pole furniture removal and replacement should be capitalised against the asset that the furniture is associated with, in its cost accounting systems? Please provide reasons for your response.

159. ComReg propose that eir should recover any additional costs of replacing a pole with pole furniture located on it by means of a one-off charge levied at the time the pole is replaced and that these should be capitalised against the asset that the furniture is associated with.

160. [✂]

161. Notwithstanding this, eir agrees that any additional cost of replacing a pole with pole furniture is recovered as a one-off charge from the requesting operator. This is consistent with sending a clear economic signal that engaging in this activity incurs a cost. This will ensure that the requesting operator considers the costs and benefits of installation which will promote efficient use of resources.

162. However, at paragraph 7.276, ComReg proposes that eir "*is required not to capitalise the additional cost of pole furniture removal and replacement against a pole asset. Instead, Eircom should capitalise it against the asset that the furniture is associated with, e.g., against a copper cable asset if it is related to copper cables or a fibre cable asset if is associated with fibre cables, in its cost accounting systems. This is to ensure that the cost is not treated as a pole related cost that could be included in a future Pole Access price. In those instances where the furniture belongs to an Access Seeker, the costs should not be capitalised by Eircom, but instead should be treated as an operating cost in a similar way to the Repayable Works Order process used to capture the costs associated with moving poles and infrastructure for third parties such as local authorities.*"

163. eir considers that this capitalisation policy introduces a significant amount of complexity in systems, accounting treatments and regulatory cost attributions for

what is likely to represent a relatively non-material level of cost. To implement this change, eir will need to maintain detailed records of the mapping between individual pole assets, the ownership of pole furniture on each pole, the costs associated with the pole furniture removal / replacement and a mapping of what cables are supported by a given pole. eir would also need to use data on the age of cables supported by a given pole in order to match the depreciation profile of the costs related to pole furniture over the remaining life of the cables.

164. A pole may contain multiple cables supporting multiple services (e.g., copper and fibre) suggesting that the capital costs associated with the pole furniture would need to be split into separate pools with different lives applied to them. In addition to increasing the level of complexity in the FAR and operational systems, cost accounting studies would need to be updated to ensure appropriate amounts of costs are going to services based on the underlying cables which support them. This would also require monitoring and maintenance of the data associated with each pole, such that if one of the cables were removed the remaining NBV would be recovered over the remaining life of the remaining cable, i.e., moved from copper to fibre.

165. These proposals and its impact on the FAR, the cost accounting model and operational systems would materially increase the complexity and scope of both the statutory and regulatory audit questioning their proportionality. To ensure equivalence between eir and Access Seekers, and to avoid the significant complexity highlighted above, it may be more appropriate to expense both external and internal pole related costs. This would warrant a discussion between eir and ComReg to agree a pragmatic approach to the accounting treatment of these costs.

Q. 19: Do you agree that (i) tree trimming costs associated with ongoing pole replacement should be recovered in the recurring pole rental price and (ii) tree trimming costs to prepare aerial cable routes in advance of cable deployment should be recovered by means of a one-off charge (calculated and pre-notified in advance based on the template referred to at paragraphs 7.263-7.264)? Please provide reasons for your response.

166. ComReg propose that if eir incurs tree trimming costs to facilitate deployment of an Access Seeker's cables along an eir pole route, these costs should be recovered as a one-off charge from the Access Seeker. Conversely where tree trimming is undertaken by eir as part of a dedicated preventive maintenance programme these are to be recovered in recurring rental charges.

167. eir agrees that tree trimming costs associated with route preparation for the deployment of cable should be recovered as a one-off charge from the requesting operator. This approach is consistent with cost causality.

168. For comments on template, please see response to Question 17.

169. eir agrees that tree trimming costs associated with route maintenance should be recovered as part of on-going pole rental. This approach is also consistent with sharing of common costs.

Q. 20: Do you agree with the proposed pricing options that Eircom should make available to PI Access Seekers, as presented above, for Duct Access / Direct Duct Access services and for Sub-Duct Access? Please provide reasons for your response.

170. ComReg propose four separate pricing options: (i) Levy an additional charge where the cost of remediation exceeds a certain threshold; (ii) Charge remediation upfront with a discounted rental; (iii) Access seeker does remediation and seeks reimbursement from eir up to threshold; and (iv) Access seeker bears the cost of remediation, but with discounted rental.

171. While eir appreciate the pricing flexibility inherent in the ComReg proposal, eir believes the simpler option would be to always let access seeker pay upfront for remediation and make appropriate corrections to the rental. This will also alleviate problems in the workings of the threshold and its distortionary properties, as discussed in response to Question 11.

172. Requiring operators to pay upfront for remediation, as ComReg is aware, is the cost approach eir has adopted for NBI duct under the Major Infrastructure Programme. The demand for copper services in the NBP IA and in the adjacent Rural Commercial area where most of NBI transit occurs, is in decline and will continue to decline as FTTH services are taken up. As a result, no new copper cables are required to support that demand, and the investment in underground assets is entirely driven by NBI requirements. Therefore, it is appropriate to recover all duct remediation associated costs up-front.

173. In contrast, eir's current agreement with NBI for poles, as ComReg is aware, is that eir will fund the investment in pole replacement in the IA (and for any transit poles that NBI testing indicates need to be replaced) and the recovery of that charge will be through the annual rental charge. This is because replacing poles is an ongoing activity to support the operation of copper cables and associated telephony and ADSL broadband services delivered in the IA. The normal cycle of pole testing would lead to all poles that fail a test being replaced over a period not substantially longer than the planned NBI deployment. This means that eir would still need to invest in poles to deliver rural copper services, even without state aid for rural high-speed broadband. While it is reasonable to recover this business-as-usual

investment through rentals, additional or accelerated pole replacement should be covered upfront.

Malachy Fox

From: Rory Ardagh <rory.ardagh@siro.ie>
Sent: Friday 3 March 2023 16:58
To: Malachy Fox
Subject: SIRO Response to the PIA Market Review

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and believe the content is safe.

Dear Malachy,

Siro welcome the opportunity to respond to the PIA Market Review.

At a high level, SIRO agrees fully with the approach adopted by ComReg in considering the issues relevant to the market review. Moreover, we agree that the proposed draft decision by ComReg represents a proportionate intervention in the market to mitigate the risk of market abuse by the dominant operator.

Practically, with regards to non-pricing remedies, we would ask that you would consider two submissions:

1. The lack of a modern interface to engage with Eircom undermines the entire ordering process. Not having the equivalent of a modern portal/gateway to allow us to raise and track orders, report on open orders in bulk, search by one of the various order reference numbers, have visibility of the underlying progress within Eircom regarding delivery, have access to road opening license reference numbers and status updates, etc. in real time is a real barrier to engage with and benefit from the availability of the product. In our view, an efficient network operator, should be required to operate in an efficient, transparent and non-discriminatory manner using modern technology. That Eircom has failed to date to implement this internally is not an excuse that they should not be required to implement it at all.
2. Comreg also needs to consider areas where eir have obsolete cables, drop wires and distribution boxes deployed on 3rd party premises, for example on buildings in town centres where eir have deployed a distribution box on private property and subsequent drops are façade fed. In most cases the only way to service these premises is by a façade deployment. When this network becomes obsolete there is no evidence that eir remove this equipment thus allowing access for others to deploy network. In deploying new network this practice causes issues in gaining consent from property owners to put additional network on the premises and also issues arise with the Local Authorities in conservation areas when agreeing the deployment of fibre in these areas due to the congestion of cabling on façade.

Additionally, we have a concern that the €11,000 per km remediation threshold is too low for urban environments, and that the use of rural comparators, notwithstanding the uplift, means that this quantum is insufficient. We would encourage ComReg to provide for a review mechanism during the middle of the term of the review period to re-examine this with learnings from experience to date.

Kind regards,

Rory Ardagh

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Virgin Media response to:

ComReg's Physical Infrastructure Access Market Review

March 2023 - Non-Confidential Version

Foreword

Virgin Media Ireland Limited ('Virgin Media') welcomes the opportunity to participate in ComReg's Review of the Passive Infrastructure Access ('PIA') Market Review.

Our response is provided below. The response is non-confidential.

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1 Introduction

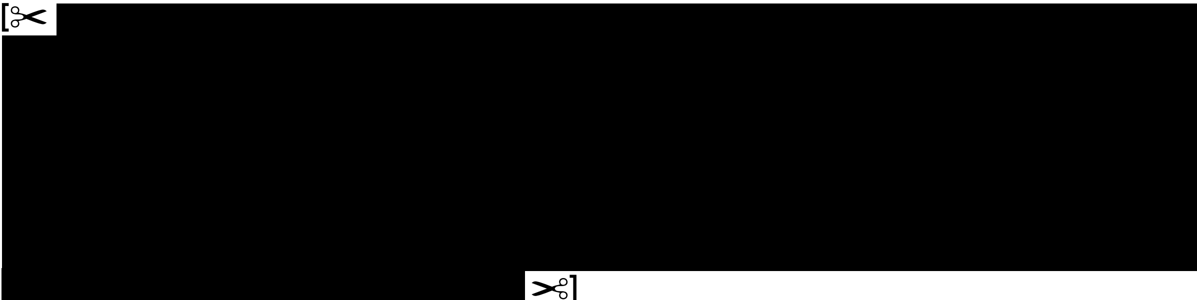
Market context and Virgin Media plans

The Commission for Communications Regulation ('ComReg') Market Review Consultations are happening at an important point in the development of fixed communications markets in Ireland. Technology is changing the way that customers now access broadband, with fibre to the premises ('FTTP') starting to take off, and copper-only based services in rapid decline.

A number of organisations (including Eircom, NBI, SIRO and Virgin Media) are investing in the deployment of FTTP networks (Virgin Media is in the very early stages of its investment journey). This creates the prospect of network-based competition emerging over the next five years, which if allowed to develop should bring long term benefits and choice to consumers and to the Irish economy at a time when access to high quality broadband has never been more important.

Virgin Media is starting to embark on a number of strategically important investments. Virgin Media has commenced (since Q1 2022) the deployment of FTTP across its network and is also for the first time moving into wholesale markets, with Vodafone confirmed as the first customer in October 2022,[1] [✂ ✂]

Setting the right regulatory framework through the Market Reviews will be crucial to the development of a well-functioning market driven by fair competition. The **emergence of network-based competition is not inevitable** – it needs the right regulatory environment to ensure it develops successfully. In particular, the framework put forward by ComReg needs to encourage long term investment in Very High-Capacity Networks ('VHCNs') and to ensure that in markets where Eircom has Significant Market Power ('SMP') it is prevented from harming the development of network-based competition, which it would otherwise have the ability to do, and which would be to the long-term detriment of Irish consumers and the economy.



In its current Strategy Statement for the electronic communications sector ComReg sets out its strategic intent as *"..a competitive sector that delivers efficient investment, innovation, and choice."* Amongst the five key indicators of this strategic intent are *"..regulatory certainty that allows for efficient investment" and "..a sector that is attractive to investors."*[2] ComReg makes similar commitments in its Draft Strategy Statement for 2023-25 (which is presently subject to a consultation process).

There is therefore a great opportunity for ComReg (and a duty for it under the Communications Regulation Act and the European Electronic Communications Code) – to establish an appropriate regulatory framework, which will be one that combines (i) setting strong incentives for investors; (ii) preventing the SMP operator from harming efficient competition; and (iii) safeguarding the long-term interests of consumers.

1 See Virgin Media announces wholesale deal with Vodafone Ireland

2 See ComReg-ECS-Strategy-Statement-English-Dec-7-Final-Web-1.pdf

Such a framework will help ensure that network based VHCN competition can develop and in turn help deliver positive outcomes for consumers including better prices, more choice and greater innovation.

In this regard, Virgin Media notes Recital 27 in the European Electronic Communications Code ('EECC'), in which it is stated:

"Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares."[3]

This shows that the European Union ('EU') recognises that incentives to efficient investment need to be **complemented** where necessary by regulation to achieve the end goal of effective competition.

ComReg is promoting the importance of PIA by running a separate review of this most upstream wholesale market (PIA having previously been a remedy in the WLA market). In theory, a fit for purpose set of Eircom PIA products could play an important role in fostering infrastructure-based competition and the development of quality VHCNs. However, the current Eircom PIA product set is not for fit for purpose and is consequently little used, other than by National Broadband Ireland ('NBI') who have little choice. ComReg should use this Market Review to address this problem. Failure to do so would be a missed opportunity.

ComReg is right to find that Eircom has SMP on a national basis in the PIA market. Further, ComReg is also right not to then deregulate the downstream wholesale markets simply because SMP has been found in the PIA market. The approach taken by ComReg is the correct one – which has been to carefully assess the conditions in each market under consideration (while considering the relevant linkages between them) – and apply regulation on that basis. In this regard, for example, ComReg is correct to apply SMP on Eircom in the Commercial NG WLA market[4].

3 See Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance. (europa.eu) paragraph (27).

4 Virgin Media makes further comments on this in its response to ComReg's review of the WLA and WCA markets.

2 Executive Summary

The ComReg review of the PIA market comes at an important moment in the development of infrastructure / network-based competition in fixed wholesale markets and in the proliferation of FTTP across the state. If successful, these things will support benefits to consumers in terms of choice, price, and innovation and to Ireland in terms of improved competitiveness and productivity.

To date, other than in the IA (where there is little choice for NBI but to use it), Eircom's PIA product has played a marginal role in the development of infrastructure-based competition. This is despite Eircom being obligated to offer PIA on regulated terms for over a decade.

In Virgin Media's view, this is because the current Eircom PIA product is not fit for purpose. In particular, the service is difficult to use, suffers from poor quality of service, and isn't easily scalable.

Virgin Media considers that Eircom has been effective at limiting the usability of PIA, and in slowing the rate of product development, to the detriment of the product's attractiveness to access seekers. Virgin Media is also concerned that at the same time Eircom's own downstream business appears to have been able to use the service effectively, and at scale. If the product is improved, Virgin Media will use the product in greater volumes.[5]

Virgin Media believes that if ComReg wants to see PIA play a bigger role in promoting the development of VHCNs, then there needs to be a step-change in the quality and usability of the Eircom PIA product, and for this to happen, ComReg needs to be far more 'hands-on.'

Virgin Media supports ComReg's proposal that Eircom has SMP for PIA on a national basis, and that ComReg is proposing to impose a comprehensive suite of price and non-pricing remedies. Virgin Media also supports ComReg's worries regarding the levels of compliance from Eircom, and its intent to strengthen the regulatory governance model.

However, Virgin Media thinks that ComReg should go further than is currently being proposed. In particular, ComReg should drive real improvements to the usability of the PIA product by imposing additional SMP remedies in the form of Quality of Service ('QoS') Standards for provision and repair, and in imposing a requirement for Eircom to produce an Internal Reference Offer ('IRO') setting out all differences in product and process when offered to external access seekers versus Eircom's own downstream business.

There is therefore an opportunity in the Market Review for ComReg to address the current deficiencies in the Eircom PIA product, and thereby enhance its ability to play a role, and not just in the IA, in promoting infrastructure-based competition, for the long-term benefit of consumers. If this opportunity isn't taken, the risk is that Eircom PIA continues to be sub-optimal and continues to be play a marginal role.

5 Virgin Media can see particular potential for the PIA service in greenfield sites.

3 Market Definition and Assessment of Market Power

Key points

ComReg correctly defines the relevant PIA Market. ComReg makes a good assessment of the telecommunications and non-telecommunications PI networks in Ireland, and rightly finds that the Eircom PI network is the only one likely to be suitable for access seekers wishing to offer Electronic Communication Services ('ECS').

ComReg is also right to find that the market is national in nature given the high degree of homogeneity of competitive conditions across the state. It is also important to note the characteristics of the Irish PIA market, as being both separate and distinct from equivalent markets in mainland Europe (i.e., through limited number and size of potential PIA competitors, geographic market conditions etc), such that any prospective analogy or assumptions by ComReg as between market conditions in Ireland and other European markets cannot be considered properly evidenced or justified.

ComReg correctly finds that Eircom has SMP in this market. The evidence in support of this finding is clear and overwhelming – there is no effective competition to Eircom in this market, nor (absent sufficient regulation) is there any prospect of effective competition developing during the period covered by the Market Review. Following the PIA market's satisfaction of the three limbs of the 3 Criteria Test ('3CT') criteria, it is only right to assume that an appropriate *ex-ante* regime is warranted (and is indicative of a market characterised by the presence of SMP).

Virgin Media strongly supports ComReg's finding that, following the formation of Fibre Networks Ireland ('FNI'), it is appropriate to find that there is one PI network across the state, which is under the effective control of Eircom. It is important that Eircom does not evade regulatory obligations through corporate restructuring.

Response to ComReg questions

Q1. *Do you agree with ComReg's definition of the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

Virgin Media agrees with ComReg's definition of the relevant PIA market.

ComReg is right to define the focal product as telecommunications specific Passive Infrastructure ('PI'). It is clear from the analysis conducted by ComReg that the non-telecommunications specific PI networks are not a suitable substitute for Eircom's PI.

ComReg is also right to find that none of the telecommunications specific PI networks, including Virgin Media's, are suitable substitutes for Eircom's PI.

ComReg does a good job in assessing the potential suitability of various PI networks (both telecommunications specific and non-telecommunications specific). The analysis involves a thorough examination of the factors that would be relevant to a potential access seeker and covers ease of deployment; ability to breakout for connections; level of network resilience; repair timescales; availability of data / surveys; levels of redundancy / spare capacity / geographic location and density (also referred to as 'capillarity'); and geographic extent. These are all relevant factors that potential access seekers would need to consider in deciding whether to make use of PI or not. It is clear from the analysis that Eircom's PI network is without rival and is the only one likely to be suitable for access seekers that are seeking to deploy ECS at any scale. It is also clear that there is no prospect of any rival to Eircom emerging during the period covered by the Market Review.

Virgin Media supports ComReg's analysis of Virgin Media's PI assets, which clearly shows that they are not suitable for access seekers. ComReg rightly finds that Virgin Media's PI network is non-contiguous and lacks capillarity. ComReg is also right to note that, given the architecture of Virgin Media's network, even if an access seeker did use Virgin Media's duct, it would then need to mount its own fibre on the eaves of premises, or build new duct to each itself, and would need to obtain the premises owner's permission to do so. ComReg also correctly notes that, while Virgin Media has commenced migration from its Hybrid Fibre-Coaxial ('HFC') network to a fully fibred network, this will not impact significantly on the current volume of the PI network as Virgin Media will largely reuse established cable routes rather than building new PI.

Finally, ComReg is right to find that the geographic PI market is national in nature. It is very clear from the analysis that there is a high degree of homogeneity in relation to the competitive conditions across the entirety of the Irish state.

Fibre Networks Ireland

Virgin Media agrees with the approach being taken by ComReg regarding the creation of FNI further to the transaction between Eircom and InfraVia.[6] ComReg is right to find that there is still one PI network, and that the network remains under Eircom's control.

It is imperative that Eircom is not allowed to escape SMP regulation that would otherwise be applied through corporate restructuring – and it is right that the same regulation is applied to Eircom's overall PI assets, including those now technically owned by FNI.

6 Through the transaction the ownership of Eircom's PI assets that are primarily outside of the National Broadband Plan Intervention Area passed to Fibre Networks Ireland.

Q2. *Do you agree with the SMP assessment above and that Eircom is likely to have SMP in the Relevant PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

Virgin Media strongly agrees with ComReg's finding that Eircom has SMP in the relevant PIA Market, assessed on a forward-looking basis. The evidence supporting this finding is clear and overwhelming and ComReg has followed best regulatory practice in arriving at this conclusion.

Given the PIA market's notable absence from the Commission's 2020 Recommendation (particularly given the uniqueness of the Irish market), Virgin Media notes ComReg's statutory requirement (prior to regulatory intervention) to assess how meritorious a market is of *ex-ante* regulation (and the establishment of a SMP) noting that said assessment should be based on the 3CT as set out in Article 66(1) of the EECC.

On the fact base evident in the PIA market in Ireland, Virgin Media agrees with ComReg's 3CT assessment – in that the PIA market in Ireland is clearly characterised by: (1) the presence of high and non-transitory barriers to entry; with a (2) market structure which does not tend towards effective competition within the relevant time horizon; and where (3) competition law alone will not be sufficient to address the market failures identified.

The structural barriers to entry to this market are high and non-transitory in nature – in particular the level of (sunk) costs to build PI are huge. Investment in rival PI would entail a high risk that investment outlay would not be fully recovered.

The analysis conducted by ComReg clearly shows a complete absence of effective competition to Eircom in this area - it is clear that no other PI network can compete with the Eircom PI network in any meaningful way. Nor is there any sign of competition (absent regulation) developing to any degree through the period covered by the Market Review.

All the criteria assessed by ComReg clearly point to a finding of SMP for Eircom (and Virgin Media would remind ComReg of its statutory obligation to designate a SMP in a market where post regulatory analysis, that market is deemed to be ineffective when it comes to efficient competition[7]). For example, Eircom is the only entity with a ubiquitous national PI network with capillarity, which cannot be easily duplicated; Eircom enjoys significant advantages of scale and scope; Eircom is vertically integrated; significant and non-transitory cost barriers to entry exist; there is an absence of countervailing buyer power ('CBP'); and there is an absence of competition and with no real prospect of any meaningful competition developing (absent sufficient regulation).

Given the evidence available, the finding of SMP is clearly correct. However, Virgin Media would also stress that a finding of SMP is not enough in isolation. As provided for in paragraph 6.12 of ComReg's draft Strategy Statement, *"..competition problems stemming from SMP are only considered to be mitigated when an operator identified as having SMP complies with the full suite of ex-ante obligations that ComReg has imposed on it".* As such, it is an imperative that upon SMP designation in the PIA market, Eircom is required to comply fully to its SMP obligations. All access seekers' confidence in the efficiency of the market will be undermined if full compliance by Eircom is not adhered to.

7 See, for reference, Regulation 27(4) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the 'Framework Regulations'); Regulation 49(8) of the European Union (Electronic Communications Code) Regulations 2022, S.I. No. 444 of 2022 (the 'ECC Regulations').

4 Competition Problems in Relevant PIA Market and Impacts

Response to ComReg question

Q3. *Do you agree that the competition problems and the associated impacts on competition end-users identified are those that could potentially arise in the related markets downstream of PIA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

Virgin Media agrees with ComReg's analysis of the competition problems and associated impacts in the PIA Market. It is right for ComReg to find that, absent regulation, Eircom has the incentive and ability to engage in anti-competitive practices including exclusionary behaviour; leveraging; and exploitative practices.

As discussed further below and in the section regarding ComReg's proposed non-pricing remedies, Virgin Media considers that some of the anti-competitive behaviours that are identified as risks are **already happening**, even in the presence of SMP regulation, and this is a big reason why PIA remains little used (other than by NBI who have no real choice but to use it).

In addition to identifying the competition problems and appropriate remedies, there is therefore an important job to be done by ComReg regarding **Eircom compliance** with the remedies imposed. In this regard, it is also right that ComReg uses the Market Review to examine whether the current regulatory compliance structures / governance model on Eircom are sufficient.

Virgin Media would remind ComReg that it has (sole) responsibility for monitoring and enforcing compliance with SMP obligations, and that every instance of non-compliance has the potential to seriously damage competition. As indicated in paragraph 6.12 of ComReg's draft Statutory Statement, while *'partial compliance'* by a SMP operator may be sufficient for the purposes of encouraging market entry, every unnecessary delay of an access request, or form of anti-competitive conduct, continues to wear away the industry's confidence that appropriate compliance structures are in place (and investment incentives).

Exclusionary behaviour

In the absence of effective regulation Eircom does have the ability to act in an exclusionary manner. ComReg rightly identifies the potential problems arising, which include Eircom engaging in a margin squeeze between PIA and downstream markets; refusing to supply and offering terms that are discriminatory in nature (e.g., by favouring Eircom's own downstream division over other access seekers).

Leveraging

There is also a risk that Eircom, as a vertically integrated organisation, will have the incentive and, absent sufficient regulation, ability to engage in leveraging i.e., using its power in the PIA market to influence outcomes in downstream markets.

In terms of non-price leveraging, ComReg rightly identifies potential risks associated with: Eircom placing restrictions on and / or denying access; engaging in delaying tactics; discriminating in terms of quality; taking advantage of information asymmetries; and unfair quantity forcing.

In Virgin Media's own experience of the **current** Eircom PIA offering, Virgin Media considers that there is evidence of Eircom engaging in delaying tactics and taking advantage of information asymmetries, and this is **in the presence of SMP obligations**. Virgin Media also considers that for the current Eircom product, there are questions to be answered in relation to quality discrimination, where Virgin Media has concerns regarding the inadequate quality of the Eircom PIA product and process which render it very difficult to use, whilst noting that Eircom's own retail business appears at the same time well able to make use of the (theoretically same) PIA product in its own fibre rollout. These matters are further discussed below in the response to the non-pricing remedies and regulatory governance points (Questions 4 and 5) below.

ComReg also identifies the risks associated with price leveraging, where in Virgin Media's view, the key risk would be of Eircom inducing a margin squeeze between PIA and downstream markets to harm competition in downstream retail and / or wholesale markets.

Exploitative behaviour

Finally, ComReg is right to identify the risk that, absent effective regulation, Eircom could engage in exploitative behaviour. The obvious risk here is that Eircom could seek to charge excessive prices for granting access to its PI.

5 Non-Price Remedies

Key points

It is essential that the Eircom PIA service is subject to a comprehensive set of non-price remedies.

ComReg is right to re-impose the remedies already in place, and to make improvements where needed, for example in relation to the Eircom product development process.

However, in Virgin Media's view, a key reason that the current PIA product is so little used by anyone other than NBI (which does not have any choice) is because the usability of the product is poor.

Looking into this further, a big contributing factor to product's poor usability is the inadequate Quality of Service ('QoS') offered, in relation to both provision and repair. Virgin Media considers that the existing remedies which, in theory, should support good QoS (e.g., SLAs) are clearly not strong enough in isolation to drive the right behaviours from Eircom.

Virgin Media considers that ComReg should take the opportunity afforded by the Market Review to conduct a thorough investigation into the PIA QoS offered and impose **additional SMP remedies on Eircom in the form of QoS Standards**. This has worked very effectively in the UK with Openreach and could really assist in improving the usability of the PIA service.

Virgin Media also suggests that the transparency and non-discrimination remedies would be strengthened by the imposition of an additional obligation (building on the existing obligations that exist including EOI) on Eircom to produce an Internal Reference Offer ('IRO') that would set out the all the differences in process between how PIA is used by the downstream parts of Eircom versus how PIA is used by third parties.

Response to ComReg question

Q4. *Do you agree with ComReg's proposed non-pricing remedies in the PIA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

ComReg is right to re-impose a comprehensive suite of non-pricing SMP remedies on Eircom. It is also right that ComReg strengthen the remedies in some areas – for example in relation to governance.

However, Virgin Media considers more can be done through the Market Review process. In particular, Virgin Media considers there should be a closer examination by ComReg of why, several years after it was launched, the Eircom PIA product is still so little used, other than by Eircom's own downstream arm, and by NBI (which does not have any other option).

In Virgin Media's view, a big reason why the PIA product is so little used by access seekers is that it is not presently fit for purpose. In particular, the product is burdensome to use operationally, and suffers from poor QoS.

Within Virgin Media, the Eircom PIA product is considered a headache to use, and in consequence tends to be adopted as a 'last resort' where there are no other viable options available. If the product and its surrounding processes were more efficient (which they should be by now), Virgin Media would make greater use of the product.

Virgin Media considers that Eircom does not wish for PIA to be widely used by competitors and has been effective to date at making the service difficult to use and at stifling its development. Virgin Media considers that the approach taken by Eircom calls into question its compliance with existing SMP obligations.

To improve the usability of Eircom's PIA product offering, ComReg should further strengthen the proposed remedies in key areas **and** take a more proactive approach to driving compliance (both in letter and spirit) by Eircom. Virgin Media provides further commentary on these matters below.

Access remedies

To be an effective remedy itself, the PIA product needs to be supported by a comprehensive set of access remedies. Virgin Media therefore supports the proposed re-application of existing remedies, and the improvements that ComReg proposes in some areas. However, Virgin Media considers that additional remedies are also needed to help improve the QoS, and thereby usability, of the PIA product.

ComReg is right to require Eircom to meet a detailed set of remedies, including obligations to meet reasonable requests (and justify where requests are rejected); obligations to provide access to specific products and facilities that are needed to foster competition; and obligations to meet certain standards offering services on fair and reasonable terms, including having fit for purpose SLA arrangements and being required to negotiate in good faith.

ComReg include an obligation, when Eircom is seeking to withdraw a service, that it obtains permission from ComReg ahead of doing this. It is right that ComReg includes this point of control, but it would be helpful if ComReg could provide assurance in the Final Statement that it will take into account the views of interested industry stakeholders (i.e., ones that would be affected by the proposed withdrawal) as part of its decision-making process.

Virgin Media also supports the continuing obligation that when Eircom is not able to offer PIA, it should be obliged to offer (where reasonably possible) dark fibre. It is also right that the dark fibre service made available in these circumstances remains subject to a cost orientation pricing obligation.

For the Eircom product development process, ComReg is proposing some simplification to the process – Virgin Media agrees with this; the current process is complex and rather opaque, and this could assist Eircom in obfuscating / delaying requests it does not want to progress, to the potential detriment of competition. Binding obligations and proposals that improve transparency and enable a better assessment of how well the process is functioning are therefore welcome.

ComReg then goes on to propose for PIA a **maximum** time for the product development process (from initial request to launch). This aspect of the product development proposals is unique to PIA. ComReg is proposing a maximum timescale of 10 months, rising to 14 months respectively for more complex developments involving systems development.

Virgin Media agrees with the ComReg proposal to impose a **maximum** timescale for product development. This, in theory (provided it is complied with) should reduce Eircom's ability to prevaricate (thereby reducing the utility of the service until the development has occurred) and will give greater assurance to access seekers in terms of development timescales.

What ComReg should, however, guard against is that Eircom doesn't treat the maximum also as a minimum timescale – for example, if there is a product development that could reasonably be completed in 4 months, then Eircom should **not** be seen to be complying with its obligations if it took 10 months to complete the work. ComReg should make this point explicit in the Final Statement and should continue to closely monitor the speed, efficacy and non-discriminatory nature of the Eircom process (in particular Eircom should not benefit from improvements that are not available to other access takers).

Virgin Media would also like to understand why ComReg has selected 10 and 14 months – there is currently an absence of analysis, and so it is difficult to know if these time periods (which still appear overly lengthy for more straightforward product developments) represent what one would reasonably expect from an efficient operator that was incentivised to sell the service in question (which should be the relevant benchmark).

ComReg rightly proposed to treat FNI as being fully under Eircom's control and is applying ex ante remedies in the normal way. Virgin Media further requests, as part of the Market Review, that ComReg analyses what input products are being offered by FNI to OpenEir. If services are being offered by FNI to Openeir but not to other operators, this could undermine the broader operation and effectiveness of ComReg's proposals. Further insight into this area would therefore be welcome.

The Case for Minimum Quality of Service Standards

Virgin Media considers that the current level of QoS for Eircom's PIA product is inadequate in several respects – provision, repair, ability to escalate issues, lack of systems and lack of transparency. This inadequate QoS reduces the attractiveness of PIA, and so reduces its effectiveness as a regulatory remedy.

For example, long or uncertain waiting times for an installation or repair may discourage usage with consequent implications for wholesale and (in turn) retail competition. In addition, there is the potential for discrimination if Eircom were to provide its downstream divisions with better QoS than it provides to other access seekers.

Virgin Media is an active participant in the Civil Engineering Infrastructure ('CEI') Forum, which plays a useful role in tracking industry discussions, but which has not got the powers / mandate to drive the fundamental improvements that are needed for this product, or to proactively drive Eircom's compliance with the letter and spirit of existing obligations.

Virgin Media believes that ComReg should use the Market Review process to conduct a thorough review of the QoS that Eircom is offering in relation to the provision and repair performance for PIA. Virgin Media considers that by doing this, it will find that the levels of QoS being offered by Eircom are inadequate and that this itself if undermining the effectiveness of the remedy.

Virgin Media sets out below in table 1 some of its own experiences and key issues in relation to the inadequate QoS and usability associated with the Eircom PIA service.

Table 1 - *Key Operational Issues for Virgin Media in relation to PIA*

Key issue	Commentary
PIA Repair SLA	Via its OpenEir division, Eircom has issued a PIA repair / service restoration SLA as described in document 'CRD900'. The SLA offered (which OpenEir has indicated is its Best and Final Offer) is a 9 working day fix any damaged PIA product. In Virgin Media's view, 9 working days is unacceptable. There can be 000's of end customers affected by PIA outages, some of them business customers. Having a repair SLA of virtually 2 weeks is clearly inappropriate and inadequate. Virgin Media is aware that BT Ireland has challenged Eircom and subsequently ComReg on this issue and Virgin Media's further understanding is that ComReg then advised BT Ireland to do down the Alternative Dispute Resolution ('ADR') route. In Virgin Media's view, a far more efficient way for the unacceptable repair SLA to be addressed would be for ComReg to intervene and require Eircom to offer a reasonable SLA, given the dependency Eircom customers (and their customers in turn) have on the service. The current terms undermine the attractiveness and utility of the product and call into question the effectiveness of the remedy.
Delayed provisions and lack of escalation process	There have been several instances where Virgin Media orders for subduct that are being installed by OpenEir have been subject to unacceptable levels of delay. With these orders, it is normal that OpenEir will agree delivery dates with Virgin Media, which are then missed (with no repercussions in terms of penalties, fines or otherwise), often on multiple occasions (thereby undermining Virgin Media's ability to manage expectations with its own customers that are in turn reliant on delivery of the service). As an example, Virgin Media is presently monitoring an order that is **2 years old** since order placement (and remains incomplete at time of writing). It is clearly unacceptable that any orders should take this long to complete, however complex they may be. Further, this experience has also exposed that there is no effective escalation process (in fact there is no clear escalation process at all) within OpenEir to facilitate senior level intervention for problematic orders. Again, this is not acceptable and undermines the attractiveness and utility of the product and calls into question the effectiveness of the remedy.

Key issue	Commentary
Set up process for sub duct self-install	One of the processes available for PIA is for operators that are not Eircom to self-install sub-duct. To make use of the process, operators need to script their own 'Work Instructions' for those tasks associated with operator install of subduct within the wholesale OpenEir duct network. OpenEir must then approve each essential Work Instruction. Virgin Media is finding the (currently still ongoing) process for developing its Work Instructions a very frustrating experience wherein OpenEir has been consistently unhelpful and obstructive. Openeir has been unwilling to create a transparent 'Operator guidance' manual in relation to sub-duct self-install to help operators understand what requirements they seek. Further, when questioned, OpenEir refused to state precisely what work instructions an Operator may require for this purpose. A Virgin Media representative was recently told by OpenEir at a CEI Forum that *"..an Operator should know what work needs to be done to install a sub-duct, so therefore Operators should know what Work Instruction require OpenEir approval."* OpenEir would not even confirm to Virgin Media how many different operational processes would require separate Work Instructions (Virgin Media found in discussion with another operator that the number was six). Virgin Media had its Work Instruction proposals rejected 4 times by OpenEir, then on the fifth occasion took advice from another operator (whose instructions had been approved), and had the proposals rejected again (and then subsequently approved). At time of writing the process is ongoing – given the amount of time of key operational people it is consuming. In Virgin Media's view the conduct of OpenEir has been deliberately unhelpful and obstructive and aims to delay and frustrate progress in relation to the sub-duct self-install process (in which regard it is working). This has certainly not been the conduct of an organisation that wants to sell its product to customers.
Lack of QoS Performance Metrics	Virgin Media currently receives no OpenEir performance metrics in relation to QoS performance for PIA (covering either for provision or repair). Virgin Media would like this to be addressed. OpenEir should be required to publish detailed Key Performance Indicators ('KPIs) covering relevant provision and repair scenarios, which can then be split in different ways – i.e., at aggregate level / operator level / show performance for Eircom downstream versus non-Eircom operators etc. Better transparency is a key plank for helping to drive improvement (by identifying more clearly how poor QoS currently is), and by identifying potential issues in relation to non-discrimination. As discussed further below, Virgin Media understands that ComReg will soon be running a separate consultation into KPIs for PIA. Virgin Media looks forward to expanding on the comments provided here in response to that consultation.

Key issue	Commentary
Major Infrastructure Project	Virgin Media has been told on some occasions by OpenEir that a particular PIA facility is not available to use because the work being requested does not qualify as a Major Infrastructure Project ('MIP'). The impression that has been created is that MIPs convey additional status and different order treatment but are solely available to NBI. However, this is not clear (nor are Eircom willing to make it clear) – leaving Virgin Media unclear as to precisely what a MIP is, how one qualifies for a MIP and what differences / benefits such a status confers. Virgin Media would like ComReg to facilitate much greater transparency in relation to this matter.
Process for customer management	[✂ ✂] Further, there is no system for managing QoS transactions – everything is done manually via email with an absence even of appropriate templates. [✂ ✂] but is indicative of a wholly inappropriate way of managing customers – the approach is clearly inefficient and not fit for purpose particularly if a customer wanted to use PIA at any scale. Virgin Media notes that a number of European NRAs already impose requirements for a web-interface system to be in place to deal with wholesale requests.[8]

It is evident that the current remedies that are in place to help deliver good QoS (for example the SLA and service credit arrangements) are insufficient – the incentives on Eircom to save money by offering poor QoS and to reduce the effectiveness of PIA-based competition are clearly stronger.

ComReg needs to address this imbalance (which experience suggests will **not** change, absent a step-change in the levels of regulatory intervention). One means to do this will be by ComReg imposing on Eircom QoS Standards as **additional** SMP remedies.

QoS Standards have been in place in the UK since 2014 when they were imposed by Ofcom on certain Openreach products through the Fixed Access Market Review.[9] Ofcom imposed the QoS Standards because they considered that the QoS being offered by Openreach for certain regulated products was (at the time) inadequate and that this was reducing the effectiveness of the remedies and thereby causing harm.

The concept of a QoS Standard is quite straight forward – a provision or repair metric is chosen, a target applied to it, then a compliance period and geography applied.

8 See BEREC Report on Access to physical infrastructure in the context of market analysis (europa.eu) table 5

9 See FAMR Statement 2014 - Volume 1.docx (ofcom.org.uk)

For example (using a stylised example) a QoS Standard could be set for provision, where the target would be, for example, 90% of provisions need to be delivered on or before the delivery date agreed between Eircom and the access seeker, measured across all of Ireland on an annual basis (i.e. the numerator would be the number of provision jobs delivered on or before the agreed date, and the denominator would be the total number of provision jobs over the same period).

In the UK Ofcom imposed other types of QoS Standard including standards against provision lead times, repair QoS Standards (e.g. x% services successfully repaired within 2 days etc); and also applied some so-called 'tail' QoS Standards for provision and repair which aimed to minimise the % of jobs that took the longest to provision or repair (e.g. a tail QoS Standard could be that no more than x% of overall provisions take more than y working days to deliver).

QoS Standards remain in place in the UK where it is clear they have worked, with Openreach offering consistently better service since their inception, to the great benefit of industry and the regulated products they support.

A major reason that QoS standards have worked in the UK is that, because the QoS Standards are SMP remedies, Openreach has strong incentives to successfully meet them since failure to do so would create the risk of the SMP operator being publicly investigated and taken to task by the regulator.

Virgin Media urges ComReg to seriously consider introduction of QoS standards for Eircom PIA to drive improved usability (and so effectiveness) of the remedy, which currently suffers from inadequate QoS.

Based on its own experience of the Eircom PIA product, Virgin Media would suggest the introduction of QoS standards looking at: (i) % provision jobs delivered on or before the agreed date; (ii) % repair jobs provisioned on or before the SLA (noting separate comments above regarding the inadequacy of certain current SLA terms on offer); (iii) mean time to provide ('MTTP') for provision; plus provision and repair tail[10] measures to limit the number of jobs that take the longest to complete. ComReg would need to conduct further analysis to determine the target levels. Virgin Media would recommend annual compliance periods (which have worked well in the UK and strike the right balance), and a national compliance geography.

Virgin Media considers that the introduction of QoS standards could really help to improve the QoS and thereby usability of the PIA product. ComReg should conduct a further mini-consultation into this matter within the overall Market Review framework and timeframe.

Non-Discrimination

It is essential that Eircom continues to offer PIA in a manner that does not favour its own downstream businesses (covering wholesale and retail businesses), as this would immediately undermine the whole purpose of ex-ante SMP regulation and be detrimental to effective competition in the PIA market. ComReg is accordingly right to re-impose non-discrimination obligations.

However, in Virgin Media's view, there are questions to be answered about whether Eircom is in practice fully complying with the letter and / or spirit of its non-compliance obligations.

For example, Virgin Media is concerned that access seekers (outside of NBI which has no choice) barely use PIA, whereas the product appears to be effectively utilised at scale by Eircom's own downstream businesses (see ComReg paragraph 8.7). This gives rise to concerns that the product and / or surrounding processes lack equivalence when comparing Eircom's own use to external use. Virgin Media makes further comments on Eircom compliance in the section covering Regulatory Governance.

10 In this context tail means minimising the number of provision / repair jobs that take the longest to provide / fix (so called 'tail' orders).

Internal Reference Offer

A mechanism that could help address the concern about non-discrimination would be for Eircom to be obliged to produce, and keep updated, a PIA Internal Reference Offer ('IRO').

The IRO would be in addition to the EOI and Reference Offer obligations already in place. What an IRO would cover is where Eircom is supplying services to itself on a non-EOI basis (e.g., PIA for the purposes of rolling out its own FTTP network), the IRO would contain **any differences in the processes** for internal use of the network access compared to use by third parties.

The IRO would need to be made public as part of the transparency obligations in place and would need to contain as a minimum the same level of detail as the published RO to allow ComReg and access seekers to identify any differences in process.

Virgin Media considers that such an obligation (which Eircom would also need to keep updated), would help provide much needed assurance to ComReg and access seekers that Eircom's PIA service is truly non-discriminatory. The IRO obligation exists in the UK (where BT is also subject to EOI obligations) and is a key support to non-discrimination obligation required of the PIA product offered by Openreach.

Transparency

Transparency is essential for access seekers to understand the regulated services they are using, monitor Eircom performance and so on. Transparency obligations also give ComReg necessary insight into whether other obligations imposed are working effectively (or not), and so be in a position take timely action where required. It is also essential that access seekers are given necessary notice where changes to process, terms and conditions are happening – this will enable them to make changes their side and so not be disadvantaged from a competition standpoint. Virgin Media therefore supports the broad set of transparency obligations proposed by ComReg.

As discussed above, Virgin Media considers that Eircom should be obligated to develop a set of KPIs covering relevant different aspects of PIA QoS. These should cover different provision and repair scenarios including (non-exhaustive list): (i) % provision jobs completed on or before the agreed date; (ii) % repair jobs completed on or before the SLA; (iii) MTTP; (iv) KPIs covering provision and repair tail measures. The KPIs should then be capable of being split in different ways – e.g., aggregate all customer level / operator level / show performance for Eircom downstream versus non-Eircom operators, show performance regionally etc. Development of such a set of KPIs – which should be made public where possible – would greatly assist in understanding the levels / trends of QoS for the PIA service, and publicly shine a light on performance where it is inadequate.

Virgin Media understands that ComReg is due to run a separate consultation soon on PIA KPIs. That being the case, Virgin Media will make further comments on this topic in response to that consultation. Where possible, it is desirable that the timing of that consultation's implementation is aligned with the timing of these Market Reviews – since KPIs need to form part of a wider set of remedies for them all to act effectively in concert.

Finally, the transparency obligations would also need to be expanded the include the IRO and QoS Standards obligations (as discussed above), should these be adopted.

6 Price Control, Cost Accounting and Accounting Separation Remedies

Key points

Virgin Media supports the ComReg proposals to reimpose a comprehensive set of Price Control, Cost Accounting and Accounting Separation remedies on the Eircom PIA product.

It is right that a price control is imposed based on cost orientation. Virgin Media agrees with ComReg that cost orientation is the only form of price control that is likely to fully address the competition problems identified (for example a cost orientation obligation will be the most effective in preventing Eircom from charging excessive prices for PIA).

The ComReg proposals also provide continuity and certainty, which will be of benefit to access seekers in terms of making investment decisions, while allowing Eircom to recover its efficiently incurred costs.

Cost orientation should, in theory, encourage the use of PIA by organisations seeking to build VHCNs, and while this is not presently happening at scale, Virgin Media considers that this is largely down to the poor usability of the PIA product rather than the way it is priced (further comments on this are provided in comments on the non-pricing remedies above).

Virgin Media does not have further detailed comments to make in relation to these matters.

7 Regulatory Governance Obligations

Response to ComReg question

Q5. *Do you agree with ComReg's proposed Regulatory Governance Obligations for the PIA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

ComReg rightly highlights the importance of Eircom complying with the SMP obligations to be imposed on it in the PIA Market. If this does not happen, it undermines the whole purpose of the *ex-ante* regime, with potentially significant and negative consequences for other operators. As observed in Section 7 of ComReg's (current) Strategy Statement, it is only when an SMP operator complies with the full suite of *ex-ante* obligations that the identified competition problems are mitigated. In addition to ComReg enforcement, Virgin Media is of the view that it is Eircom's duty (given its status of SMP and previous ComReg investigations and settlements) to have in place internal controls to proactively prevent and detect non-compliance. Virgin Media considers that either Eircom has not put in place the appropriate operational and governance measures to ensure compliance with its SMP obligations, or they are not being correctly utilised.

The context in this regard is not promising. For example, ComReg note that the Information Oversight Body ('IOB') set up by Eircom as part of a set of commitments it agreed to following High Court proceedings was not Independent as it should have been, with ComReg saying: *"However, following its review of the IOB's first report of 8 September 2021, ComReg noted that the IOB Report was wholly based on evidence provided by Eircom and that Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate. As such ComReg considered that the IOB was not in a position to adopt an opinion on the overall effectiveness of Eircom's RGM and as a result, the IOB Report – while providing some information about aspects of Eircom's RGM – did not provide ComReg with reason to place meaningful reliance on the effectiveness of Eircom's RGM when ComReg is exercising its regulatory functions."* [11] ComReg then go on to say that it *"..continued to have some concerns around the state of competition and the culture of compliance within Eircom in the presence of the enhanced RGM, and that it would continue to review the effectiveness of the RGM and Settlement Agreement and consider if more regulatory action is required."* [12]

The picture being painted by ComReg is that Eircom cannot be trusted to fully comply with its SMP obligations, and that the current processes and culture that exist in Eircom to monitor and ensure compliance are inadequate.

This is a worrying and unacceptable situation – which cannot be explained away as being associated with set up problems – given that Eircom has been an SMP operator for decades and has had more than sufficient time to put in place the necessary processes to ensure that a proactive culture of compliance is established.

Further, ComReg rightly raises concerns regarding the low and slow take up of PIA (excepting NBI, which has little choice but to use PIA) from non-Eircom access seekers, when at the same time Eircom itself appears to be able to successfully make use of the product, including in its FTTC, Rural 300k + and IFN programmes.

11 See WLA and WCA Market Reviews Consultation, paragraph 9.628.

12 See WLA and WCA Market Reviews Consultation, paragraph 9.629.

ComReg says *"ComReg is concerned in this regard that the lack of take up of passive based PIA products suggests that Eircom may not be playing their role in full in supporting the development of sustainable infrastructure-based competition both from an Access Seeker's perspective and that of alternative networks who would use passive PIA products to expand their existing footprint."*[13]

ComReg also correctly identifies the creation of FNI as a separate legal entity to hold some of the PI previously in the ownership of Eircom, as a development that could *"..potentially impact on Eircom's incentives in making available PIA products that facilitate effective competition."* [14]

Given this backdrop and noting the importance of effective SMP remedies to the development of the PIA Market and markets downstream of it, plus ComReg's stated interest in fostering infrastructure-based competition, it is rather mystifying why ComReg is choosing to take the *"least interventionist"* option available to it to address the shortcomings identified. ComReg's proposals would be strengthened if it were to lay out the options (including the more interventionist options available) in more detail, with a better explanation as to why the least interventionist one is appropriate at this time.

That said, Virgin Media supports ComReg's recognition that there is a problem, and that it is proposing to act. The proposal appears to be based on a strengthened Statement of Compliance ('SoC') obligation, which will be comprehensive in nature, and which will need to be signed by Eircom person(s) of appropriate seniority. Virgin Media also supports the proposed timescales for the SoC to be submitted (within three months of the Final Decision) and considers that the SoC should be available to stakeholders to review. Eircom demonstrating compliance with its obligations will have a direct bearing on all other operators in the PIA Market – and it is right that those operators can view (and comment as necessary) on the SoCs produced. If Eircom's culture of compliance is currently in question, which it appears to be, then wide transparency in relation to compliance may be a useful tool to drive improvement. To note, if this approach does not lead to improvements in the near term, ComReg should not delay in taking further steps to ensure that a proactive culture of compliance is embedded at Eircom.

Virgin Media notes that the culture of compliance at Eircom would benefit from a genuinely independent IOB and active enforcement with use of ComReg's new civil enforcement powers. Virgin Media notes in this regard the positive role played for in the UK by the Equality of Access Board (in relation to Openreach as the SMP incumbent). It would be useful in its Final Statement if ComReg should provide an update on the status of genuinely independent IOB being created, and even if this is not a matter for the Market Reviews, what steps are being taken by ComReg to ensure that such a body is properly constituted.

As discussed above, in Virgin Media's view the current PIA offering is not fit for purpose precisely because it is difficult and inefficient to use – there is an opportunity through the market review to address this problem. Failure to do so will likely mean PIA continuing to play, outside of the IA, a marginal role in the development of broadband in Ireland.

One key aspect that will need to improve, if possible, is the speed at which action is taken. For example, when reviewing the ComReg determination of the dispute between NBI and Eircom regarding the former's request for Duct Access (Ref 22/89), which was determined on 27 October 2022, Virgin Media notes that NBI's first request into Eircom was made in August 2021, and in the dispute determination (in which ComReg found against Eircom), Eircom was given a further 85 working days to comply with various requirements as set out in the WLA Decision Instrument. In other words, **over fourteen months** after NBI had first made its request to Eircom, resolution of its request was potentially still months off even after a positive finding for it in a regulatory dispute.

While ComReg's decision in this dispute was the right one, Virgin Media does not consider that this was a timely process or placed an effective incentive on Eircom to comply with its obligations in a proactive and timely manner.

Given all these considerations, Virgin Media urges ComReg to take in future a more proactive approach to driving compliance at Eircom regarding PIA.

13 See PIA Market Review, paragraph 8.7

14 See PIA Market Review, paragraph 8.9

8 Regulatory Impact Assessment

Response to ComReg question

Q23. *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.*

Virgin Media strongly supports ComReg's preliminary conclusions on the Regulatory Impact Assessment. Given the continued competition problems identified, it is right and proportionate that ComReg re-impose a comprehensive set of SMP remedies on Eircom. In fact, and as discussed above, Virgin Media considers that a broader set of SMP remedies (and a proactive approach to ensuring compliance with those remedies) are justified to make the PIA service fit for purpose.

Virgin Media supports ComReg's selection of 'Option 4' – this provides the remedies in the areas that are necessary to support the development of a well-functioning market (which it currently is not). This option is in fact the only one that will optimise the chances of competition developing, to the long-term benefit of end users.

The obligations associated with Option 4 are not burdensome on Eircom; Eircom is well able to manage this suite of obligations and is already set up organisationally to do so. In fact, as ComReg rightly identifies in its SoC / regulatory governance proposals, Eircom needs to do more to demonstrate that it is complying, in letter and spirit, with the obligations already in place.

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