



Commission for  
**Communications Regulation**

**Response to Consultation and Decision**

**Rental Price for Shared Access to the Unbundled Local loop**

**Response to Consultation Document No. 08/106 and Decision**

<b>Decision No:</b>	<b>D04/09</b>
<b>Document No:</b>	<b>09/66</b>
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**An Coimisiún um Rialáil Cumarsáide**

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## 1 Executive Summary

- 1.1. Local loop unbundling (LLU) is a service that telecoms operators can use to provide narrowband and broadband services. They can do this by renting the “local loop” (the connection between a home or premises and the local exchange) from Eircom Limited (“Eircom”), and using their own equipment to provide services. There are a number of ways of offering services at the retail level; however, there are only two variants in relation to LLU: Full Unbundling and Line Share (“LS”). Using full unbundling means taking control of the entire capability of the loop. However, it is also possible to separate out the broadband capability of the line from narrowband and provide it separately. The LLU Line is the wholesale facility from Eircom that allows this, i.e., an operator rents the broadband capability of a loop only, leaving Eircom free to provide narrowband services (mainly voice) either on a retail or wholesale basis. This paper relates to the pricing of LS.
- 1.2. As the operator designated with Significant Market Power, (“SMP”) Eircom, is legally obliged by the Commission for Communications Regulation (“ComReg”) to allow other authorised operators (“OAOs”) to access its copper loop network in order to allow them to provide electronic communications services to end-users, pursuant to ComReg Decision No. 08/04<sup>1</sup> (“the SMP Decision”). The current price for LLU (also known as unbundled local metallic path or (“ULMP”) is determined in ComReg Decision No. D15/04;<sup>2</sup> however, ComReg is currently carrying out a public consultation process to determine a new price for ULMP<sup>3</sup> and a final decision is due in October 2009. ComReg has also recently consulted on wholesale Migration charges<sup>4</sup> and a decision on this is due in the coming weeks.
- 1.3. ComReg published Consultation Document No.08/106 - “Rental Price for Shared Access to the Unbundled Local Loop” on 23 December 2008 (“Consultation Document No. 08/106”). It set out ComReg’s preliminary assessment of what it considered to be the appropriate monthly rental price for LS. It should be noted that since 2001 the price of LS has been set by reference to a decision made by the Office of the Director of Telecommunications Regulation (“ODTR”) in 2001, as published in ODTR Decision No. D8/01 – “Local Loop Unbundling – Eircom’s Access Reference Offer (“ODTR Decision No. D8/01”)<sup>5</sup>. It mandated that the price of LS should be determined by

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<sup>1</sup> Designation of Significant Market Power and Decision on Obligations – Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops, Doc. No. 04/70, dated 15 June 2004.

<sup>2</sup> Decision Notice and Direction: Local Loop Unbundling – Review of Eircom’s ULMP monthly rental charge; D15/04; Document No.04/110; published on 5 November 2004.

<sup>3</sup> ComReg Document No. 09/62: Further Input to Consultation Document No. 09/39 on Local Loop Unbundling (“LLU”) and Sub Loop Unbundling (“SLU”) Monthly Rental Charges; published on 27 July 2009.

<sup>4</sup> ComReg Document 08/105, Intra Migration Premium

<sup>5</sup> ODTR Decision No. D8/01: Local Loop Unbundling – Eircom’s Reference Access Reference Offer (ARO); ODTR Document No. 01/27R; published September 2001.

allocating the cost of the local loop 50:50 between broadband and narrowband (i.e. traditional line rental) services. This led to the current price of €8.41 per line per month for LS.

- 1.4. ComReg, after carefully considering the responses to Consultation Document No. 08/106 and taking into account more up to date costing information and following a “no comments” response from the European Commission, has decided to change the cost allocation methodology. This paper sets out that only costs which are incremental to the provision of LS should be recovered in the price of LS since the common costs of the local loop are already reflected in narrowband prices. As a result of this, ComReg has decided that a maximum monthly rental charge of €0.77 is the appropriate cost oriented charge going forward.
- 1.5. The main respondent, Eircom, proposed that a Ramsey Pricing approach would be the optimal approach for ComReg to take and made suggestions in this regard. However, ComReg after further detailed consideration has taken the view that in line with the initial Consultation Document No.08/106, Ramsey pricing is not a practical option for ComReg to take due to the complexity involved in gathering market data on product and price elasticities. This approach does not give assurance that the outcome would reconcile with the regulatory objectives set out, namely compliance with the cost orientation obligation and protecting consumer welfare.
- 1.6. ComReg believes that this revised cost oriented charge (i.e. €0.77) will ensure that the provision of broadband by OAOs will no longer be impeded by the current high charge (i.e. €8.41) which creates negative incentives to further investment in critical infrastructure. It will also provide certainty to the business community that the regulated entity, Eircom, is complying with its price control obligations. ComReg is satisfied that this approach is justified in light of ComReg’s statutory objectives.
- 1.7. ComReg is also proceeding to revoke the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges.
- 1.8. ComReg believes that this price change, together with further investment from the telecoms industry in the necessary infrastructure and services, will deepen the level of infrastructure competition in the broadband market and ultimately lead to faster broadband speeds and lower prices to end users.

## 2 Introduction

### Background

- 2.1. In Consultation Document No. 08/106, ComReg examined the importance of LLU. The local loop is the physical path, usually copper, which connects a local exchange to an end-user. It is the most difficult part of a telecommunications network for Eircom's competitors to replicate economically. LLU allows OAOs to compete with the fixed line incumbent, not only on the range of services offered, but also on their price, quality and other differentiating characteristics. Ultimately consumer interests are protected and enhanced by allowing for a choice between operators in direct competition with each other, thereby providing wider choice in product and price.
- 2.2. ComReg identified considerable evidence demonstrating that in many countries where LLU has been a success, the take up of broadband, the service being delivered and the prices being paid for high speeds, have progressed at a much faster pace than in markets that rely on the resale of the incumbent's wholesale services<sup>6</sup>.
- 2.3. The current methodology to determine the LS price is detailed in ODTR Decision No. D8/01. Consultation Document No. 08/106 is a public consultation process to determine whether the methodology for pricing LS has to be updated<sup>7</sup>.
- 2.4. When availing of LLU, the OAO has the option to rent either the entire loop ("full unbundling"), or, alternatively, to rent only the high capacity frequencies within the loop which are then used to provide broadband services, via shared access to the unbundled local loop using LS. The LS product allows the services provided by Eircom and a digital subscriber line ("DSL") service offered by an OAO, to be integrated over the same two wire metallic path. The points of demarcation for Eircom will be the Network Termination Unit ("NTU") in the end customers' premises and the OAOs' connection blocks on the main distribution frame ("MDF").
- 2.5. ComReg published Consultation Document No. 08/106 to review the rental price of shared access to the unbundled local loop. It put forward ComReg's analysis and subsequent proposals in relation to costing LS. Consultation Document No. 08/106 also detailed ComReg's analysis of the best available economic models that are commonly used in other EU member states for pricing LS. It also considered the methodologies adopted for pricing other Eircom wholesale and retail products, e.g., full LLU based on forward looking long run incremental cost ("FL-LRIC"). Consultation Document No. 08/106 was also accompanied by a separate independent and expert report prepared by

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<sup>6</sup> Source: European Competitive Telecommunications Association  
[http://www.ectaportal.com/en/upload/File/Broadband%20Scorecards/Q307/BB\\_Sc\\_Q307\\_prv2.pdf](http://www.ectaportal.com/en/upload/File/Broadband%20Scorecards/Q307/BB_Sc_Q307_prv2.pdf)

<sup>7</sup> Directive No.2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, Annex II defines shared access as '*...the provision to a beneficiary of access to the local loop or local sub-loop of the notified operator, authorising the use of non voice band frequency spectrum of the twisted metallic pair; the local loop continues to be used by the notified operator to provide the telephone service to the public.*'

Tera Consultants (“Tera”) for ComReg. This report was published as ComReg Document No. 08/106a<sup>8</sup> (“Tera Report”).

- 2.6. ComReg reviewed the analysis put forward in the Tera Report and concluded that the incremental cost approach is the most practical and appropriate approach where retail tariffs are fully rebalanced and the full loop cost, as provided for under the FL-LRIC price control, is recovered through the current monthly rental price for ULMP. Following an assessment of the component parts that make up the cost of providing the LS service using the incremental cost methodology, ComReg proposed a price of €0.75 per line per month for LS in Consultation Document No. 08/106.
- 2.7. Responses from a number of OAOs to Consultation Document No. 08/106, together with recent volumes of orders for LS by Eircom, clearly indicate that there is sufficient demand for LS to justify regulatory intervention at this stage. This is set out further throughout this document and also in the Regulatory Impact Assessment (“RIA”) in Annex D. ComReg also believes that OAOs and consumers will benefit from the ability of operators to provide broadband over OAO infrastructure which will allow differentiation at the service level rather than being constrained to the wholesale bitstream offers of the incumbent, Eircom. LS may also allow OAOs the choice of giving the customers that they currently service through Single Billing Wholesale Line Rental (“SB-WLR”) and bitstream, a smoother transition to full unbundling. Full unbundling entails additional operational complexity caused by such matters as jumpering the full telephone line at the local exchange of the customer and porting a customer’s fixed line number among other things.
- 2.8. ComReg, in the Direction attached at Annex B, revokes the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges. ComReg, in Annex C, imposes a maximum LS rental price of €0.77 per line per month, which while very close to the maximum charge proposed in ComReg Document No. 08/106, and in adhering to its method of calculation, is slightly different to the charge proposed in ComReg Document No. 08/106 because some of the cost inputs to this price were amended in order to take account of respondents’ views.
- 2.9. The remainder of this document is structured as follows:
  - Section 3 details the consultation questions posed in ComReg Document No.08/106 as well as a summary of the views of respondents and ComReg’s position and conclusion in relation to each of the 25 Questions posed.
  - Annex A sets out the legal basis. Annex B and C set out the Directions that will be imposed under this Response to Consultation and Decision.
  - Annex D provides ComReg’s Regulatory Impact Assessment (“RIA”) in relation to this Decision.
  - Finally Annex E provides the updated competition assessment in the market for wholesale unbundled access (“WUA”).

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<sup>8</sup> ComReg Document No. 08/106a: Tera Report on Methodology for Line Share Pricing in Ireland, dated 23 December 2008.

### **3 Setting a revised Rental Price for Shared Access to the Unbundled Local Loop**

#### **Introduction**

- 3.1. ComReg received seven responses in relation to Consultation Document No. 08/106 from:
1. Eircom Limited (“Eircom”);
  2. BT Communications Ireland Limited (“BT”);
  3. Alternative Operators in the Communications Market (“ALTO”);
  4. Magnet Networks Limited (“Magnet”);
  5. Sky Ireland Limited (“Sky”);
  6. Smart Telecom (Smart”); and
  7. Vodafone Ireland Limited (“Vodafone”)
- 3.2. In the following section, ComReg summarises the key points of each non confidential response received in relation to each of the questions raised in the Consultation Document No. 08/106. ComReg then responds to any significant points raised by the respondents and gives its final view in relation to each of the questions posed in Consultation Document No. 08/106. The Directions which ComReg shall issue to Eircom are attached in Annex B and Annex C.
- 3.3. Eircom engaged Indecon-London Economics as expert consultants to address the Tera Report. The Indecon International Economics Consultants’ and London Economics’ Non-Confidential Report (“Indecon Report”) is published as ComReg Document 09/66a<sup>9</sup>. The Indecon Report broadly addresses the Tera Report, focusing on elasticities of Public Switched Telephone Network (“PSTN”) demand and putting forward Ramsey Pricing (“Ramsey Pricing”) as the most optimum allocation model.
- 3.4. As the Indecon Report raised a number of new points in relation to the merits of one methodology over the other, ComReg and Tera, reviewed the substantive points raised in the Indecon Report to ensure that the initial proposal made, the Incremental cost approach, remained the optimum approach for ComReg to take. ComReg is now satisfied following a review of the conclusion of this further review by Tera, that the initial proposals were correct. The further views of Tera can be seen in ComReg Document No. 09/66b<sup>10</sup> (“Tera Response”).
- 3.5. Please note that both the Indecon Report and the Tera Response will be discussed in further detail in ComReg’s position and conclusion in relation to Question 1. There will also be references made to both reports in ComReg’s position and conclusion in relation to other questions.

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<sup>9</sup> ComReg Document No. 09/66a: Response to ComReg’s Line Share consultation. Report prepared for Eircom by Indecon International Consultants and London Economics. March 2009.

<sup>10</sup> ComReg Document No. 09/66b: Assessment whether a Ramsey-pricing methodology can be implemented for setting the Local Loop Unbundling (“LLU”) Line Share (“LS”) price in Ireland. A Report for ComReg, prepared by Tera Consultants. August 2009.

## **ComReg's Obligations and the Obligations of the Dominant Operator**

- 3.6. In Consultation Document No. 08/106 ComReg summarised its statutory objectives as defined under Section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007<sup>11</sup>. (“the Act”). Under Section 12(1) and (2) of the Act, ComReg’s statutory objectives are, inter alia, to:
- Promote competition
  - Promote the interests of users within the community;
  - Ensure that there is no distortion or restriction of competition;
  - Encourage efficient investment in infrastructure and promoting competition; and
  - Encourage access to the internet at a reasonable cost to end-users.
- 3.7. The Tera Report considered in full the analysis of available methodologies and proposals in Consultation Document No. 08/106 using the following criteria:
- maximising consumers’ welfare;
  - ensuring that Eircom recovers its efficiently incurred costs;
  - avoiding any cost under/over-recovery by Eircom;
  - encouraging efficient investment in infrastructure and avoiding a risk of deterring investment in alternative infrastructure; and
  - ensuring that the methodology is practically implementable.
- 3.8. In addition, in accordance with Regulation 9(6) of the Access Regulations<sup>12</sup> ComReg considers the directions at Annex B and C, in relation to LS, are based on the nature of the competition problems identified in this document and Consultation Document No. 08/106, and are proportionate and justified in light of the objectives set out in section 12 of the Act. The Decisions follow a public consultation under Regulation 19 of the Framework Regulations and the draft measure has been notified to the European Commission pursuant to Regulation 20 of the Framework Regulations<sup>13</sup>.
- 3.9. In accordance with Article 7 of the Framework Directive<sup>14</sup>, ComReg notified the European Commission, of the proposed changes to the LS monthly rental price on 18 May 2009. The notified measures were a further specification of a

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<sup>11</sup> No. 22 of 2007.

<sup>12</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007).

<sup>13</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007).

<sup>14</sup> Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive”).



requirement<sup>15</sup> relating to an existing obligation to “offer cost oriented prices for LLU services, collocation, and associated facilities”<sup>16</sup>. On 18 June 2009, ComReg received a “no comments” letter from the European Commission, stating that the European Commission had no comments on the proposed manner in which ComReg wished to implement the new LS pricing methodology and price and as such could proceed to finalising the Decision. In addition, in a statement made to the Irish press, the EU Commissioner for Information Society and Media, Viviane Reding stated that the actions of ComReg were to allow for “greater flexibility and innovation in the provision of broadband Internet services and ultimately lead to wider choice and lower prices for consumers”<sup>17</sup>. In addition, Competition Commissioner Neelie Kroes said: “ComReg’s proposal is good news for competition and consumers. Alternative operators will have to pay considerably less for access to Eircom’s broadband network. They will thus be in a position to make more attractive retail offers and consumers will get a better choice”.

- 3.10. Regulation 14(2) of the Access Regulations states that when imposing an obligation in accordance with Regulation 14(1) of the Access Regulations, ComReg shall take into account any investment made by the operator, and allow the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved. In this regard, the incremental cost methodology being adopted by ComReg includes only those costs relevant to the ongoing day to day running of the service. Included as part of the incremental costs are the remedial costs associated with pair gain systems removal, this relates to a small number of lines which were installed many years ago which cannot now deliver broadband and remedial work is required to ensure that, going forward, broadband can be delivered over these lines. This involves some cost of a capital nature with the appropriate depreciation charge being recovered each year. The allowed cost of capital contribution is also included as part of the capital cost of the remedial work involved. A return on capital employed for all the normal assets of the company (i.e., excluding pair gain system removal) are fully recovered in the respective models of Eircom’s networks, namely the narrowband network and core network and associated charges such as full LLU, interconnection etc.

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<sup>15</sup> Pursuant to Regulation 17 of S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>16</sup> ComReg Decision Notice D8/04 (section 9): Market analysis: Wholesale unbundled access (including share access) to metallic loops and the sub-loops, dated 15 June 2004.

<sup>17</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/953&format=HTML&aged=0&language=EN&guiLanguage=en>

“I fully support ComReg’s proposal, as I am convinced that truly cost-oriented prices will be of great benefit to consumers.” said EU Telecoms Commissioner Viviane Reding. “Broadband competition in Ireland is currently being held-up by the high access prices Eircom charges its competitors and the Irish regulator is now making very important efforts to foster competition by promoting direct investment in broadband infrastructure. This move will allow for greater flexibility and innovation in the provision of broadband internet services and ultimately lead to wider choice and lower prices for consumers.”

- 3.11. Furthermore, Regulation 14(3) of the Access Regulations, provides that ComReg shall ensure that any pricing methodology it imposes, in accordance with the Access Regulations will promote competition, by ensuring that there is no distortion or restriction of competition in the market and by encouraging efficient investment in infrastructure. ComReg believes that the new LS price and methodology will be in line with ComReg's objectives under section 12 of the Act, namely to promote competition and to promote the interests of users. In addition, it will be in line with the Regulation 14(3) of the Access Regulations, namely to promote efficiency and sustainable competition and maximise consumer benefits.
- 3.12. Consultation Document No. 08/106 also summarised the obligations of the SMP operator.
- 3.13. In the SMP Decision Eircom was designated with SMP in the market for Wholesale Unbundled Access ("WUA") to the Local Loop. As a consequence of this, certain SMP obligations were imposed on Eircom whereby it is obliged to offer cost oriented prices for LLU (both fully unbundled and shared lines) services and associated facilities on the basis of FL-LRIC in accordance with Regulation 14 of the Access Regulations. The Access Regulations transpose Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive"<sup>18</sup>).
- 3.14. ComReg is of the opinion that the price control obligation set out in the SMP Decision and as directed in ComReg Decision No. D15/04<sup>19</sup> is not being satisfied by ODTR Decision No. D8/01. The overriding obligation on the incumbent for LLU cost recovery is a cost orientation obligation. The full LLU price in place for the last number of years has allowed for full recovery of the efficient costs allowed for building and maintaining the copper loop. By applying the 50:50 mechanism the ODTR Decision No. D8/01 as Eircom is currently applying it, without adjusting the price of narrowband services, namely WLR and Retail Line Rental, Eircom over recovers in aggregate. This over recovery does not comply with the cost orientation obligation. It should also be noted that at the time, ODTR Decision D8/01 set a benchmark price for the full LLU monthly rental due to low level of information that was available from Eircom in the early days of regulation and the low level of demand for broadband.<sup>20</sup> ComReg is also of the view that circumstances have changed materially since 2001. Broadband was virtually non-existent at the time of ODTR Decision No. D8/01 and LS did not have the significance it has now. Accordingly, the 50:50 allocative approach is no longer appropriate. While it has taken some years for the broadband market in Ireland to develop and competitive pressures to take hold, the consequences of the continued existence

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<sup>18</sup> Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>19</sup> Decision Notice and Direction Local Loop Unbundling – Review of Eircom's ULMP Monthly Rental Charge, Decision No. D15/04, dated 5 November 2004.

<sup>20</sup> Per ODTR Decision Notice D8/01 "*As Eircom has failed to supply very significant elements of the relevant information, the Director has set prices based on information available to her...The prices are set on an interim basis, and in approving final prices, the Director will review in light of an appropriate and adequately justified submission by Eircom.*"

of the application of ODTR Decision No. D8/01, in respect of LS, can lead to significant distortions in the market on both a wholesale and retail level.

- 3.15. ComReg is in the process of carrying out a further Market Analysis for the Wholesale Physical Network Infrastructure Access at a fixed location market (“WPNIA”). The Response to Consultation Document, ComReg Document No. 08/104<sup>21</sup>, sets out ComReg’s preliminary conclusions which demonstrate that Eircom continues to have SMP in the WPNIA (formerly WUA) market. A final decision in relation to WPNIA has not yet been reached.
- 3.16. The competition assessment (at Annex E) has concluded that the conditions of competition in the WUA market in so far as they relate to LS have remained substantially the same as at the time of the designation of SMP in 2004. In particular, deployment of fibre in the local loop since 2004 has been minimal. As such, the decision to amend the pricing methodology remains equally valid. ComReg therefore considers that the continued imposition of the price control and cost orientation obligation is consistent with ComReg’s objectives as set out in the Access Regulations and that the price control and cost orientation obligation should remain in place. The European Commission agrees with ComReg in this regard as per its letter of 18 June 2009.
- 3.17. ComReg believes it is appropriate to proceed to make a final decision for LS now. The issues in relation to prospective NGN access in the WPNIA paper are complex and there is no reason to delay the current LS decision unduly while these issues are examined, given the unchanged nature of the copper network market since 2004. This current decision is required to eliminate an over recovery of cost (by reference to FL-LRIC costs) and to stimulate competition and help Ireland catch up with its international peers. Delay would bear the significant risk that ComReg would fail to meet its statutory objectives. These issues are further addressed in the Regulatory Impact Assessment at Annex D.
- 3.18. It is important to note that if the final determination in the WPNIA market analysis shows that Eircom no longer has SMP in the WPNIA market or that an obligation of price control or cost orientation is no longer necessary then no related regulated price will apply.
- 3.19. Finally, given that the SMP Decision has not been withdrawn and will remain in place until such time as the WPNIA decision is finalised, ComReg intends to rely on the current SMP Decision for the purposes of directing Eircom in relation to the methodology and price for LS.
- 3.20. Set out below are the Questions that were asked in Consultation Document No. 08/106, together with a summary of the responses from industry. All non-confidential responses will be treated in accordance with normal ComReg practice and will be published on the ComReg website within 10 working days of the Decision publication date.

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<sup>21</sup> Market review: Wholesale physical network infrastructure access (Market 4): Response to ComReg Document 08/41 and Draft Decision, Document 08/104, 23 December 2008

## Consultation Question

*Q. 1. Do you agree or disagree that in order for ComReg to meet its objectives it must review the current pricing and act on the conclusions of the expert report commissioned? Please explain in detail your response.*

## View of respondents

- 3.21. ComReg received seven responses to this question.
- 3.22. The respondents generally agreed that in order for ComReg to meet its objectives it must review the current pricing and act on the conclusions of the expert report commissioned.
- 3.23. **BT** strongly agrees that for ComReg to meet its objectives, and the guidance of the European Commission, it must review the pricing of LLU from time to time. The only issue BT would question is whether the numbers of carrier systems (lines which cannot deliver broadband due to legacy issues) is as high as the Tera Report appears to assume given the disproportionate influence on the ultimate rental price. BT believes the current Eircom LS price (€8.41 per month not including the cost of other LS components) is now so close to the bitstream price (€9.48 per month including port costs, backhaul costs, network and routing costs and fault handling costs) that it is having a margin squeeze impact which is distorting the market and competition.
- 3.24. **Magnet** agrees that each of ComReg's five objectives would be impacted in the absence of a review of the current pricing structure. Magnet believes that failing to review LS pricing fails to promote competition as it makes it unattractive for an OAO to migrate its bitstream customers in its footprint. Magnet believes that high LS pricing is currently restricting competitors from offering LS and is preventing end-users from receiving higher uncontended broadband speeds. Magnet also believes that there may be a possible margin squeeze when comparing the current price of LS with Eircom's bitstream products.
- 3.25. **Smart** supports the view that ComReg needs to review the current LS pricing in order to meet its stated objectives. Smart believes that LLU in Ireland has not become a major influence in the market as a result of which Ireland lacks the levels of platform competition that has led to a high degree of competition in other markets. Smart acknowledges that the Tera Report simply copper fastens the logic behind the revised proposed price.
- 3.26. **Vodafone** agrees and believes that, given the considerable time that has passed since the original decision in 2001, the evident inefficiency and competitive distortions arising from a 50% allocation of common costs of the local loop to the LS service, and major changes in the market including the completion of full rebalancing of tariffs to eliminate any cross subsidisation of access costs through call prices the current pricing review is required.
- 3.27. **Vodafone** believes that the current pricing of Line Share in the context of ULMP, SB-WLR, and PSTN retail line rental prices, allows for an inefficient over-recovery of costs by Eircom that is acting as a serious and artificial obstacle to local loop unbundling on the basis of shared access. They believe that this has had a detrimental effect on the market and consumer welfare.

Vodafone believed based on their review of the incremental costs that the proposed price of €0.75 should be amended to €0.68.

- 3.28. **Sky**, in its response stressed the importance of LLU to the development of innovative, differentiated, and affordable broadband products. Sky noted its experience in the United Kingdom, where in 2005, BT, under pressure from Ofcom (i.e. The independent regulator and competition authority for the UK communications industries), brought in a very substantial price cut to both full and shared LLU, as a result of which a number of positive developments occurred including:
- A significant decrease in retail prices;
  - Significant innovation around the product; and
  - An increase in broadband penetration to approximately 60% of households.
- 3.29. Sky stated that it believes competition based on reselling the same wholesale products charged at a purely variable cost is simply an artificial arbitrage opportunity and brings insufficient added value to consumers. Sky believes this is largely the case in Ireland as it was in the UK until the reinvigoration of LLU in the UK. It believes that the successful LLU products should lead to the emergence of Internet Service Providers (“ISPs”) with different business models.
- 3.30. Given the importance to OAOs of pricing access to the incumbent’s copper products, Sky considers that the high price for LS in Ireland has played a major role in the low level of LLU lines across the country. Sky believes that there is a clear principle that regulation should aim to recover common costs only once between the various products that have those cost components. Sky believes that the proposed reduction in LS pricing, together with an appropriate system to ensure the LLU products and processes involved are ‘fit for purpose’, will enhance the likelihood of increased competition in LLU based retail broadband services from existing operators and potential new entrants, providing innovative, differentiated and affordable broadband services to the consumer.
- 3.31. **ALTO** strongly agrees that Eircom is over-recovering its costs with the current LS price of €8.41 per month, on top of the payment it receives for line rental and charges for all the other components of LLU. Ireland now has one of the highest LS prices in Europe. ALTO believes that this has impeded the development of LLU, is bad for consumers and has inhibited investment. ALTO considers that this may also be anti-competitive. ALTO, through its association with the European Competitive Telecommunications Association (“ECTA”) in Brussels has realised that market stimuli have been employed in other countries such as France, the UK and more recently Greece and this is now the time for similar stimuli in Ireland. ALTO believes that LLU pricing levels are inhibiting opportunities for competition and the customer as highlighted by the recent ECTA report<sup>22</sup> which identifies a linkage between countries that have exploited

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<sup>22</sup> ECTA Regulatory Scorecard 2008.

LLU to the full and improved broadband features overall. ALTO generally considers the analysis work balanced and correct, however, it notes the disproportionate influence on rental prices if carrier system figures are inaccurately reflected.

3.32. **Eircom** agrees that it is appropriate to review the current pricing, but disagrees that ComReg should act on the expert report, as Eircom asserts that the analysis and conclusions contained therein are incorrect and unsustainable and inconsistent with ComReg's statutory objectives. Eircom believes it is important that the price controls applicable to LS are not modified in isolation, but considered in the context of the price controls applicable to ULMP, WBA, Wholesale Line Rental ("WLR") and retail line rental, given the obvious interrelationships. Eircom believes the common cost of the copper access network should be allocated across all products and the welfare enhancing method of achieving this is Ramsey Pricing. Eircom believes that the Indecon report<sup>23</sup> (submitted as part of Eircom's response to Consultation Document No. 08/106) demonstrates that the issues with Ramsey allocation are manageable, and that there are Ramsey-Boiteux pricing precedents in the regulation of telecommunications and other regulated utilities elsewhere. Eircom believes that ComReg has rejected the Ramsey allocation methodology on account of the claimed difficulty in collecting the data to implement the methodology and because of the complexity involved in ensuring no over recovery of common costs by Eircom. The substantive points raised by Indecon can be summarised as follows:

- Eircom believes that the incremental cost approach is not the best approach in terms of LS cost allocation, a variant of Ramsey Pricing is likely to be the best approach.
- Eircom believes that the traditional objections regarding the complexity of implementing Ramsey Pricing have been refuted in recent literature. Indecon believes that implementation is possible and that any difficulties can and should be overcome by regulators.
- Eircom believes that applying a global price cap<sup>24</sup> could be an approach to implement Ramsey Pricing in a decentralised manner.
- Indecon estimated the elasticities of demand for broadband and PSTN services in Ireland using Eircom's own data on lines and prices. Indecon's findings that price elasticities for broadband and PSTN were very similar and therefore the 50:50 rule is unlikely to be too far from the optimal Ramsey-Boiteux rule.
- Indecon's analysis and conclusions are set out in Eircom's external consultant's report which is published as ComReg Document No. 09/66a and henceforth referred to as "The Indecon Report").

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<sup>23</sup> ComReg Document No. 09/66a: Response to ComReg's Line Share consultation. Report prepared for Eircom by Indecon International Consultants and London Economics. March 2009.

<sup>24</sup> I.e. considering the retail price(s) and access charge(s) in one single price cap formula.

### **ComReg's Position & Conclusion**

- 3.33. ComReg welcomes the views of all respondents. It remains of the view that in order to meet its statutory objectives, it must review the current pricing and pursuant to its analysis of the expert report, act on the conclusions of the expert report commissioned.
- 3.34. ComReg notes that a number of respondents have cited the success of LLU and LS in other jurisdictions, through their own experience, and its positive impact on broadband. ComReg affirms its belief that fit for purpose and cost oriented LLU products will drive broadband growth in Ireland.
- 3.35. ComReg believes that the incumbent has an obligation to ensure no margin squeeze is evident between any of its retail and wholesale offerings, including 1Mb/s and 3Mb/s products. ComReg notes respondents' claims of a margin squeeze, but notes that this issue is beyond the scope of this paper. Any action in this respect would be the subject of a separate investigation.
- 3.36. ComReg addresses the issue of the numbers of carrier-systems (also referred to as pair gain systems) later in the paper when addressing its position and conclusion in relation to Question 18. ComReg notes Eircom's view that wholesale prices should not be reviewed independently of each other and broadly agrees with this view. Through this process of review, it is clear that the LS price needs to be amended. This is one consideration that has prompted the current review in that the current LS price (based on an inappropriate method, 50:50) appears to be inconsistent with current prices of wholesale broadband and full unbundling. It should also be noted that ComReg has recently completed a review of the costs associated with the local loop and recently published its preliminary conclusions in its Response to Consultation and Further Consultation in ComReg Document No. 09/39<sup>25</sup> and more recently sought further information in ComReg Document No. 09/62. This work is consistent with the view that the cost of the loop is indeed recovered from the full LLU monthly rental price and ultimately via retail and wholesale narrowband prices since these are reflective of the cost of full unbundling. As regard wholesale broadband prices, these are currently set via a retail minus regime by which means Eircom is free to set prices at a level that it regards as appropriate. In fact, currently some of these wholesale prices are below the maximum required by the price control. ComReg strongly disagrees with Eircom's view that the findings of Tera's Report are inconsistent with ComReg's statutory objectives. Moreover, ComReg and Tera used ComReg's statutory objectives as the basis<sup>26</sup> for analysing the most appropriate cost allocation methodology for determining the monthly rental price for LS.
- 3.37. ComReg, as per Consultation Document No. 08/106 and the accompanying Tera Report, agreed that Ramsey Pricing can be, in theory, the most welfare enhancing allocation method, in other utility related environments, but does not believe that it is practical to implement in the telecommunications environment. This is because, in ComReg's view, it is very unlikely to be able to identify the

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<sup>25</sup> Response to Consultation and Further Consultation and Draft Decision – *Response to Consultation Document No. 08/56 Further Consultation on Local Loop Unbundling (“LLU”) and Sub-Loop Unbundling (“SLU”) Monthly Rental charge*, Doc No. 09/39, dated 8 May 2009

<sup>26</sup> Consultation Document No. 08/106 – Section 5 and Consultation Document No. 08/106a – Section 5

underlining inputs to Ramsey Pricing with sufficient precision to reap the benefits of this approach. ComReg has reviewed the analysis in the Indecon Report and has also considered Tera's subsequent detailed assessment of the practical implementation of Ramsey Pricing which is discussed below. Tera's analysis of the difficulties inherent in the implementation of Ramsey Pricing in telecoms is set out in Section 3 of Consultation Document No. 09/66b<sup>27</sup> (The Tera Response). Tera's analysis of the possible implementation of a Global Price Cap in telecoms is also considered in detail in this report.

3.38. Tera also sets out the steps that would need to be performed if Ramsey Pricing were to be implemented. Tera's review concluded the following:

- Tera reviewed the economic background in relation to Ramsey Pricing. It focused on the various notions of price-elasticities (own-price, cross-price, wholesale price elasticity, retail price elasticity) and presented both the "classical" Ramsey Pricing and one of its variants, a "Global Price Cap".
- Tera reviewed of the process that ComReg could implement in order to apply Ramsey Pricing to LS in Ireland. Tera described the different models that are available to derive elasticities and detailed the list of data that is required for estimating the elasticities in the case of LS. This led to a step-by-step process that ComReg could follow to appropriately implement and apply Ramsey Pricing to LS in Ireland.
- Tera carried out a similar exercise in relation to the implementation of the Global Price Cap (i.e. a decentralised version of Ramsey Pricing) in order to price LS in Ireland..
- Finally, Tera reviewed the implementation of Ramsey Pricing proposed by the Indecon Report to determine if Indecon's approach and results are consistent with an appropriate regulatory process implementation by ComReg.

3.39. Tera considers that the calculation of necessary and unbiased own prices and cross price elasticities is highly complex, highly uncertain and costly.

3.40. Following a thorough review of the detailed Tera Response, ComReg believes that implementing a version of Ramsey Pricing is simply not technically feasible or possible to implement from a practical point of view without:

- an appropriate degree of certainty on the elasticities;
- reasonable costs of monitoring; and,
- the guarantee that the economic surplus is maximised.

3.41. ComReg also believes that, even with a Global Price Cap as a decentralised variation of Ramsey Pricing, such results cannot be obtained. The Indecon Report does not provide any new evidence to support why this approach would be effectively feasible. A Global Price Cap would in fact only transfer the difficulties of appropriately implementing Ramsey Pricing from ComReg to

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<sup>27</sup> Consultation Document No. 09/66b: Assessment whether a Ramsey-pricing methodology can be implemented for setting the Local Loop Unbundling ("LLU") Line Share ("LS") price in Ireland. A Report for ComReg, prepared by Tera Consultants. August 2009.



Eircom. ComReg believes that this would tend to increase the difficulties because Eircom would have to collect the required data from its competitors. It would also prevent ComReg from ensuring that Eircom's assumptions are reasonable and that it is not behaving in an anti competitive manner. The proposal ignores the obvious temptation for any incumbent to price strategically in such a way as to reduce competition by means of margin squeeze.

- 3.42. The incremental cost approach has, in comparison to an inappropriate implementation of Ramsey Pricing, the advantage of being much easier to implement and to monitor in the medium term. The incremental cost approach gives more visibility to OAOs. It prevents Eircom from over recovering its costs where the PSTN monthly rental charge recovers the cost of the local loop. Moreover, the incremental cost approach avoids ComReg and Eircom implementing a complex mechanism whereby some of the local loop costs are allocated to the LS product.
- 3.43. ComReg believes that the Indecon Report fails to demonstrate that the complexity of Ramsey Pricing is not an insurmountable exercise. Unfortunately, Indecon's analysis does not demonstrate an appreciation of the complexity of the process for implementing Ramsey Pricing for LS in Ireland (as highlighted above such a process for implementation is included as part of Tera's Response). The examples noted in the Indecon report relates in the main to regulated utilities<sup>28</sup> or industries<sup>29</sup> where the range of products is generally limited or the rate of technical progress and innovation is lower and the dynamics on the demand side are more stable.
- 3.44. The case studies put forward in Section 3.6 of the Indecon Report relate to utilities or industries where most of time, the preferences on the demand side are more stable meaning that, even if the task is not easy, assessing and monitoring the elasticities with a reasonable degree of accuracy and reliability is easier compared to technological and innovative services associated with telecommunications. Such differences are underlined in the World Bank Institute's working paper<sup>30</sup> mentioned by Indecon:
- “While it is true that elasticity of demand is difficult to forecast for new innovative services (especially in the telecommunications sector) in some utilities (gas, electricity) patterns of demand are rather standard and predictable so that the regulator could and should try to produce such estimates”.*
- 3.45. The examples of the practical implementation in the telecommunications industry are very limited, and mainly theoretical. The Indecon Report widely

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<sup>28</sup> Indecon in section 3.6 cite the examples in Postal (United States Postal Service) and Electricity (Chinese Electricity and Energy De France)

<sup>29</sup> Indecon in section 3.6 cite the examples in airlines (Ryanair) and page 7 rail (Irish Rail)

<sup>30</sup> World Bank – policy research working paper 2097 - Valletti & Estache 1998, The theory of access pricing: an overview for infrastructure regulators, p 22; [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/06/04/000094946\\_99042010294494/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/06/04/000094946_99042010294494/Rendered/PDF/multi_page.pdf)

cites De Ridder<sup>31</sup> who concludes that Ramsey Pricing is the optimum welfare enhancing allocation methodology, which is the same conclusion as ComReg in Consultation Document No. 08/106: however, De Ridder does not address the practical implementation of Ramsey Pricing.

3.46. In the Tera Response, Tera, having detailed a step by step approach to implementing a form of Ramsey Pricing, then analysed in depth the empirical estimates of elasticities in telecoms put forward in the Indecon Report, which concluded that the Ramsey allocation of common costs may not vary significantly from the 50:50 allocation determined on a different basis in ODTR Decision Notice No. D8/01. Tera does not disagree with Indecon's choice of the Almost Ideal Demand System (“AIDS”)<sup>32</sup> as the most appropriate model to estimate price elasticities in the context of multiple products. However, Tera’s Response notes that the elasticities that Indecon applied to conclude how common local loop costs should be allocated between broadband and PSTN are inadequate where:

- Some elasticities are calculated at the wholesale level;
- The products considered are not the appropriate retail products; and
- Cross-price elasticities are not applied.

3.47. According to Tera’s response, Indecon did not clearly set out its objectives as to which type of elasticities should be considered and calculated. Moreover, Indecon appears to choose elasticities that suggest a rough equivalence of elasticities between voice and broadband resulting in a 50:50 cost allocation between broadband and PSTN while disregarding other elasticities. ComReg agrees with Tera’s summary and that insufficient detail has been presented that would indicate this approach is optimal.

3.48. ComReg has considered the analysis and conclusions in both the Indecon Report and the Tera Response. ComReg notes its concerns that there are many anomalies in relation to the elasticities and products considered as well as the statistical data set used by Indecon in its empirical estimates. ComReg is concerned that Indecon chose to include only Eircom’s own-price elasticities, not fully considering cross elasticities, and did not fully consider all substitutable products and bundles. These concerns cast doubts over the results put forward by Indecon. It is unclear how the results of the Indecon study appear to arrive at a similar price to that currently charged and it is not supported by the detailed analysis carried out by ComReg and Tera. If Eircom/Indecon’s proposals were accepted by ComReg, ComReg would have to carry out a significant body of work that has clearly not been carried out by Eircom, and this could take an extremely long time with no assurance that a meaningful conclusion could be implemented that meets Eircom’s and ComReg’s obligations.

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<sup>31</sup> De Ridder (2008), “Goldilocks Pricing for Broadband”, Telecommunications Journal of Australia, Vol 58 (No. 1), pages 1 – 13.

<sup>32</sup> An almost Ideal Demand System, A. Deaton and J. Muellbauer, The American Economic Review, Vol. 70, No. 3 (June 1980), pp. 312-326

3.49. Following a detailed review of the respective consultants' reports, ComReg is of the view that it cannot use the results of the Indecon Report to determine the LS price that would maximise consumer welfare because in summary:

- Indecon did not consider the appropriate elasticities.
- Indecon did not consider the appropriate products and prices.
- Indecon has collected a very small amount of data, omitting volumes and prices associated with mobile, cable and fixed wireless access ("FWA").
- Indecon uses data where PSTN prices have changed only twice since 2004.
- Indecon uses a long observation period while the markets considered are dynamic.
- Indecon should take precautions to properly consider bundles, complementarities between access and usage in the PSTN market and different levels of quality of services in the broadband market

3.50. ComReg's preliminary view in Consultation Document No. 08/106 was that Ramsey Pricing is not feasible in the context of LS pricing in Ireland. ComReg remains of the view that Ramsey Pricing, or a variant of Ramsey Pricing is not feasible to implement in the context of LS pricing in Ireland. ComReg believes that given the current level of competition in the Irish Telecoms market any such approach would be contrary to its regulatory objectives. ComReg has set out why it believes there is a need for action now below and also in its Regulatory Impact Assessment ("RIA") at Annex D.

3.51. The need for action now is due to but not limited to the following factors:

- ComReg attempted to rectify the pricing anomaly in 2008; however, the decision to set a LS price by reference to a benchmark price calculated by reference to EU 15 Member States was appealed to the High Court by Eircom. ComReg decided to set aside that decision until it had considered and consulted upon a full analysis of the pricing options. This is now completed.
- ComReg is aware that there are existing and new players in the broadband market that wish to invest significant capital in their own broadband hardware. Cost oriented prices from the incumbent are an essential stepping stone to making "build or buy" decisions.
- The Irish broadband market is growing fast and any barriers to industry's demand for "fit for purpose" wholesale products / services could negatively impact on the roll out of key infrastructure in Ireland.
- The European Commission has commented negatively on the current progress of competition in Ireland and in particular the high access prices being charged by Eircom. It is important that ComReg ensures Ireland keeps pace with its European peers to ensure that Ireland can compete for medium to large business investment.
- The European Commission commented positively in response to ComReg's notification of the draft measure in relation to LS.

**Conclusion:** ComReg has concluded, following a detailed review of all the information provided (mainly by Eircom), together with the advice of Tera, that in order to meet its regulatory objectives it must proceed on the basis initially proposed to ensure the timely and practical correction of the current pricing problem, i.e. ComReg must adopt the Incremental Costing Methodology.

### Consultation Question

*Q.2. Do you agree or disagree that the existing obligation of cost orientation is not being met by the existing charging mechanism adopted by Eircom? i.e. 50:50 allocation of common costs of the local loop to LS. Please explain in detail your response.*

### View of respondents

- 3.52. ComReg received five responses to this question.
- 3.53. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that the existing obligation of cost orientation is not being met by the existing charging mechanism adopted by Eircom i.e. 50:50 allocation of common costs of the local loop to LS, pursuant to ODTR Decision No. D8/01. These four respondents broadly agreed that since tariffs are fully rebalanced and all the costs of the local loop are recovered from line rental at the retail or wholesale level, to allow an allocation of 50% of the common costs of the local loop to the LS service is contrary to the existing obligation of cost orientation.
- 3.54. **Eircom** disagrees and points out that the current charging mechanism was not adopted by Eircom, but directed by Decision No. D8/01. Eircom believes that persistent over-recovery of the common costs of the local loop from the combination of PSTN and LS services has not occurred in any financial reporting period since Decision No. D8/01 was directed.

### ComReg's Position & Conclusion

- 3.55. ComReg has considered all responses and remains of the view that the existing obligation of cost orientation is not being met by the existing charging mechanism, which, although based on ODTR Decision No. D8/01, has been incorrectly applied by Eircom where retail narrowband and the corresponding wholesale line rental product pricing has remained the same. As outlined in Consultation Document No. 08/106 and the Tera Report published in conjunction with this consultation in ComReg Document No. 08/106a, ComReg has explained why this is the case. In summary, Eircom continues to charge consumers for the full cost of the loop within Retail line rental while at the same time recovering 50% of this cost from broadband services.
- 3.56. ODTR Decision No. D8/01 was imposed at a time when there was very limited broadband penetration. Broadband penetration has increased and it is now appropriate that the monthly rental price of LS is reviewed. It is also clear at this stage, that adoption of LLU in Ireland is unusually low and this is unlikely to change unless among other things, current pricing structures are modified. ComReg believes the 50:50 allocation method is no longer appropriate, as 100% of the common costs of the local loop are recovered through PSTN line rental

and WLR, consequently there is an over-recovery of the costs associated with the current LS monthly rental price.

- 3.57. ComReg does not agree with the assertion that there has been no evidence of over-recovery of costs in financial reporting. In the first instance, it would appear from Eircom's response that Eircom did not consider that the costs of the local loop are based on the LRIC methodology using an independent cost model, known as Bottom Up LRIC or BU LRIC as clearly outlined in Consultation Document No. 09/39. It is quite inconsistent for Eircom therefore to argue that the total cost of the local loop should be set on one basis (BU-LRIC) but that a service such as LS would be priced using an entirely different methodology (Historical cost).
- 3.58. Even if one disregards Eircom's inconsistency, ComReg does not believe, based on the evidence before it, that Eircom's Historical Cost Accounts ("HCA") convincingly supports its claims. There is insufficient disaggregation in these accounts to show the true cost of providing LLU, LS or wholesale bitstream. Even where Eircom's accounts are used (i.e. in the case of voice interconnect) certain adjustments and further detailed disaggregation of published accounts is necessary to understand where any under/over-recovery from different services can occur. In any case, the accounts for voice interconnect are based on current costs and are highly detailed. No current cost data is available from Eircom's accounts for LS which means that HCA data would need to be analysed. This would be poor regulatory practice since in a telecommunications context many of the assets of the company are many years old and not appropriate either for ensuring Eircom recovers its efficiently incurred costs as they exist today or for setting the correct investment signals to other companies going forward.

<p><b>Conclusion:</b> ComReg believes the existing charging mechanism is no longer appropriate. It is therefore removing the 50:50 allocation methodology and replacing it with the Incremental cost methodology.</p>
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### **Methodology for current LS pricing**

- 3.59. ComReg in Consultation Document No. 08/106 reviewed the current LS pricing methodology. The existing methodology for calculating the LS monthly rental charge was set out in ODTR Decision No. D8/01. Under this treatment, the underlying cost of the entire local loop was to be shared equally between voice and data, with lines rented under LLU LS effectively being treated as half lines. This was reflected in the price methodology where LS was determined as being 50% of the cost of ULMP, plus wholesale billing and administration costs.
- 3.60. The Director of the ODTR at the time of setting this price stated that no local loop had actually been unbundled due to a number of issues, primarily, according to the Director, to do with the lack of co-operation from Eircom<sup>33</sup>. The decision on full LLU and LS at the time was made without the full

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<sup>33</sup> ODTR Decision No. D8/01 - "On pricing, some progress has been made, but there are still very substantial gaps indicating non-compliance in the material provided by Eircom, despite repeated requests and the clear direction of 30th April as the date by which these would be finalised. In the circumstances, I consider that I must act to determine pricing and my conclusions are set out in Section 6 of this Decision Notice."

knowledge of what Eircom's costs were and how they should be recovered in order to meet its obligations.

- 3.61. In assessing the appropriateness of this methodology, in the context of the current broadband market, one consideration is that Eircom's broadband products appear to be relatively cheap compared to the price of LS. For example the price of Eircom's 1mb/s wholesale broadband product is €9.48<sup>34</sup> per month as compared to €8.41 for LS. Any issue concerning a possible margin squeeze may be addressed separately and not as part of this paper.
- 3.62. Another important consideration is that the cost of a local loop on a bottom up FL-LRIC basis is already fully recovered through the price charged for narrowband access services whether via retail access, WLR or full LLU.
- 3.63. While these issues may not have been as much a cause for concern when there was very little demand for LS, this is no longer the case as there is clear evidence of increasing demand for LS through the increase in orders and recent announcements from OAOs that they wish to invest in broadband infrastructure. BT and Vodafone have recently announced an agreement which they believe will significantly boost competition and network investment in Ireland<sup>35</sup>. BT has stated that it will make investments, by unbundling up to 58 additional exchanges to provide a platform for the delivery of up to 24Mbps broadband services to approximately two thirds of Ireland's available broadband lines. Moreover, regardless of the level of demand, the underlying cost orientation obligation should be respected and there therefore should be no over-recovery, since over recovery will of itself negatively impact demand. As noted in the Tera Report, regulated prices that are set either too low or too high can give the wrong investment signals to competitors and can lead to a serious distortion in the market place. As a consequence, ComReg and Eircom spend significant time and resources on arriving at detailed costing and economic models which are typically used to ensure such distortions do not take place. The current full LLU price of €16.43 has evolved from an Eircom FL-LRIC model which produced a cost for a sample of the access network, including 100% allocation of common costs. However, when looking at LS pricing, Eircom has made no adjustment at the retail level for cost allocation changes, in circumstances where the number of LS connections have increased.
- 3.64. While Eircom is applying ODTR Decision No. D8/01 as set out in that direction in practice, this results in the anomaly of a price that is too high when considering related wholesale and retail charges for narrowband rental. For Eircom to simply apply all historical costs against regulated prices to demonstrate cost recovery is not consistent with the cost orientation obligation imposed. ComReg has not in the past and cannot accept historical cost accounting information for any given year where such accounting information can include for example inefficiencies, one off adjustments, exceptional costs etc which have not been adjusted for when considering the appropriate costs for regulatory pricing. A clear example of where ComReg has reviewed the actual

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<sup>34</sup> Eircom Wholesale Bitstream Price List 3.9

[http://www.Eircomwholesale.ie/dynamic/pdf/bitpricelistv3.9\\_v2.pdf](http://www.Eircomwholesale.ie/dynamic/pdf/bitpricelistv3.9_v2.pdf)

<sup>35</sup> Press Release: [http://www.btireland.ie/pr\\_2009\\_07\\_22\\_vodafone.shtml](http://www.btireland.ie/pr_2009_07_22_vodafone.shtml) , 22 July 2009.

costs of Eircom relates to an exercise recently carried out relates to the relevant LLU monthly rental charge<sup>36</sup>.

### Consultation Question

*Q.3. Do you agree or disagree that the Full LLU monthly rental price has up to now allowed Eircom to recover the full cost of the Local loop based on FL-LRIC principles? Please explain in detail your response.*

### View of respondents

- 3.65. ComReg received five responses to this question.
- 3.66. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that the Full LLU monthly rental price has up to now allowed Eircom to recover the full cost of the local loop based on FL-LRIC principle. Vodafone believed it allowed Eircom to recover that cost at a minimum.
- 3.67. **BT** agrees and considers that allowing Eircom to automatically attain year on year price rises for full unbundling has allowed Eircom to over recover its costs for full LLU. As such, annual price increases do not appear to have occurred within the WLR product which actually uses more assets. BT also has serious concerns as to what costs Eircom has been allocating and inputting into their FL-LRIC calculation for LLU and how such automatic increases could take place where such increases do not appear to be happening for other products which are similarly price regulated, but more beneficial to Eircom. Given that through the 50:50 rule the full unbundling rental price sets the LS rental price, it is difficult to see how the increases in the LS price are also justified using cost orientation rules, given that LS uses little or no additional assets.
- 3.68. **Eircom** noted that it never accepted that the current ULMP price allowed an adequate recovery of costs or that ComReg's flawed implementation of FL-LRIC methodology was an appropriate basis for either setting prices or establishing the appropriate costs associated with building and maintaining the access network in Ireland. Eircom believes that on the basis of Eircom's actual audited costs, the regulated ULMP price for a local loop has never fully recovered the cost of the access network. Eircom believes its estimation of the FL-LRIC costs of the access network, the combined ULMP and LS prices are insufficient to recover the costs of the local access network at current or likely future volumes using either current or proposed alternative LS monthly rental price.

### ComReg's Position & Conclusion

- 3.69. ComReg has considered all responses and remains of the view that the full LLU monthly rental charge has, up to now and continues to, allow Eircom to recover the full efficient cost of the Local loop based on FL-LRIC principle. This is also reflected in the retail narrowband pricing as reviewed by ComReg in 2007<sup>37</sup> and corresponding Wholesale Line Rental Pricing.

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<sup>36</sup> Please refer to ComReg Document 09/39, "Response to Consultation and further Consultation on Local Loop Unbundling Monthly Rental Charge."

<sup>37</sup> ComReg Document No. 07/76: "SMP Obligation: Retail Price Cap Remedy; Decision No. D03/07."

- 3.70. ComReg does not accept Eircom's view that the implementation of the FL-LRIC methodology is flawed. However, this is the methodology and price that has been in place until now and accepted by Eircom since its introduction. ComReg's position is that the cost of a local loop on a bottom up FL-LRIC basis is already fully recovered through the price charged for narrowband access services whether via retail access, WLR or full LLU. The current LLU price was based on a detailed Bottom Up Modelling exercise in 2003 / 2004 and is currently being updated. The preliminary conclusion in Consultation Document No. 09/39 showed a similar conclusion to the price set some years ago. This modelling process has taken into account the engineering rules of Eircom and the actual costs incurred. However, the current price for LLU is based on a FL-LRIC model set some years ago and has remained in place except for the annual adjustments that were made to the LLU monthly rental charge for inflation up to 2007.
- 3.71. The incremental cost methodology being adopted by ComReg includes only those costs relevant to the ongoing day to day running of the service. It should be noted that the remedial cost associated with pair gains systems is included as part of the incremental costs that ComReg is allowing Eircom to recover as part of the LS charge. This involves some cost of a capital nature with the appropriate depreciation charge being recovered each year. The appropriate weighted average cost of capital ("WACC") contribution to Eircom is also allowed through this annual depreciation charge. A return on capital employed for all the normal assets of the company (i.e., excluding pair gain system removal) is fully recovered in the respective models of their networks, namely the narrowband network and core network and associated charges such as full LLU, interconnection etc. Please refer to ComReg's position and conclusion in relation to Question 18 for more details on pair gains systems.

<p><b>Conclusion:</b> ComReg believes that the Full LLU monthly rental price has up to now and continues to allow Eircom to recover the full efficient cost of the Local loop based on the FL-LRIC principle.</p>
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### Consultation Question

*Q.4. Do you agree or disagree that the existing price methodology for LS could act as a barrier to further investment by OAOs to the detriment of competition and overall consumer welfare? Please explain in detail your response.*

### View of respondents

- 3.72. ComReg received five responses to this question.
- 3.73. Four Respondents (**BT, Smart, Vodafone and Magnet**) agreed that the existing price methodology for LS acts as a barrier to further investment by OAOs to the detriment of competition and overall consumer welfare. These respondents believe that the current LS price is undermining competition in the broadband market. Vodafone also raised possible issues of margin squeeze which will not be addressed in this document.



- 3.74. **BT** believes the high price derived by the current methodology is now so close to the Eircom wholesale bitstream price that there is insufficient margin to continue to invest, particularly given that the trend of the bitstream price is downwards and that for LS is upwards. BT states that Ireland has one of the highest LS prices in Europe and that this is damaging investment and innovation in Ireland. BT believes that the resolution of LLU issues such as reducing the LS price has created a significant market stimulus in other countries (France, Greece and UK) and this is the perfect time to enable such a stimulus in Ireland to assist the economy and job creation. BT's view is that current LLU pricing in Ireland restrains significant opportunities for customers. BT believes that Eircom continues to have a monopoly in the wholesale fixed broadband market and a monopolist may take considerably longer to upgrade its network in isolation, other than where it is being forced to upgrade its network due to competition within the market.
- 3.75. **Magnet** believes that the existing methodology acts as a barrier to further investment. It maintains that an OAO has to invest considerable capital to unbundle exchanges, to build the backhaul and to pay Eircom all associated charges. Thereafter the OAO must pay Eircom further line rental charges to provide customer services. Magnet notes that a high LS product erodes any profit or return and believes that a LS service priced greater than an Eircom bitstream product cannot compete fairly, thus allowing for a margin squeeze in the market.
- 3.76. **Eircom** disagrees and believes that the current pricing methodology for LS recovers 50% of the common costs of the copper network. Eircom contends that the PSTN service provided on the same loop is allocated the other 50% of the copper costs of the local loop. Eircom believes that the costs it reported in its separated accounts for bitstream and PSTN access use the same allocation where the services share the same loop. The price control on a retail PSTN access is informed by this allocation of copper costs. Eircom notes that WLR is based on retail price less the retailing costs avoided.

### **ComReg's Position & Conclusion**

- 3.77. ComReg has considered all responses and remains of the view that the existing price methodology for LS could act as a barrier to further investment by OAOs to the detriment of competition and overall consumer welfare.
- 3.78. ComReg believes that the incumbent has an obligation to ensure there is no margin squeeze between any of its retail and wholesale offerings. In reference to the respondents' claims that there is evidence of a margin squeeze, ComReg may consider these issues in greater detail in parallel to ensure competition law obligations are not being breached, but it is outside the scope of this paper.
- 3.79. ComReg notes BT's example of the successful introduction of LS in other jurisdictions and how it has acted as a stimulus for increased broadband penetration and competition in the market. ComReg is of the belief that there is pent up demand for LS in the market, based on the recent LS order volumes and representations made by OAOs. LS will offer end users greater choice of broadband speeds and differentiation of products. Both full LLU and LS allow OAOs to commit to investment in the telecoms market and offer consumers

differentiated products and prices. Alternative investment can also act as a key stimulus to a monopolist to invest in key infrastructure to ensure that it keeps pace with retail offers in the market. This process is reflected in the experience of the Irish market. Although the roll out of broadband by Eircom has been slow the introduction of mobile broadband and retail offers from OAOs has acted to speed up the enabling of exchanges by Eircom to the benefit of consumers and the wider community.

- 3.80. ComReg does not agree with Eircom's view that PSTN services provided on the local loop recover only 50% of the copper costs of the local loop. PSTN services are offered as stand-alone services and the price of WLR and retail line rental allows Eircom to recover 100% of the common costs of the copper network. To provide a LS service, OAOs must purchase the wholesale product relevant to Retail Line Rental, i.e. WLR service, to be in a position to make available a retail fixed broadband service. Currently there is no discount to the WLR price when paired with the LS service even though costs from the WLR price are attributed by Eircom to LS. There is therefore an over-recovery of common costs of the copper network associated with the current LS price. ComReg has no plans currently for reviewing the WLR charge further to that carried out in 2008<sup>38</sup>. Any further movement to the current retail minus price control, that is to say, a cost plus mechanism would be subject to a further detailed review and consultation.
- 3.81. The price control on retail PSTN access is based on regulated wholesale inputs i.e. the current LLU price, which is based on FL- LRIC and the balance to make up the relevant access price derived from actual efficient costs, for example line cards, retail costs etc<sup>39</sup> which when added together give rise to the current Retail line rental price charged.

**Conclusion:** ComReg remains of the opinion that the existing price methodology for LS could act as a barrier to further investment by OAOs to the detriment of competition and overall consumer welfare.

### Consultation Question

*Q.5. Do you agree or disagree that the current implementation of the previous ODTR Decision D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges. Please explain in detail your response.*

### View of respondents

- 3.82. ComReg received five responses to this question.
- 3.83. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that the current implementation of the previous ODTR Decision No. D8/01, insofar as it relates

<sup>38</sup> ComReg Document No. 08/19. Information Notice: Single billing wholesale Line Rental, Direction to Eircom regarding retail minus %, published on 22 February 2008.

<sup>39</sup> Consultation Document No. 07/76. ComReg Decision No. D03/07: SMP Obligation: Retail Price Cap Remedy – Fixed Narrowband. Published on 1 October 2007.

to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges.

- 3.84. **BT** fully agrees that the ODTR Decision No. D8/01 creates a cost accounting anomaly and over time has become a direct contradiction of the obligation on Eircom to recover its costs on a cost orientated basis. BT believes that given the same physical asset is used for both WLR/PSTN telephony services and LS, the cost of the asset should only be recovered once, not twice.
- 3.85. **Magnet** agrees that there is an anomaly between the cost recovery employed in full LLU and LS. Full LLU recovery is calculated through FL-LRIC. Magnet notes that bitstream accounts are not disaggregated and separately prepared and thus it is hard to monitor the true price of narrowband and LS.
- 3.86. **Eircom** disagrees and believes that for ComReg to purport to demonstrate a margin squeeze between the LS price and the very lowest wholesale bitstream price (set by ComReg Decision No.D1/06<sup>40</sup>) without reference to the rest of the product portfolio is incorrect. Eircom believes that if there are anomalies in the pricing of wholesale products, these are a result of ComReg's inconsistent approach to wholesale price regulation.

### **ComReg's Position & Conclusion**

- 3.87. ComReg welcomes the responses from respondents. It remains of the view that the implementation of ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges.
- 3.88. ComReg disagrees with Eircom's claim that for ComReg to demonstrate a margin squeeze between the LS price and the very lowest wholesale bitstream price (set by ComReg Decision Notice D1/06) without reference to the rest of the product portfolio is incorrect. Eircom has a clear competition law obligation not to margin squeeze. This matter is, however, outside the scope of this consultation.

<p><b>Conclusion:</b> ComReg remains of the view that the implementation of the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges.</p>
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<sup>40</sup> Decision Notice *Retail minus wholesale price control for the WBA market*, Decision No. D1/06 dated 13 January 2006

### Consultation Question

*Q.6. Do you agree or disagree that the methodology adopted in 2001 is not appropriate in 2008 or going forward to comply with the cost orientation obligation as set out in D8/04. Please explain in detail your response.*

### View of respondents

- 3.89. ComReg received six responses to this question.
- 3.90. Five respondents (**BT, Smart, Vodafone, ALTO and Magnet**) agreed that the current implementation of the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through full LLU monthly rental charges. These respondents generally agreed that whilst market conditions had changed, broadband speed expectations and broadband penetration having grown significantly, the anomaly resulting from ODTR Decision No. D8/01 has retarded any corresponding development of the LS product.
- 3.91. **Magnet** believes the methodology was adopted in 2001 for compliance reasons rather than having regard to the evolution of broadband and the welfare of end-users. Magnet believes that in 2009 it is imperative that ComReg adhere to its objectives to ensure a methodology is used that focuses on competition and the provision of services to the end-user at a reasonable cost.
- 3.92. **Smart** believes the simple fact that LLU accounts for only a few percentage points in the overall broadband penetration is proof in itself of the failure of LLU in the market.
- 3.93. **ALTO** is of the view that the current pricing methodology is now potentially acting against the interests of the market and consideration should be given to its withdrawal, either wholly or in part, irrespective of the outcome of this consultation to allow LS pricing to default to existing regulation on cost orientated pricing.
- 3.94. **Eircom** agrees that the SMP Decision should be reviewed, however it is of the view, supported by the Indecon Report, that the inflexible 50:50 methodology should be replaced by Ramsey Pricing or a similar flexible global price cap based approach that dynamically reflects demand elasticities, in conjunction with consideration of the price controls of all wholesale broadband services, while avoiding the over or under recovery of appropriate costs.

### ComReg's Position & Conclusion

- 3.95. ComReg acknowledges the views of respondents and remains of the view that the implementation of the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges.
- 3.96. ComReg is issuing a separate decision (see Annex B) to revoke ODTR Decision No.D8/01 insofar as it relates to LS recurring charges and the methodology for their calculation.

- 3.97. ComReg has considered in full the Indecon Report and the Tera Response, and remains of the view that Ramsey Pricing is not practically feasible to implement in the context of LS pricing in Ireland. ComReg believes that the implementation of a Global Price Cap, as a variant of Ramsey Pricing, presents the same issues as Ramsey Pricing, but would also transfer the difficulties of appropriately implementing Ramsey Pricing from ComReg to Eircom, which is not considered to be optimal. Please refer to ComReg's position and conclusion in relation to Question 1 for further details on the Indecon Report and the Tera Response in conjunction with the actual consultants' reports that have been published on ComReg's website.
- 3.98. In respect of the SMP Decision, ComReg is separately consulting on replacing this decision with a new market analysis of the WPNIA market (See Annex E).

**Conclusion:** ComReg remains of the opinion that the implementation of the ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges, creates an anomaly when compared to the recovery of costs through Full LLU monthly rental charges.

### Consultation Question

*Q.7. Depending on your answer to the above do you agree or disagree that ComReg should withdraw D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges? Please explain in detail your response.*

### View of respondents

- 3.99. ComReg received five responses to this question.
- 3.100. Four respondents (**BT**, **Smart**, **Vodafone** and **Magnet**) agreed ComReg should withdraw ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges.
- 3.101. **BT** believes this should be done immediately and irrespective of the outcome of this consultation. BT recommends that independent of this consultation, and without waiting for its outcome, ComReg should immediately withdraw ODTR Decision No. D8/01 as cost orientated regulatory obligations are already in place.
- 3.102. **Eircom** agrees that ODTR Decision No. D8/01 should be withdrawn, but only once a suitable Ramsey Pricing or a similar pricing method that accounts for demand elasticities, in conjunction with consideration of the price controls of all wholesale broadband services is in place. The supporting Indecon Report shows that Ramsey allocation of common costs might not vary significantly from the 50:50 allocation determined on a different basis in ODTR Decision No. D8/01. The analysis put forward by Indecon demonstrating that Ramsey allocation of common costs might not vary significantly from the 50:50 allocation is set out in Section 4 of the Indecon Report.

### **ComReg's Position & Conclusion**

- 3.103. ComReg acknowledges the views of respondents and remains of the opinion that it should withdraw ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges.
- 3.104. ComReg is issuing a separate decision (see Annex B) to revoke this ODTR Decision No. D8/01 insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges.
- 3.105. ComReg has in its position and conclusion to Question 1 of this Document, expressed its views on the Indecon Report in relation to its alternative cost allocation approach using Ramsey Pricing or a Global Price Cap.
- 3.106. Tera's full analysis of empirical estimates of elasticities in telecoms is set out in detail in the Tera Response and the key aspects are also summarised and included as part of ComReg's position and conclusion to Question 1.

<p><b>Conclusion:</b> ComReg remains of the opinion that ComReg should withdraw ODTR Decision No. D8/01, insofar as it relates to LS recurring charges and the methodology for the calculation of LS recurring charges.</p>
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### **Tariff Rebalancing**

- 3.107. Consultation Document No. 08/106 confirmed that there is no longer an access deficit in Ireland, and that Eircom's tariffs are fully rebalanced<sup>41</sup>. This is a critical conclusion when assessing the appropriate costing methodology for LS. In the earlier years of regulation, there was an access deficit which was supported by high retail call prices and high margins on calls. Significant changes have occurred in recent years in the retail market for calls with the successful introduction of competition in the Carrier Pre-Select Market. This has reduced the cost of calls to consumers generally and the traditional high margins made by the incumbent. However, retail line rental charges from the incumbent have increased by approximately 39% since 2001 while the cost of the access network has seen a combination of reductions and increases in its cost base, inter alia, through reduced staff numbers, increases in salaries, more efficient technology, more expensive copper, and increased number of lines. As explained in a report by Frontier Economics (as referenced below) to ComReg, the result of this is that the tariffs charged by Eircom are fully rebalanced and the full cost of the network is recovered through PSTN line rental, either retail or wholesale. It should be noted that this assessment was published prior to either of the LS consultations. As Frontier Economics states in Consultation Document No. 07/48a<sup>42</sup>, the current pricing methodology for LS leads to an over-recovery of costs by Eircom. However, Frontier Economics noted at the time that the volume of LS orders was immaterial and therefore any over-

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<sup>41</sup> Retail price cap as a potential remedy on fixed narrowband access markets Submission to consultation 07/48 - 15 August 2007. In this consultation paper ComReg confirmed that tariffs are fully rebalanced.

<sup>42</sup> Frontier Economics - Narrowband Access Retail Price Control: A report prepared for ComReg - [http://www.comreg.ie/\\_fileupload/publications/ComReg0748a.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0748a.pdf), July 2007.

recovery would not be material. Where the number of LS orders increase, as is currently the case, the issue of cost over-recovery is a more significant issue which must be rectified.

- 3.108. The prices for retail narrowband fixed access, wholesale narrowband fixed access and local loop unbundling are consistent with the same unit cost for the access network derived from a Bottom Up FL-LRIC model of Eircom's access network. As a result, Eircom recovers a similar amount from all end-users who purchase narrowband fixed access services using Eircom's copper access network, either directly from Eircom or indirectly from OAOs that use WLR or ULMP to deliver services.

### Consultation Question

*Q.8. Do you agree or disagree that based on the information analysed to date by various experts, namely Frontier Economics and Tera on behalf of ComReg that Eircom fully recovers all costs of the Access network through either retail line rental, SB-WLR or LLU monthly charges through FLRIC cost recovery principles.*

### View of respondents

- 3.109. ComReg received five responses to this question.
- 3.110. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that based on the information analysed to date by various experts, namely Frontier Economics and Tera at the request of ComReg, that Eircom fully recovers all costs of the Access network through retail line rental, SB-WLR or LLU monthly charges by reference to FL-LRIC cost recovery principles.
- 3.111. BT believes that as Eircom has and continues to offer standalone PSTN/WLR services, it is difficult to perceive Eircom selling these services without recovering as many regulated costs as it can. Given the obligation is based on FL-LRIC, for Eircom to do otherwise would be a breach of the past rules. BT believes that the studies of Tera and Frontier support this argument.
- 3.112. Smart believes that Eircom continues to over-recover costs on full ULMP pricing and ancillary costs such as fault handling.
- 3.113. **Eircom** believes that ComReg should regulate the level of charges separately from the structure of charges and also disagrees with the setting of the structure of charges by ComReg. Section 2.2 of the Indecon Report notes that ComReg quote, at the beginning of the section 5 in Consultation Document No. 06/108, Arcor AG & Co. KG v Federal Republic of Germany (Case C-55/06)<sup>43</sup> ("Arcor"), citing that cost orientation "prohibits...remuneration several times for providing the same service". The Indecon Report contests that (a) this has nothing to do with cost structure and cost allocation, but the level of cost recovery; (b) Eircom is not seeking to recover costs "several times over"; and (c) Eircom is not providing the 'same service' but two different services. Indecon believes that the *Arcor* case is clearly talking about the level of cost

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<sup>43</sup> Case C-55/06 *Arcor AG & Co. KG v Federal Republic of Germany*, judgment of 24 April 2008.

recovery for a single service, whereas here, the main issue is the structure of cost recovery between two services.

- 3.114. Eircom believes that ComReg does not appear to recognise that Eircom operates in a dynamic market and does not take account of the basic economics of the telecommunications industry. Eircom notes that Consultation Document No. 07/48a<sup>44</sup> predicted that PSTN volumes would increase by 2% p.a. over the period of the control, however, the cost of the PSTN service is largely fixed while PSTN volumes have since declined.
- 3.115. Eircom believes the access network is a joint and common cost, constituting a fixed sunk capital investment that can support multiple incremental services at negligible incremental costs. Eircom assumes that ComReg predicated its analysis on the simplistic assertion that voice telephony recovers the entire cost of the access network and therefore broadband can get a free ride on the network. Eircom believes the number of loops is falling over time. Eircom forecasts that this will continue, in which case the average price of loops will have to rise in order to permit it to recover the full costs of the network. Eircom believes it is irrational for ComReg to direct Eircom to respond to falling demand by increasing prices or to force Eircom to under recover appropriate network costs.
- 3.116. Eircom believes that ComReg's own expert recommends Ramsey Pricing as providing an economically efficient outcome, but for practical implementation purposes has opted for what it considers is an inefficient incremental cost methodology. Eircom believes that this method will accelerate the rate of line loss, with resulting loss of economies of scale for the whole industry. Eircom believes that an increased rate of decline will further undermine ComReg's belief that PSTN line rental will indefinitely recover all of the costs of the access network.

### **ComReg's Position & Conclusion**

- 3.117. ComReg acknowledges the views of respondents and remains of the view that based on the information analysed to date by various experts, namely Frontier Economics and Tera, that Eircom fully recovers all costs of the Access network through retail line rental, SB-WLR or LLU monthly charges through FL-LRIC cost recovery principles.
- 3.118. The focus of ComReg Consultation Document No. 08/106 relates to cost recovery, not cost structure. In terms of the assertions made by Indecon Report in Section 2.2:
- a) ComReg's objective is to ensure efficient cost recovery. ComReg believes that, given the current cost structure, a 50:50 allocation leads to an over recovery;

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<sup>44</sup> Consultation on a Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets - Part II: Appendix C Reference Number: 07/48a dated 27 July 2007, prepared by Frontier Economics.



- b) With the current LS price, with 50% allocation of common costs of local loop and no change to the PSTN rental charge, there is a clear risk of over-recovery as highlighted in Consultation Document No. 08/106; and
- c) Eircom is providing the same service: access to the local loop, where this service is facilitating both the PSTN product and the LS product. As a consequence, ComReg's citation of Arcor is appropriate.

3.119. ComReg disagrees with Eircom's claim that ComReg's analysis is predicated on the "simplistic" assertion that voice telephony recovers the entire cost of the access network and therefore broadband can get a free ride on the network. ComReg remains of the view that 100% of the common costs of the copper network are recovered through PSTN/WLR. To provide a PSTN service together with a LS service, OAOs must take WLR. Fixed retail customers must avail of narrowband access in order to avail of fixed broadband. Since there is no discount on the WLR price when paired with an LS service, there is an over-recovery of the copper network common costs associated with the current LS price. Currently, and going forward, a significant proportion of lines are sold at the wholesale level providing both voice and broadband services. An issue of cost recovery could arise where the current price for line rental at the wholesale and retail level shows that efficient costs are not being recovered. However, it does not necessarily follow that prices must increase. If the reasons for any under-recovery of costs were, for example, as a result of a Universal Service Obligation, Eircom can apply for a Universal Service Fund in line with current regulations.

3.120. While Eircom's number of working lines has increased over many years, ComReg notes that there has been a decline in the number of Eircom's working lines during the past twelve months, as confirmed by ComReg's recent Quarterly Report data.

3.121. Changes to the number of working lines could result from a range of factors including short term economic fluctuations, longer-term structural factors such as fixed-mobile substitution ("FMS") and increasing levels of broadband penetration. In ComReg's view, the recent decline in the number of lines is predominantly a short-term phenomenon arising from the sudden economic crisis that has hit Ireland over the past year which has led to a significant one-off adjustment similar to general economic circumstances of all companies in the Irish business market. It is also the case that inflation in Ireland has reached its lowest point for a number of years and this also would need to be taken into account when looking at an actual cost recovery exercise. However, ComReg believes that the recent announcements of investment by alternative operators, increased broadband penetration and increased demand for higher speeds should stimulate demand for fixed line services over the coming years and reverse the declining trend. ComReg believes that the successful entry of LLU operators<sup>45</sup>

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<sup>45</sup>Press Release: [http://www.btireland.ie/pr\\_2009\\_07\\_22\\_vodafone.shtml](http://www.btireland.ie/pr_2009_07_22_vodafone.shtml) , 22 July 2009 - BT and Vodafone have recently announced an agreement to significantly boost competition and network investment in Ireland<sup>45</sup>. BT will make investments, by unbundling up to 58 additional exchanges to provide a platform for the delivery of up to 24Mbps broadband services to approximately two thirds of Ireland's available broadband lines.

will act as a key stimulant to this demand and a reduction to key wholesale prices, where appropriate, can only serve to increase this demand. ComReg's preliminary conclusion is that while access line numbers have fallen, the recent changes would not be expected to continue at the current rate. However, this is considered in further detail through the relevant consultations on the full loop price referred to earlier.

- 3.122. In its report Tera identified that, from a theoretical perspective, Ramsey Pricing could be the most welfare enhancing methodology. However, Tera clearly identified that due to the complexity of implementation and the regulatory burden of ongoing monitoring it was impractical to implement in the context of LS in Ireland. These conclusions have been reaffirmed in the Tera Response, where Tera critically assessed in detail the step by step approach of implementing Ramsey Pricing in the context of LS in Ireland. The Tera Response clearly demonstrated the complexities involved in Ramsey pricing, such as, identifying and collecting elasticities, lack of certainty that the economic surplus would be maximised, and ultimately the Tera Response highlighted the additional regulatory burden of additional cost and monitoring.
- 3.123. Tera's full analysis of the possible implementation of Ramsey Pricing in telecoms is set out in the Tera Response and the key points are summarised as part of ComReg's position and conclusion in relation to Question 1. ComReg analysed in detail the initial Tera Report and the further Tera Response together with the responses from operators, in particular Eircom/Indecon, and agrees with the analysis carried out and the conclusions arrived at.

<p><b>Conclusion:</b> ComReg has analysed expert reports and remains of the view that based on the information available that Eircom fully recovers all costs of the Access network through retail line rental, SB-WLR or LLU monthly charges through FL-LRIC cost recovery principles.</p>
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### **Principles of cost recovery**

- 3.124. In Consultation Document No. 08/106, ComReg considered the principles of cost recovery with respect to the LS service. The "recognised set of cost recovery principles,"<sup>46</sup> as decided by the Independent Regulators Group ("IRG") is a check-list of factors that may be taken into account in setting charge limits: namely, cost causation, distribution of benefits, effective competition cost minimisation, reciprocity and practicability. These principles were considered in detail by ComReg and Tera.

### **Consultation Question**

***Q.9. Do you agree or disagree that the above criteria (and as further set out in the Tera Report) forms a sound basis for assessment when reviewing regulated prices? Please detail in full your response.***

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<sup>46</sup> Principles of Implementation and Best Practice regarding cost recovery principles as decided by the Independent Regulators Group, published 24 September 2003.

### **View of respondents**

- 3.125. ComReg received five responses to this question.
- 3.126. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that the above criteria, as further set out in the Tera Report, forms a sound basis for assessment when reviewing regulated prices.
- 3.127. BT agrees that the criteria set out by ComReg is aligned with the principles of regulation adopted in the EU and many places around the world and constitutes both a methodical and robust basis upon which to establish LS pricing in Ireland. BT notes that the European Regulators Group (“ERG”) looks to “best in class” regulatory principles across Europe hence the principles will have been tried and tested.
- 3.128. **Eircom** agrees that the 6 recovery principles outlined provide suitable guidance for the recovery of costs from wholesale services. However, it does not agree with the treatment of these principles in section 4.2 of Consultation Document No 08/106 or in the Tera Report.
- 3.129. Eircom’s position is as follows:
- *Cost causation*: Eircom believes that it is a perversion of this principle to imply that because the LS product requires a PSTN service to be already in place that 100% of the common costs of the copper network should be recovered from the PSTN service.
  - *Distribution of benefits*: Eircom believes the benefits of two services should be at similar levels, where a service provider adding a broadband service is clearly benefiting to a similar degree as one adding a PSTN service to the same loop.
  - *Effective competition*: Eircom believes the proposal to allocate none of the common costs of the copper platform to the broadband service added by the OAO purchasing LS, will distort competition by forcing similar allocation decisions on competing service providers considering adding broadband services to their platforms.
  - *Cost minimisation*: As discussed in the Indecon paper, Eircom believes that the Ramsey allocation of common costs is ultimately cost minimising, in that this form of pricing optimises the combined demands for PSTN and Broadband services.
  - *Reciprocity*: Eircom agrees that this principle is not relevant to the pricing decision at issue.
  - *Practicality*: Eircom disagrees and contends that the Ramsey approach is possible and practical as demonstrated by their expert report from Indecon.

### **ComReg’s Position & Conclusion**

- 3.130. ComReg acknowledges the views of respondents and remains of the view that its assessment of Tera’s Report with respect to the “recognised set of cost recovery principles” forms a sound basis of assessment for reviewing regulated prices.

3.131. ComReg acknowledges that Eircom does not agree with the treatment of the cost recovery principles and addresses these concerns as follows:

- *Cost causation*: This principle does not address the issue of how common costs should best be allocated and recovered, which is the central issue of Consultation Document No. 08/106 and was addressed by Tera in section 5 of the Tera Report. While wholesale charging for full LLU continues to recover 100% of the cost for providing that service LS cannot also be allowed to recover additional revenues for Eircom.
- *Distribution of benefits*: ComReg believes that the LS pricing methodology should be consistent with a reasonable distribution of benefits, in particular, by facilitating the wider use of broadband services without adding any costs to voice customers. This was addressed by Tera in section 3 of the Tera Report and ComReg agrees with it.
- *Effective competition*: ComReg believes that Consultation Document No. 08/106 corrects an anomaly where there was an over-recovery of the common costs of the copper network. ComReg believes that addressing this anomaly will allow fuller use to be made of the local loop for the provision of all telecommunication services. Alternative suppliers of infrastructure links will be able to compete with Eircom and OAOs using LS or PSTN line rental across the full range of telecommunication services. This was also addressed by Tera in section 4 of the Tera Report.
- *Cost minimisation*: ComReg agrees that Ramsey Pricing is the most welfare enhancing allocation methodology from a purely theoretical perspective, however, due to the complexity of its implementation in practice ComReg's preliminary view, as set out in Consultation Document No. 08/106, was not to apply Ramsey Pricing. ComReg's preliminary view was reinforced upon consideration of the analyses in both the Indecon Report and Tera's Response. The LS pricing methodology should enable costs to be minimised, by preventing over-charging, by avoiding an unnecessarily complex calculation of refunds from broadband customers to voice line rental customers, and by facilitating increased competition. The incremental cost approach fulfils these requirements.
- *Practicality*: ComReg has considered in full the Indecon Report and the Tera Response, and remains of the view that Ramsey Pricing is not practically feasible to implement in the context of LS pricing in Ireland. The detailed step by step approach to implementing Ramsey Pricing is set out in Tera's Response (and summarised as part of ComReg's position and conclusion in relation to Question 1). The Tera Response clearly demonstrated the complexities involved in Ramsey pricing, such as, identifying and collecting elasticities, lack of certainty that the economic surplus would be maximised, and ultimately the Tera Response highlighted the additional regulatory burden of additional cost and monitoring. The Indecon Report did not provide any detailed implementation process.

<p><b>Conclusion:</b> ComReg remains of the view that ComReg's assessment of Tera's Report, with respect to the "recognised set of cost recovery principles", forms a sound basis for assessment when reviewing regulated prices.</p>
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### **The appropriate cost measure**

- 3.132. In Consultation Document No. 08/106, ComReg looked at the appropriate cost measure to be applied to LS. In Consultation Document No. 08/56<sup>47</sup>, and more recently in ComReg Documents No 09/39 and 09/62,<sup>48</sup> ComReg consulted on a number of pricing methodologies which a regulator could adopt going forward for the full LLU price. The approach recommended in these consultations is to set the full LLU price on a BU FL LRIC approach.
- 3.133. This approach involves ComReg taking due consideration of the actual costs incurred by the incumbent when setting regulatory prices and engaging at length with Eircom to establish what these actual costs are year on year when reviewing prices in general. However, it is generally agreed by all regulators that a regulator must be mindful of the risks of setting inappropriate regulatory prices based on historical cost information. HCA uses costs that may well be out of date. For example asset prices that were purchased in the past may have changed significantly in the intervening period. This creates a serious risk of, for example, under recovery by Eircom if prices have increased in the intervening period. (This price trend is true of many cost categories in the access network where the cost profile is dominated by construction costs). Incorrect price signals to other operators may result which can cause significant distortions to platform competition. HCAs are prepared by the incumbent and audited to a standard that does not generally give an opinion on the reasonableness of unit prices such as LLU or LS, for example. There is insufficient disaggregation in the access network section of the HCAs to show the true cost of providing LLU, LS or wholesale bitstream for example. It is also a fact that HCAs are subject to many fluctuations year on year which may not be appropriate or relevant for regulatory pricing purposes.
- 3.134. The review of Current Cost Accounts (“CCA”) might also be used as a proxy for a more up to date and efficient network, avoiding the legacy engineering of the old network and being more cost reflective of costs today and going forward. However, since Eircom currently does not prepare audited CCA accounts for the access network they are unavailable to ComReg so as to enable it to assess them against the Bottom Up FL-LRIC price being charged.
- 3.135. However, these issues are not relevant when pricing LS, as the full LLU monthly rental price is set so that Eircom recovers all of the costs which an efficient operator would be reasonably expected to incur year on year. The fact that the actual costs incurred in a given year may be more or less than that recovered through the full LLU price set is not relevant, as the HCA method is not the method by which the price control obligation of cost orientation is set (i.e. FL-LRIC).

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<sup>47</sup> ComReg Document No. 08/56. Consultation: Proposals for Local Loop Unbundling Pricing Methodologies, published on 10 July 2008.

<sup>48</sup> ComReg Document No. 09/62: Further Input to Consultation Document No. 09/39 on Local Loop Unbundling (LLU) and Sub Loop Unbundling (SLU) Monthly Rental Charges; published on 27 July 2009.

### Consultation Question

*Q.10. Do you agree or disagree that HCAs are generally not an appropriate basis on which to set regulatory pricing decisions and that few regulators have used them in the past without detailed analysis and transparency. Please detail in full your response.*

*Q.11. If you believe that the HCAs of Eircom are a suitable basis on which to base regulatory pricing decision, do you believe that the current presentation of these accounts allows for the determination of appropriate regulated prices? Please detail in full your response.*

### View of respondents

- 3.136. ComReg received five responses to these questions.
- 3.137. All Five respondents (**BT, Smart, Vodafone, Magnet and Eircom**) agreed HCAs are generally not an appropriate basis on which to set regulatory pricing decisions. The respondents generally believe that HCAs should not be the basis for setting LS, as this methodology takes account of historic costs and does not reflect prices on a competitive market.
- 3.138. BT believes that setting tariffs on the basis of HCAs offers no incentive to either achieving static or dynamic efficiencies. BT believes that the current presentation of Eircom's accounts does not allow for the determination of appropriate regulated prices.
- 3.139. It is Magnet's view that HCAs fail to take into account versatility of copper and the interoperability of services and is thus not a true reflection on the actual cost of providing that service.
- 3.140. Smart believes that HCAs are useful when looking at trends over a long period, however, the level of fluctuation year on year can vary to such an extent as to make it likely that incorrect regulated prices would be set.
- 3.141. Eircom believes the cost accounting methodology is relevant to establishing the level of prices, but is not relevant to the structure of prices and allocation of common costs which are the subject of this consultation. Eircom believes that historic costs demonstrate that the PSTN service does not recover 100% of the common costs of the copper network. Eircom, however, does not propose that LS pricing should be based on historic costs. Eircom proposes that the findings of the Indecon Report should be taken together with Eircom's forecast of service volumes and LRIC costs to inform a forward looking price control that will ensure adequate and efficient recovery of common costs of the copper network across the range of services delivered over that network.

### ComReg's Position & Conclusion

- 3.142. ComReg acknowledges the views of respondents and remains of the view that HCAs are generally not an appropriate basis on which to set regulatory pricing decisions.

- 3.143. HCAs are not relevant for setting ULMP prices due to the fact that ComReg uses a FL-LRIC methodology as set out in the remedies imposed on Eircom as a result of its SMP designation.
- 3.144. Although Eircom believes that historic costs demonstrate that the PSTN service does not recover 100% of the common costs of the copper network, ComReg notes that Eircom has not demonstrated this. ComReg has in parallel, through the full LLU price review project, gained a more in-depth understanding of the actual costs incurred by Eircom, as reported through the HCAs. The outcome of this exercise has not altered the current position in relation to LS.
- 3.145. ComReg reasserts its opinion that the common costs of the copper network are fully recovered through the combination of retail line rental, WLR and full LLU. ComReg observes that section 2.2.1 of the Indecon Report states that “if all prices are based on LRIC, there is a greater risk of under recovery”. ComReg believes that this is an incorrect understanding of the way LRIC is implemented in general by national regulatory authorities (“NRAs”), including ComReg, in the EU. NRAs allow operators to recover a share of their common costs when they set LRIC prices. The current full LLU price in Ireland recovers a share of the common costs (called “indirect capital costs” or “indirect operating costs”).
- 3.146. ComReg has reviewed the Indecon Report findings in detail and does not believe that they can be used to determine the LS monthly rental price. ComReg notes that it has concerns with the consistencies of the data and how it is applied in the Indecon Report. In particular, ComReg’s concerns relate to the elasticities considered, the products that are considered and the statistical data set used by Indecon in its empirical estimates. ComReg is very concerned that Indecon chose to include only Eircom’s own-price elasticities, and did not properly consider cross elasticities. In addition, Indecon did not fully consider all substitutable products and bundles. These inconsistencies are discussed further in the Tera Response and in ComReg’s position and conclusion in relation to Question 1.



















**Conclusion:** ComReg remains of the view that HCAs are not an appropriate basis on which to set a LS price.

### **Review and analysis of cost recovery principles in other jurisdictions**

- 3.147. ComReg, in Consultation Document No. 08/106, has considered the methodologies adopted in 18 selected Organisation for Economic Co-operation and Development (“OECD”) countries<sup>49</sup> (as illustrated in figure 1 below). In section 2 of the Tera Report, Tera analysed the methodologies adopted in the 18 selected OECD countries.

<sup>49</sup> Mexico, Hungary, Poland, Slovakia, Turkey, Czech Republic have not been included since the PPP-GDP/capita is below \$30,000, far from the Irish level. Iceland has not been included due to the very small size of the country. South Korea and Canada have not been analysed in absence of information (even if the situation in Canada appears to be very similar to the one in the USA). Switzerland and New Zealand do not propose LS. Finally, in Norway, the same methodology as in Denmark is used.

**Figure 1 – Overview of methodologies used by NRAs for setting LS prices**

Country	Which current methodology?	Changes in methodology in the past?
Austria 	50%	NO
Belgium 	Incremental	Yes, in 2007
Denmark 	50%	NO
Finland 	50%	NO
France 	Incremental	Yes, in 2002
Germany 	Incremental	NO
Greece 	Incremental	Yes, in 2006
Ireland 	50%	NO
Italy 	Incremental	NO
Luxembourg 	Percentage determined by the incumbent	NO
Netherlands 	Incremental	NO
Portugal 	Incremental	Yes, in 2002
Spain 	Incremental	NO
Sweden 	50%	NO
United Kingdom 	Incremental	NO
USA 	Some allocation	NO
Australia 	Incremental	NO
Japan 	Incremental	NO

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Source: TERA Consultants

3.148. It can be concluded that in general NRAs use two methodologies in allocating the common costs of the local loop. The first methodology is a “50:50” allocation of the common costs of the local loop between narrowband and broadband services. The second methodology is an “incremental” cost approach, where all the common costs of the local loop are allocated to the narrowband service and only the incremental costs of providing the LS service are allocated to broadband.

3.149. Eleven NRAs adopt an incremental cost methodology. Five adopt a 50:50 allocation methodology<sup>50</sup>.

3.150. Tera, in Consultation Document No. 08/106a, analysed the methodologies adopted in each of the respective countries from both a static and dynamic perspective. Tera concluded, in section 2 of its report, that the preferred option of NRAs is the “incremental” cost methodology because this methodology:

- avoids cost over-recovery;
- prevents discrimination;
- is compliant with the cost causality principle;
- is easier to implement in comparison with other methodologies;
- and is consistent with the Ramsey-Boiteux optimum<sup>51</sup>.

<sup>50</sup> 3 of the 18 selected 18 OECD countries adopt variations of the two dominant methodologies. The United States and Luxembourg allocate some common costs of the local loop to LS and Greece adopts a benchmark price as a proxy for incremental costs.

<sup>51</sup> Ramsey-Boiteux pricing is defined and discussed in detail in section 5.1 of the Tera report.



### Consultation Question

*Q.12. Do you agree or disagree with the above summary, if not please provide any additional information you might have? Please detail in full your response.*

### View of respondents

- 3.151. ComReg received five responses to this question.
- 3.152. Three respondents (**BT**, **Smart** and **Vodafone**) agreed with ComReg's summary.
- 3.153. BT believes that the summary of the adoption of LS pricing methodologies in the key countries is a reasonable summary of the current situation. BT also agrees that most countries have or are moving to the LS pricing model now being proposed by ComReg. BT also notes that the change to these principles unlocked the Greek market which according to ECTA is now growing rapidly.
- 3.154. Magnet stated that it had not undertaken a review of others nation's approaches and was thus unable to give a conclusive agreement.
- 3.155. **Eircom** believes that there is no basis whatsoever for the Tera Report finding that an incremental cost methodology is consistent with Ramsey Pricing. Eircom's views are expanded in Section 2.1 of the Indecon Report, which argues that the pure incremental cost variant has not been shown to be better than variants of Ramsey Pricing. The Indecon Report argues that the Tera Report seems to ignore Ramsey Pricing simply on the grounds of difficulty of implementation. Indecon also argues that the Tera Report ignored a Global Price Cap methodology as an alternative approach. Indecon notes that, in reference to section 2.1 of the Tera Report, Tera identified, that from a dynamic aspect, 4 out of 18 NRAs<sup>52</sup> moved from the 50:50 approach to the incremental cost methodology. Indecon believes Tera's interpretation is arbitrary as 14 of the 18 NRAs did not change methodologies. Indecon, in section 2.4.3 of their report, also believe that Switzerland, Norway, Canada and New Zealand should be included in the international benchmark, thereby demonstrating that 11 out of 22 OECD countries adopt the incremental methodology.

### ComReg's Position & Conclusion

- 3.156. ComReg acknowledges the views of respondents and remains of the opinion that the analysis performed by Tera is an accurate representation of the methodologies employed by NRAs in the OECD countries identified.
- 3.157. Eircom states "there is no basis whatsoever for the Tera finding that an "incremental" cost methodology is consistent with the Ramsey Boiteux optimum". ComReg would like to clarify that the word "consistent" does not mean "equivalent" in this case. By comparing the relative levels of elasticities of PSTN and broadband, ComReg believes that the incremental cost approach represents a better approximation of Ramsey Pricing, by virtue of its simplicity

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<sup>52</sup> Four countries changed their methodologies, to the incremental approach, for setting LS prices in recent years: France and Portugal in 2002, Greece in 2006 and Belgium in 2007.

and ease of implementation which will therefore be more consistent with consumers' welfare optimisation, than symmetric methods such as 50:50 approach. This was analysed in section 5.2 of Consultation Document No. 08/106.

- 3.158. ComReg has considered in full the Indecon Report and the Tera Response, and remains of the view that Ramsey Pricing is not practically feasible to implement in the context of LS pricing in Ireland. Tera's detailed step by step approach to implementing Ramsey Pricing, which was not considered by Indecon, has clearly demonstrated the complexities of Ramsey Pricing, such as identifying and collecting elasticities, the lack of certainty that the economic surplus is maximised and ultimately the additional regulatory burden of additional cost and monitoring. ComReg believes that the implementation of a Global Price Cap, as a variant of Ramsey Pricing, offers the same issues as Ramsey Pricing, but would also transfer the difficulties of appropriately implementing Ramsey Pricing from ComReg to Eircom.
- 3.159. ComReg believes that Indecon's argument in relation to the dynamic aspect of the fact that 4 NRAs changed to the incremental cost methodology, while 14 of the 18 NRAs have not changed methodologies, is incorrect. As ComReg believes that the dynamic aspect of the NRAs that have changed to the incremental approach from the 50:50 approach, based on the international benchmark, is demonstrating a recent international trend. As highlighted in figure 2 of this document 11 out of 18 NRAs<sup>53</sup>, based on an international benchmarking exercise carried out by Tera, currently adopt the incremental approach. Switzerland and New Zealand cannot be included in an international benchmark as there is no LS offering in these jurisdictions, so by including Canada and Norway into an international benchmark, to imply that 11 out of 20 jurisdictions adopt the incremental methodology, does not alter the findings of section 2.1 of the Tera Report. Moreover, it must be noted that there are no precedents in any jurisdiction where Ramsey Pricing, or a variant thereof, has been adopted to determine the LS monthly rental price. This, however, was not noted by Indecon.
- 3.160. Please refer also to the Indecon Report and the Tera Response as well as ComReg's position and conclusion in relation to Question 1.

<p><b>Conclusion:</b> ComReg remains of the opinion that the analysis performed by Tera is an accurate representation of the methodologies employed by NRAs in the OECD countries identified.</p>
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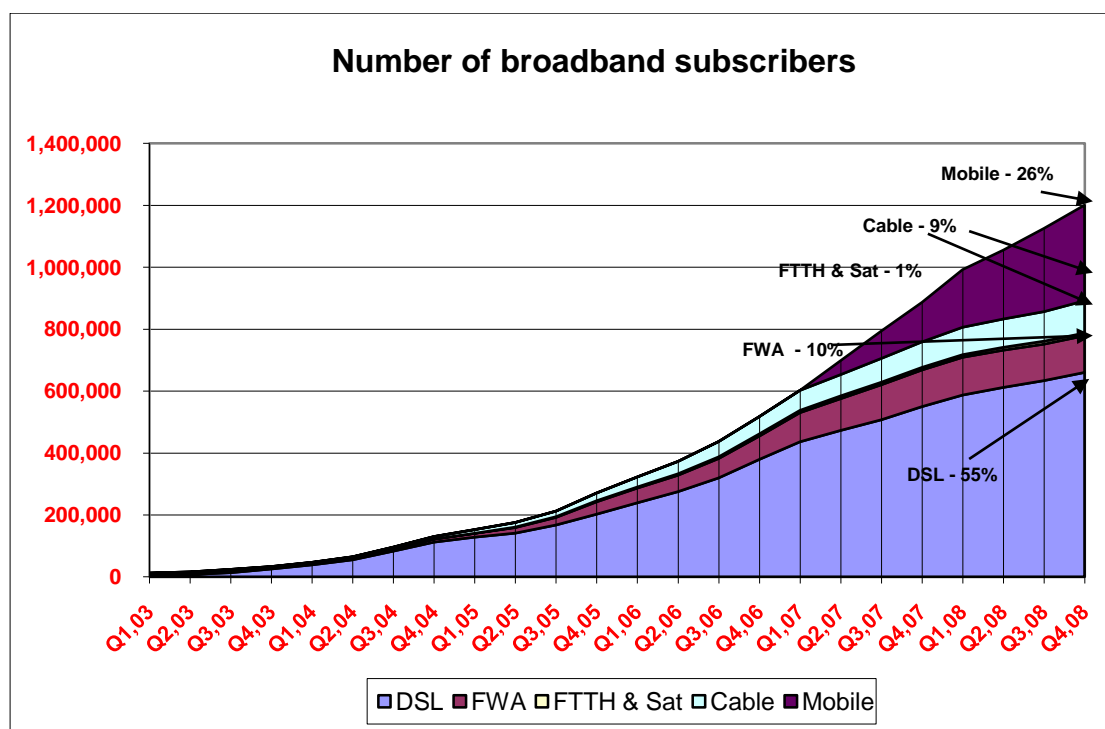
## Competition

- 3.161. There has been significant growth in alternative infrastructure for broadband in Ireland over the last number of years (as illustrated in figure 2 below ) and ComReg is mindful of the need to set regulated prices in such a way that these alternative platforms are not unfairly discriminated against.

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<sup>53</sup> 11 out of 18 NRAs, including the 4 NRA's (Belgium, France, Greece and Portugal) who changed to the incremental approach.

Figure 2- Broadband subscribers in Ireland Q1 2003 – Q4 2008



Source: ComReg Quarterly Reports

3.162. It is ComReg’s view that, in principle, no distortion in inter-platform competition should arise as long as the cost of a fixed loop is recovered in aggregate. In Ireland, it is not currently possible for end-users to avail of broadband over DSL without paying for line rental together with broadband. For the reasons noted below, ComReg believes that because the total cost of the loop is recovered in a manner consistent with the promotion of inter-platform competition, no distortion of inter-platform competition should result from the new price mandated by this decision.

3.163. Currently the local access network is costed using an engineering cost model based on a FL-LRIC methodology. Advocate General Poiares Maduro<sup>54</sup> in case of Arcor and the judgment of the Court of Justice of the European Communities (“the ECJ”) approved the use of this methodology in circumstances where independent platform competition is an important consideration.

3.164. One of ComReg’s goals<sup>55</sup> is to “encourage both investment in networks and competition by providing appropriate regulatory controls and pricing structure”. There is evidence of a demand for LS based on the volume of recent orders processed by the incumbent together with representations from industry currently reselling the Eircom bitstream product. ComReg does not believe that the current price structure of LS is consistent with these goals and that it could act as a barrier to current and future growth of the LS service since it no longer

<sup>54</sup> In paragraphs 48 and 63 of the Opinion delivered on 18 July 2007 Case C-55/06, European Court of Justice, the case of *Arcor AG & Co. KG v Federal Republic of Germany*.

<sup>55</sup> Document No 07/104, ComReg Strategy Statement (2008 – 2010), published on 17 December 2007

correctly reflects underlying costs as mandated through the SMP Decision and as proposed in Consultation Document No. 08/104.

### **Possible impact of LS pricing methodology on other regulated products**

3.165. ComReg, in Consultation Document No. 08/106, was mindful of the impact a new LS price would have on competition and other regulated products. ComReg must ensure a level playing field and prevent margin squeeze. There are a number of regulated products which also utilise the local loop and it is important to review possible impacts the proposed change to the LS pricing methodology could have on these services. For the purposes of the consultation, ComReg considered the impact of LS pricing methodology on Full LLU, bitstream and SB-WLR.

#### **Full LLU**

- 3.166. The price of full LLU (ULMP) is currently based on the results of a Bottom Up FL-LRIC model of Eircom's copper access network.<sup>56</sup> In comparison with LS, full LLU enables OAOs to offer customers differentiated narrowband and broadband services without having to purchase WLR. Products based on LS can only be availed of when an end-user also purchases narrowband access in combination with WLR. Since the issue is what proportion of the cost of the local access network should be borne by broadband services as against narrowband services, and since ULMP allows for the provision of both broadband and narrowband services, it follows that the price of ULMP will be independent of the price of LS.
- 3.167. ComReg considers that there is no relationship between the Full LLU pricing methodology and the LS pricing methodology. However, due to the breakdown in the information gathering exercise with Eircom, ODTR Decision No. D8/01, set a benchmark price for the full LLU monthly rental<sup>57</sup> and, in parallel, the LS price was set based on the full LLU benchmark price, using an economic rationale.

#### **Bitstream**

3.168. Bitstream pricing is currently determined on the basis of the retail minus methodology. As per ComReg Decision No. D01/06, when setting bitstream prices, Eircom must ensure that it does not create a margin squeeze. The level of bitstream prices should be set so that efficient investments in full LLU and LS are not discouraged. ComReg does not believe that the current proposal will create a margin squeeze; on the contrary ComReg believes it will correct the current anomaly where the current LS price is inconsistent with the 1MB bitstream price; therefore ComReg believes current proposals will not impact on

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<sup>56</sup> ComReg Decision D15/04 – Local Loop Unbundling, Review of Eircom's ULMP monthly rental charge.

<sup>57</sup> Per ODTR Decision No. D8/01 "*As Eircom has failed to supply very significant elements of the relevant information, the Director has set prices based on information available to her...The prices are set on an interim basis, and in approving final prices, the Director will review in light of an appropriate and adequately justified submission by Eircom.*"

bitstream prices going forward. LS may also allow OAOs the choice of giving customers currently serviced through SB-WLR and bitstream a smoother transition to full unbundling.

### **SB-WLR and PSTN retail service**

- 3.169. As discussed in section 2.1 of Consultation Document No. 08/106, since tariffs are fully rebalanced in Ireland, there would be no impact for WLR or the PSTN retail monthly rental charges, unless it were decided to allocate some of the cost of the local access network to broadband only services such as LS.

### **Consultation Question**

*Q.13. Do you agree or disagree that the proposals of ComReg will not have an impact on infrastructure investment of alternative platforms? Please explain in detail your response.*

### **View of respondents**

- 3.170. ComReg received five responses to this question.
- 3.171. Four respondents (**BT, Smart, Vodafone and Magnet**) agreed that ComReg's proposals will not impact on the infrastructure investment of alternative platforms. These respondents generally believe that the LS monthly price will not have an impact on infrastructure investment in alternative platforms as the total cost of the local access network in aggregate is recovered from subscribers and there is no proposal to set the LS price below the incremental costs of provision.
- 3.172. Magnet believes ComReg's proposal will not have an impact as investors and OAOs take into account different issues and not just LS when deciding to invest in technology.
- 3.173. Smart believes that the LS price proposal is only one of the entire review of the WUA and WPNIA markets, and at the end of the current consultations that a revised view of both LS and full LLU should be provided. Smart believes that if correctly done, the "ladder of investment" will be preserved in the market for all infrastructure players and investment in infrastructure will continue and in many cases may actually be enhanced.
- 3.174. Vodafone believes ComReg's current proposal will address the current price anomaly and contribute to a more efficient price structure for regulated wholesale products. Vodafone believes that some of the existing demand for the use of bitstream to provide broadband services to end-users is therefore likely to switch to the use of the LS product.
- 3.175. **Eircom** believes what ComReg is proposing, by setting a LS price to make no contribution to the common costs of the copper network, is to remove the economies of scope available to the copper network from adding broadband services. Eircom believes this will ultimately affect the investment decision for an operator of an alternative network considering adding a broadband service. Eircom believes that new services would only be added successfully if the revenue they generate will contribute to the common costs of the underlying network to the extent that they replace the declining contribution from those services reaching the end of their product life cycle. Eircom believes ComReg's

proposal makes no contribution to the common costs of the Eircom copper network. Eircom believes that broadband investment decisions on Eircom's copper network influence the business case for infrastructure competitors; therefore ComReg's decision will have a significant impact on the investment decision for alternative platforms.

### **ComReg's Position & Conclusion**

- 3.176. ComReg acknowledges the views of respondents and remains of the opinion that the proposals, as set out in Consultation Document No. 08/106, will not impact upon the infrastructure investment of alternative platforms.
- 3.177. ComReg does not agree with Eircom's response. It believes there will be no adverse impact on infrastructure development, as explained in section 4 of the Tera Report. Eircom does not appear to refer to the Tera analysis. On the contrary, ComReg strongly believes that where industry has confidence in an effective regulatory regime that ensures among other things, that prices are set to an efficient cost recovery level, they will be more open to investment. There are opportunities in the Irish Telecoms market for investment in broadband services as evidenced with recent announcements from key players such as BT and Vodafone. To foster the growth of competition in the market, ComReg must ensure that the correct processes are in place and that prices are cost orientated.
- 3.178. There are many other factors that OAOs have to consider when deciding to avail of a LS service including the availability of efficient backhaul and capital expenditure considerations. This has not been considered by Eircom in its response to consultation but in line with considering the wide range of prices and services being made available by Eircom, ComReg must also be conscious of the other players in the market, both potential and actual competitors.

**Conclusion:** ComReg remains of the opinion that the proposals set out in Consultation Document No. 08/106 will not have an impact on infrastructure investment of alternative platforms.

### **Review of cost allocation methodologies**

- 3.179. As stated in ComReg's conclusion to Question 8, the allocation of costs common to the local loop is currently entirely allocated to the low frequency narrowband service on a FL-LRIC basis. This is supported by the Report done for ComReg by Frontier Economics<sup>58</sup>. As such the retail price cap set in 2007 for narrowband services allows for the recovery of the cost of the local loop. It follows that the inclusion of line costs in LS represents an over-recovery of costs based on the current cost orientation obligation in place.

### **Review and assessment of cost allocation methodologies**

- 3.180. In section 5 of the Tera Report, the position in 18 selected member states of the OECD is analysed through reviewing different papers and consultations published by their respective NRAs, in addition to a survey of relevant economic literature. From this review Tera arrived at 10 possible methodologies

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<sup>58</sup> Consultation on a Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets - Part II: Appendix C Reference Number: 07/48a dated 27 July 2007, prepared by Frontier Economics

that an NRA could adopt when considering the allocation of common costs of the local loop;

1. Ramsey Pricing;
2. Efficient Component Pricing (“ECPR”);
3. Cooperative Bargaining Theory;
4. Shapley Shubik Pricing;
5. Stand alone cost;
6. Equi Proportionate Mark-Up (“EPMU”);
7. Incremental costs;
8. Network incentive fees;
9. Joint production theory; and
10. Federal Communications Commission (“FCC”) ad hoc method.

3.181. For each of these 10 methodologies, Tera has completed an assessment of their consistency with the aims and objectives of ComReg. ComReg has analysed Tera’s assessment and agrees with its conclusions. Tera and ComReg have considered ComReg’s objectives pursuant to Section 12 of the Act and determined the following 5 categories as the terms of reference for assessing the various allocation methodologies:

1. Maximising consumers’ welfare;
2. Ensuring Eircom recovers efficient costs;
3. Avoiding any cost over-recovery by Eircom;
4. Encouraging efficient investment in infrastructure and not deterring incentives to deploy alternative infrastructure; and
5. Practical implementation.

3.182. Section 5.1 through to section 5.10 of the Tera Report explored the assessment of each of the 10 methodologies set out at paragraph above.

### **Recommended cost allocation methodology for Ireland**

3.183. ComReg, in Consultation Document No. 08/106, observed that, in theory, the best method, for allocating the common costs of the local loop to LS, from the viewpoint of maximising consumer welfare is the Ramsey Pricing rule. However, the Ramsey methodology requires information about product elasticities which would be very difficult to obtain with any degree of certainty. This is explained in detail in the Tera Response and in ComReg’s position and conclusion in relation to Question 1.

3.184. Tera identified, and ComReg agrees with Tera’s assessment, that the Ramsey Pricing methodology is not practically feasible in the context of a fast moving and dynamic telecoms market. This is due to the issues of data gathering, and the general burden this method imposes on stakeholders; for this reason,

ComReg has had to consider what the next best options are.

**Figure 3 - Advantages and disadvantages of the 10 allocation methodologies in relation to the achievement of ComReg's objectives**

		Maximizing welfare	Ensuring Eircom recovers its costs	Avoiding any cost over recovery	Encouraging efficient investment in Infras	Compliance with full LLU	Simplicity
1st best but too complex	Ramsey Boiteux	Yes	Yes	Yes if reduction in PSTN monthly charge	Yes	Yes	No
	Incremental	Yes but lower than Ramsey	Yes	Yes	Yes	Yes	Yes
Asymmetric methods	Joint production	Yes but lower than Ramsey	Yes	Yes	Yes	Yes	Yes
	Coop. Bargaining	No	Yes	Yes if reduction in PSTN monthly charge	Yes	Yes	Yes for calc./No for implem. as PSTN monthly charge required
Symmetric methods	Shapley	No	Yes	Yes if reduction in PSTN monthly charge	Yes	Yes	Yes for calc./No for implem. as PSTN monthly charge required
	Stand alone	No	Yes	Yes if reduction in PSTN monthly charge	Yes	Yes	Yes for calc./No for implem. as PSTN monthly charge required
	ECPR	No	Yes	No	No	No	Yes
Not relevant here	EPMU	No	Yes	Yes if reduction in PSTN monthly charge	No guarantee	Yes	Yes for calc./No for implem. as PSTN monthly charge required
	FCC ad hoc	Yes but lower than Ramsey	Yes	Yes	Yes	Yes	Not relevant in the EU case
	Incentive fee	No	No	No	No	Yes	No

Source: TERA Consultants

3.185. ComReg's preliminary conclusion was to agree with the majority of NRAs that the asymmetric family, and in particular, incremental costs represents the most appropriate method of allocating the common costs of the local loop to LS. The incremental methodology has also been endorsed by the IRG<sup>59</sup>.

### Consultation Question

*Q.14. Do you agree or disagree that the above methodologies form an appropriate basis on which to consider the methodology options available to ComReg? Please explain in detail your response.*

*Q.15. Taking into account the table above, which methodology do you think is the most appropriate and why, taking into account the regulatory objectives of ComReg as set out? Please explain in detail your response*

### View of respondents

3.186. ComReg received five responses to these questions.

3.187. All five respondents (BT, Smart, Vodafone, Eircom and Magnet) agreed that the above methodologies form an appropriate basis on which to consider the methodology options available to ComReg.

<sup>59</sup> Principles of implementation and best practice regarding LLU as decided by the Independent Regulators Group 18 October 2001 and amended in May 2002.



- 3.188. Four respondents (BT, Smart, Vodafone and Magnet) agreed that the incremental costing methodology is the most appropriate taking into account the regulatory objectives of ComReg as set out.
- 3.189. BT agrees with ComReg's analysis that incremental costs are both the most appropriate in allocating costs whilst at the same time are practical to implement. BT also notes that the IRG, which has a function to promote best practice regulation, also recommends the use of 'incremental methodology' and that the majority of NRAs in other EU Member States have either adopted this approach or are in the course of doing so.
- 3.190. Magnet believes that the incremental methodology is the most effective method of satisfying ComReg's objectives since it allows Eircom to recover its costs whilst ensuring that the end-user receives a value for money product. It also allows OAOs to offer the service and make a return on their investment.
- 3.191. Smart agrees that the incremental cost model is the most appropriate to avoid over-complex modelling and to accurately reflect the costs actually incurred.
- 3.192. Vodafone acknowledges that Ramsey Pricing is the most optimal pricing method in theory, however, it agrees with Tera's findings that it is impractical to implement. Vodafone believes that, through Ramsey Pricing, it is likely that a small portion of the common costs of the local loop may be allocated to LS; however, the associated requirement to implement a downward adjustment to the retail price of PSTN line rental for lines being unbundled on the basis of the LS product could be very complex.
- 3.193. Vodafone believes that while the incremental pricing of LS does not maximise consumer welfare since it does not achieve an optimum allocation of the common costs between the two products, it is more practical to implement and satisfies all other criteria. Vodafone considers that it is reasonable to assume that the price elasticity of demand for PSTN is relatively inelastic and that for broadband services is relatively elastic. On that basis the incremental approach is unlikely to lead to outcomes considerably at variance with the Ramsey approach in terms of the final price for the LS service.
- 3.194. Eircom disagrees with ComReg's assertion that Ramsey Pricing is too complex to practically implement (See Indecon Report, section 3). Eircom believes that, in any event, this criterion should be given little weight in light of the sophistication of the rate-setting process and the available experts. Eircom believes that the Ramsey Pricing methodology for the allocation of the common costs of the copper network over the several services using it, is the most economically efficient for price setting purposes at the retail and wholesale level. Eircom believes that ComReg and Tera acknowledge the welfare enhancing nature of the Ramsey allocation of common costs to services, but overstate the problems of over-recovery and pricing complexity. Eircom proposes that an access price cap encompassing the range of services sharing the common costs of the copper network is a straightforward mechanism to avoid cost over-recovery in regulated utilities characterised by the high levels of common costs. Under such a control Eircom can set access prices to approximate the Ramsey allocation of the common costs of the copper network as demand changes. Eircom believes that the general constraints of that control should be set so as to ensure there is no over-recovery of inefficiently incurred

costs of the copper network from the revenues of the various wholesale services delivered over that network.

### **ComReg's Position & Conclusion**

- 3.195. ComReg acknowledges the views of respondents and remains of the opinion that the incremental costing methodology is the most practical and appropriate methodology taking into account the regulatory objectives of ComReg. In addition to the reasons set out in Consultation Document No. 08/106, ComReg has, following the submissions of industry, engaged in a further round of detailed analysis and considered Eircom's proposal in detail. This has been discussed in Question 1. ComReg, having considered all responses, the Indecon Report and the Tera Report and Tera Response and sees no reason to change its position.

**Conclusion:** ComReg remains of the opinion that the incremental costing methodology is the most practical and appropriate approach taking into account the objectives of ComReg.

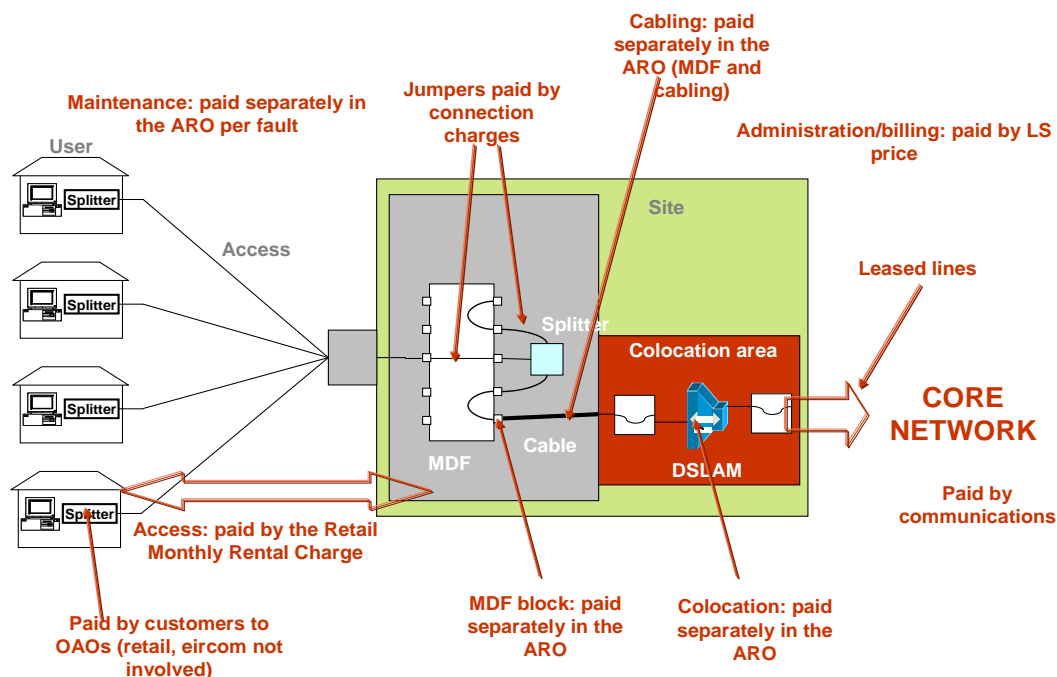
### **Recommendation for the setting of the LS price in Ireland**

- 3.196. The preliminary conclusion of Consultation Document No. 08/106 was that the "incremental" cost approach is the most suitable methodology in determining the allocation of costs of the local loop to LS. ComReg believes the cost of a local loop on a Bottom Up FL-LRIC basis is already fully recovered through the price charged for narrowband access services whether via retail access, SB-WLR or via full local loop unbundling. As the cost of the local loop is fully recovered, any allocation of common costs of the local loop to LS would represent an over-recovery of the efficient costs of Eircom, therefore no common costs should be allocated to LS. The only costs allowable for determining the price of LS are the incremental costs of providing the LS service.
- 3.197. ComReg assessed the components of providing the LS service and the incremental costs associated with it. In section 6 of the Tera Report, Tera identified and assessed in detail the incremental costs of providing the LS service in Ireland.

### **Identifying the incremental costs of providing the LS service**

- 3.198. Consultation Document No. 08/106 states that the provision of LS requires Eircom to complete several tasks, including the installation of cables, removal of jumpers, carrier administration and billing.
- 3.199. Figure 4 illustrates the main costs that relate to LS in Ireland.

**Figure 4 - Costs related to LS in Ireland**



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Source: TERA Consultants

3.200. Many of these tasks are already recovered by prices listed in Eircom’s ARO price list.<sup>60</sup> Connection charges, disconnection charges and line fault charges, which includes LS Line testing and LS fault clearance, are clearly identified in the ARO price list.

### Consultation Question

*Q.16. Do you agree or disagree that the above diagram (figure 4) is a fair representation of the costs involved in providing the LS services? Please explain in detail your response.*

### View of respondents

- 3.201. ComReg received five responses to these questions.
- 3.202. All five respondents (**BT, Smart, Vodafone, Eircom** and **Magnet**) generally agreed that the above diagram (figure 4) is a fair representation of the costs involved in providing the LS services.
- 3.203. BT, however, believes the diagram in figure 4 seems to suggest that the splitter is provided by the incumbent and is located around the main distribution frame (“MDF”). In commercial terms this means that the OAO is already paying for the splitter and the space it is located in.
- 3.204. Smart believes that the addition of any other costs leads to the over-recovery of costs by Eircom.

<sup>60</sup> Eircom’s Access Reference Offer Price List – Annex C, Service Schedule 103, Line Sharing Service

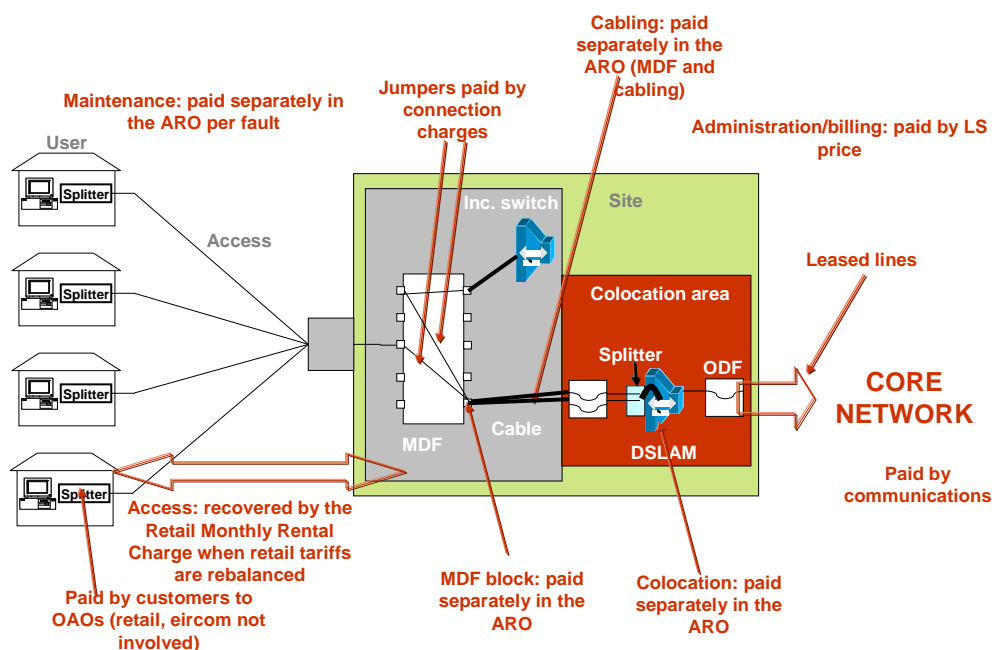
3.205. Whilst Eircom generally agrees, it does not agree with the implication of the text "Access: paid by the Retail Monthly Rental charge" as it believes that this implies that all of the common costs of the copper network are recovered from PSTN monthly rental.

### ComReg's Position & Conclusion

3.206. ComReg acknowledges the views of the respondents as set out above.

3.207. Based on responses received ComReg has made minor changes to the diagram in Figure 5 above. ComReg acknowledges that the splitter is, in fact, provided by OAOs. ComReg disagrees with Eircom's comments, and remains of the opinion that copper local loop costs are recovered from the inter alia, PSTN monthly rental charge. A minor change to the diagram is thus proposed, by changing the text "Access: paid by the Retail Monthly rental charge" to "Access: recovered by the Retail Monthly rental charge when tariffs are rebalanced". This change is illustrated in an updated diagram in Figure 5 below.

Figure 5 - Costs related to LS in Ireland (revised)



**Conclusion:** ComReg made some minor changes to the diagram, based on responses to consultation, and believes that the updated diagram in figure 5 above is a fair representation of the costs involved in providing the LS services.

3.208. On this basis, the LS monthly rental price should cover the fixed costs related to the development of the LS product and recurring fees related to the provision of the service only. ComReg believes that there are four main cost categories of

providing the LS service that should be considered in any associated incremental cost. These are:

1. Pair Gain Removal.
2. Clearing the Additional Faults Reported on Shared Lines.
3. Product development and Management.
4. Wholesale billing and administration.

### **Consultation Question**

*Q 17 Do you agree or disagree that ComReg has considered all incremental costs from the list above? Please explain in detail your response.*

### **View of respondents**

- 3.209. ComReg received five responses to these questions.
- 3.210. All five respondents (**BT, Smart, Vodafone, Eircom** and **Magnet**) generally agreed with the above categories are appropriate when considering incremental costs for LS provision.
- 3.211. BT and Magnet had additional comments in relation to the inclusion of pair gain removal. This is elaborated upon in their responses to Question 18 of this document.
- 3.212. BT believes that a level of management overhead related to LLU should be assigned to the rentals. As regards product development, BT considers that only efficient costs could be considered

### **ComReg's Position & Conclusion**

- 3.213. ComReg acknowledges the views of the respondents as set out above.
- 3.214. ComReg has addressed the issue of pair gain systems in the paper in its position and conclusion in relation to Question 18.
- 3.215. ComReg has addressed the issue of product development and management in its position and conclusion in relation to Question 20.

<p><b>Conclusion:</b> ComReg concludes that the categories as set out in ComReg Document No. 08/106 are appropriate when considering the incremental costs for the provision of LS.</p>
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### **Pair gain removal**

- 3.216. Pair gains relate to the practice of sharing cables between end users. Before the advent of broadband this was common practice as ComReg understands that narrowband service quality was, in general, adversely affected. However, the presence of these pair gain systems does impact on those lines ability to carry broadband. Usually pair gains will need to be removed if an acceptable broadband service is to be provided. In terms of pair gains, ComReg identified two options:

- Determine that lines with pair gain systems are not entitled to be unbundled; or
- Establish that lines with pair gain systems can be unbundled, in which case the cost of pair gain removal for LS must be recovered through the LS price.

3.217. It is not possible to quantify how many of these lines are directly relevant for the purpose of LS, however as the overall per line amount may not be material; an average cost across all lines could be acceptable. Eircom estimated the average capital cost of removal to be approximately €28.00 per line,

3.218. Once the capital cost of the pair gain system is determined, this cost should be depreciated over a period of time and the monthly depreciation charge should represent an incremental cost towards the cost of providing the LS service. This results in a range of costs of facilitating pair gains removal from €0.29 to €0.79. ComReg applied a 10 year depreciation period in Consultation Document No. 08/106; which implies that the incremental cost of pair gain removal is estimated to be €0.36.

**Figure 6 – Pair-gain removal costs per line and per month**

Depreciation period	42 months With old WACC	42 months With new WACC	120 months With new WACC	180 months With new WACC
Cost per line and per month	0,79€	0,78€	0,36€	0,29€

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Source: TERA Consultants

### Consultation Question

***Q.18.** Do you agree or disagree that lines with pair gain system should be unbundled? If so, what do you believe is a reasonable cost associated with pair gain removal and how should it be recovered? Please explain in detail your response.*

***Q.19.** Do you consider that an incremental cost of €0.36 per line per month for pair gain removal is correct and reasonable, if it is established that lines with pair gain systems can be unbundled? Please explain in detail your response, with additional reference to the depreciation period chosen.*

### View of respondents

3.219. ComReg received five responses to these questions.

3.220. Two respondents (**Eircom** and **Vodafone**) agreed that lines with pair gain systems should be unbundled, however neither respondents agreed with the incremental cost of €0.36 per line per month. Two further respondents (**BT** and **Magnet**) disagreed that lines with pair gain systems should be unbundled. Smart did not have a view on this.

- 3.221. Vodafone considers that it is important, in the interests of the promotion of competition and the promotion of social inclusion, that customers currently availing of fixed services on lines where a pair gain system is present should not be precluded from availing of broadband services provided by OAOs on the basis of LS. However, Vodafone contends that a depreciation period of at least 180 months, rather than the 120 months currently proposed would be more appropriate and consistent with Consultation Document No.09/11.<sup>61</sup> Vodafone notes that Tera is not consistent with Consultation Document No. 09/11, section 4.30.3 proposes a regulatory asset life of 20 years for pair gain systems. Vodafone considers it appropriate to depreciate pair gain systems over a minimum of 15 years (180 months) in line with the depreciation period used by OfCom, as mentioned in the Tera Report.
- 3.222. Recent Eircom studies indicate that this cost is approximately €28.00 per line. Eircom, however, does not believe that €0.36 per line per month is a fair and reasonable charge to recover the cost of pair gain removal as the cost is a result of the provision of broadband and not PSTN and should therefore be written off consistent with the cost of broadband retail costs, i.e., over a much shorter term than that proposed by ComReg.
- 3.223. Eircom agrees that the cost of pair gain removal on the minority of PSTN lines should be recovered across all LS services connected, but does not agree that the 120 month asset life is an appropriate term for the recovery of the incremental cost that it incurs by removing the pair gain system. Eircom believes the cost of pair gain removal is caused by the requirement for the broadband service, irrespective as to whether it is provided as retail, bitstream or LS.
- 3.224. Eircom believes that the price regulation applicable to WBA requires that one-off retail costs, incurred to provide individual broadband services, be recovered over 42 months. Therefore, Eircom believes that the choice of 120 months as the period to recover the one-off costs of pair gain removal is incorrect. Eircom provided, in confidence, what it believes to be the appropriate charge based on a 42 month period.
- 3.225. **BT** believes that the incumbent removes pair gain systems for its own downstream bitstream and broadband services, hence, on the basis of non-discrimination, it should apply the same approach to LLU products. BT does not agree to the cost of pair gain removal being added to line rental as it pertains to a one off activity at the time of connection. BT believes that even if such a charge were valid, which BT does not believe it is, LLU generally exists in urban areas where broadband penetration is traditionally strong and where most pair gain systems already have been removed for the provision of the incumbent's bitstream service.
- 3.226. BT believes the proposal to charge for pair gain also causes an inconsistency in order types, as in those cases where an operator migrates a customer to LLU from bitstream via Inter and Intra migration orders, it is known that there is no pair gain. BT believes that in such cases the pair gain charge should simply not apply.

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<sup>61</sup> ComReg Document No. 09/11. Consultation & Draft Decision- Review of the regulatory asset lives of Eircom Limited, published 17 February 2009.

- 3.227. BT believes that if ComReg is of the view that the cost must be recovered in LS rentals, then ComReg should estimate the cost of pair gain removal across all DSL services (pooling) such as bitstream, LLU, PPCs (EUL access), Ethernet Access etc, and allocate the cost to all (spread) as all benefit from these devices being removed. Therefore, BT states that it is unfair to load the cost into LLU rentals.
- 3.228. **Magnet** believes the customer is paying for a full copper pair into their residence; therefore, Eircom should not recover for something that should not exist.
- 3.229. **Smart** believes that ComReg, using the powers bestowed upon them by the Act should obtain and be aware of the actual costs. Smart believes that a fully working "similarly efficient model" is required when calculating cost models. The absence of such a model may, in theory, leaves ComReg's decisions on this issue open to challenge.

### **ComReg's Position & Conclusion**

- 3.230. ComReg acknowledges the respondents' views and remains of the opinion that lines with pair gain systems should be suitable for broadband and, where necessary, unbundling.
- 3.231. ComReg believes that BT's comment that pair gain systems have already been removed in densely populated areas is not justified, because this implies that only Eircom should support the cost of removing the pair gain systems in densely populated areas, even if Eircom's customers remain only for short periods of time with Eircom and then migrate to LS.
- 3.232. ComReg does not agree with BT's proposal that costs of removing pair gain systems could be recovered through one-off charges. Even if BT's proposition has some advantages, ComReg believes that this would act as a disincentive for lines with pair gain systems because OAOs would have to pay one-off fees. ComReg believes that such a proposal would add another layer of complexity to the LS order process because it would require an additional test to be carried out on the line to be unbundled to determine whether a pair gain system is present.
- 3.233. ComReg believes that Eircom's proposal is also not appropriate. Eircom's response presumes that when a LS order requires a pair gain system to be removed, it will never be reinstalled to either Eircom or an OAO. Eircom's proposal appears to be based on the assumption that once a customer has cancelled its LS subscription it will never again avail of a broadband service with Eircom or an LLU operator. This is a most conservative assumption since the line customer is highly likely to be used again for a broadband service.
- 3.234. ComReg proposes that the pair gain removal cost is depreciated over the economic life of the asset and not the customer life. This should address BT's concerns that by charging for pair gain removal an inconsistency in order types may be created when an operator migrates a customer to LLU from bitstream via Inter and Intra migration orders.
- 3.235. It should be noted that ComReg has accepted the cost estimate of Eircom in relation to pair gain removal costs, as it is likely to be a difficult cost to measure accurately at this stage. It is also not possible for ComReg to independently



verify the number from that provided and ComReg also does not believe this should be necessary at this stage. The incremental cost approach is a recognised international approach adopted by numerous NRAs. ComReg has analysed in full other alternatives and is confident that the incremental cost approach is a robust and fit for purpose methodology for determining the monthly rental price of LS.

- 3.236. While not clearly highlighted in Consultation Document No. 08/106, the incremental cost of €0.36 per line per month is calculated by dividing the total pair gain removal investment by the total number of lines to ensure there is no discrimination from one service to another, including LLU, bitstream and DSL.
- 3.237. While not directly in line with the LRIC pricing principles of an efficient operator, where pair gains would not have arisen in the context of a new network, ComReg is sympathetic to the fact that Eircom currently incurs actual costs in remediating legacy network build issues.
- 3.238. As Vodafone pointed out, ComReg's proposal is inconsistent with Consultation Document No. 09/11 where an asset life of 20 years for pair gain systems is proposed. It must be noted that Consultation Document No. 09/11 was published subsequent to Consultation Document No. 08/106. ComReg agrees with Vodafone that they must be consistent. Accordingly, ComReg is revising the asset life of pair gain systems to 20 years, which changes the depreciation period from 120 months to 240 months, in line with ComReg's Decision No. 03/09<sup>62</sup>.
- 3.239. To recover the total cost of pair gain systems removal would require approximately €28.00 per line to be recovered across all PSTN lines. This cost is depreciated over a 240 month period. Eircom's weighted average cost of capital ("WACC") of 10.2% is included in the depreciation calculation. A present value of approximately €28.00 over 240 months, at the Eircom WACC of 10.2%, results in a cost of €0.26 per line per month. ComReg therefore has revised the proposed incremental cost per line per month of providing a LS service to €0.26 per line per month.

**Conclusion:** ComReg remains of the view that lines with pair gain systems should be in a position to provide broadband services where possible and that they can be unbundled if and when requested. ComReg, however, has revised the incremental cost of removing pair gain systems from €0.36 to €0.26 per line per month in line with the most up to date asset life applicable.

### **Clearing Additional faults reported on Shared lines**

- 3.240. In Eircom's ARO price list, faults are paid separately through the "fault clearance charge". As a consequence, additional faults reported on shared lines should not be paid by OAOs through the LS monthly price but through the "fault clearance charge".

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<sup>62</sup> Decision No. D03/09: Response to Consultation and Final Decision – Review of the Regulatory Asset Lives of Eircom Limited; published on 11 August 2009.

- 3.241. Section 6.2 of the Tera Report analysed the type of faults that may occur on LS lines addressed how each fault is cleared and the actual mechanism for recovering the costs of line testing and fault clearance.
- 3.242. ComReg's conclusion, based on this analysis, was that the cost of clearing additional faults reported on shared lines is already recovered through fault repair charges published in Eircom's ARO and therefore the incremental cost of providing the LS service is zero.

### **Consultation Question**

*Q.20. Do you agree or disagree that the cost of faults relating to LS are already recovered by Eircom through fault repair charges? Please explain in detail your response.*

### **View of respondents**

- 3.243. ComReg received five responses to this question.
- 3.244. Four respondents (**BT, Smart, Vodafone and Magnet**) generally agreed that the costs of faults relating to LS are already recovered by Eircom through fault repair charges. These respondents generally agreed that the fault repair charges are recovered through the Eircom ARO price list.
- 3.245. BT believes that there are three categories of fault repair to be taken into account when considering the assets utilised by LS. These are, Line fault from the customer to the handover point to the OAO in the exchange and tie circuit connections in the local exchange are recovered through the ARO price list. However, BT believes that other specific LS faults are more likely to be due to either electromagnetic radio interference into cables, overhead cabling or due to a deterioration of the underlying copper line where voice is still viable but DSL services are degraded. BT is of the view that it should be possible for Eircom to repair such degradations. BT sees these as the sort of issues that could be included in a LS fault charge on a cost orientated basis.
- 3.246. **Eircom** disagrees and believes that when a PSTN service is unbundled using the LS service, incremental costs arise from the additional fault conditions that impact upon a broadband service, but allow for satisfactory levels of PSTN service. Eircom considers that the recovery of these costs should be reviewed at this point, because the original price structure for LLU determined in ODTR Decision No. D8/01 is currently under review as part of the LLU pricing project. Eircom believes that if the LS monthly rental charge moves to a level with no contribution to network operating costs, then the fault repair charge is the only means for making the appropriate contribution to the additional cost to Eircom from the higher level of line faults arising from the sharing of copper lines.

### **ComReg's Position & Conclusion**

- 3.247. ComReg acknowledges the views of the respondents, but remains of the view that the costs of faults relating to LS are already recovered by Eircom through fault repair charges.

- 3.248. The Tera Report analysed how each fault is cleared and the actual mechanism of how these line testing and fault clearance costs are recovered. ComReg analysed this and is in agreement with Tera's conclusions.
- 3.249. BT states that Eircom should repair specific LS faults (due to factors that degrade DSL services but not the voice service); however, ComReg believes that the current fault repair charges recovered through ARO fault clearance charges price list adequately compensate Eircom for any efficient costs incurred for repairing all faults in the network.
- 3.250. ComReg believes that the incremental costs of LS specific faults are recovered through the ARO fault clearance charge because when there is an additional fault that impacts upon the broadband service, but not PSTN, OAOs will request Eircom to remove this fault and will ultimately pay the ARO fault clearance charge. As such, Eircom recovers the efficient cost of fault repair regardless of the volumes in question.
- 3.251. ComReg, in Consultation Document No. 08/106, does not propose to include the cost of fault clearance in the monthly LS rental price. This will thus remain as a separate fault clearance charge. ComReg, through this consultation process, is not reviewing the level of ARO fault clearance charges.
- 3.252. ComReg has through Consultation Document No. 09/39 consulted on the charge for fault clearance and responses have been received and a decision will be published in due course. However, it should be noted, that to date, ComReg has not been made aware of any additional separately identifiable costs that exist between repairing a LS line and a regular line. Any proposal from Eircom to have a separate and/or an additional charge for repairing such faults would require a detailed analysis of such a proposal in addition to the information already provided to ComReg on fault repair costs. This would represent a new charge in the Eircom ARO price list.

<p><b>Conclusion:</b> ComReg remains of the opinion that the efficient costs of faults relating to LS are already recovered by Eircom through fault repair charges.</p>
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## **Product Management and Development**

- 3.253. Product development and management costs relate to the development of, and the associated ongoing cost of marketing the LS product. ComReg did not have information on the likely cost of the monthly product development and management costs of the LS product. There was also no information on the initial product development, however, the product has been available for a number of years and therefore ComReg did not consider that any such incremental cost should be included in the recurring monthly charge going forward.

## **Consultation Question**

***Q.21. Do you agree or disagree that the costs of product development and management should be included in the monthly rental cost of LS? If so, please provide the appropriate costings associated with the LS service?***

### **View of respondents**

- 3.254. ComReg received five responses to this question.
- 3.255. Two respondents (**Eircom** and **Vodafone**) agreed that the costs of product development and management should be included in the monthly rental cost of LS. Three respondents (BT, Smart and Magnet) disagreed.
- 3.256. **BT** has no evidence of any marketing of LLU by Eircom and does not perceive any marketing in the foreseeable future hence no costs should be allocated. BT, however, agrees that appropriate management costs incurred in running the product should feed through to the incremental charge. However, BT strongly disagrees that unnecessary or inefficient costs should be loaded into the products, such as the costs of systems or processes that are not required.
- 3.257. Eircom believes that the ongoing costs of developing and managing the mandated wholesale products can only be recovered from the monthly rental charges to access seekers for the use of those products. Connection fees, after direction by ComReg, are set to recover only the short-term variable costs of providing the connection service. Eircom Wholesale clearly inputs the ongoing costs of managing the continued delivery of access products and Eircom central services incur the costs of addressing the issues of pricing and regulation associated with the mandated product. This is based on the principle of 'cost causality'. Eircom believes that the access seeker should therefore contribute to the recovery of product management and development costs. Eircom provided a confidential submission, with calculations, for the revised incremental cost of product management for Eircom's wholesale access products.

### **ComReg's Position & Conclusion**

- 3.258. ComReg acknowledges the views of respondents.
- 3.259. ComReg has come to the conclusion that there is a product management service and it is an incremental cost of providing a LS service. ComReg believes that the incremental cost of product management and development should be included on the basis of the principle of cost causality. OAOs should contribute to the ongoing cost of product management and development, which arise as a result of the provision of the LS service.
- 3.260. ComReg reviewed Eircom's confidential submission and after analysing the workings, arrived at the conclusion that the incremental cost of product management should be €0.16 per line per month. This was arrived at by looking at the overall costs likely to be spent on providing the LS service on an ongoing basis. However, it would not be appropriate to charge this cost on the basis of the amount of lines facilitating just the LS service. To do so could discriminate from one retail provider to another. This incremental monthly cost of €0.16 is derived from spreading the annual cost associated across all access paths, wholesale and retail, and dividing by twelve to derive the associated incremental cost per line per month. By spreading the incremental cost across all access paths, wholesale and retail, ComReg is acting in a manner consistent with the principle set out in relation to interconnection billing in ComReg

Decision No. D14/03<sup>63</sup>, where the cost of the administration of interconnection should be recovered from all operators, including Eircom retail.

**Conclusion:** ComReg has concluded that the incremental cost associated with the product management of LS should be included. It estimates the incremental costs of product management at €0.16 per line per month based on calculations detailed above.

### **Wholesale Billing and Administration**

3.261. ComReg, in Consultation Document No. 08/106 acknowledged that wholesale billing and administration is a cost which would not be incurred by Eircom if LS did not exist. As such it is reasonable to recover any costs associated with it. As previously published in the Consultation Document No. 04/111<sup>64</sup> Eircom has assessed these costs at €0.39 per line per month.

### **Consultation Question**

*Q.22. Do you agree or disagree that the costs of wholesale billing and administration should be included in the monthly rental cost of LS? If so, please provide the appropriate costings associated with the LS service?*

### **View of respondents**

- 3.262. ComReg received five responses to this question.
- 3.263. All five respondents (**BT, Smart, Vodafone, Eircom** and **Magnet**) agreed that the costs of wholesale billing and administration should be included in the monthly rental cost of LS.
- 3.264. Eircom provided a confidential submission, with calculations, for the revised incremental cost of wholesale billing and administration for Eircom's wholesale access products.

### **ComReg's Position & Conclusion**

- 3.265. ComReg acknowledges the views of respondents and remains of the view that the costs of wholesale billing and administration should be included in the monthly rental cost of LS.
- 3.266. ComReg received a confidential submission from Eircom which contained new workings for the incremental cost of wholesale billing and administration.
- 3.267. ComReg reviewed Eircom's submission and after analysing its contents, arrived at the conclusion that the incremental cost of wholesale billing and administration should be €0.35 per line per month. This incremental monthly cost is derived from spreading the annual cost associated across all access paths, wholesale and retail, and dividing that figure by twelve to derive the associated

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<sup>63</sup> Consultation Document No. 03/57: Decision No. D14/03 – Decision Notice on Fixed Interconnection Charging Mechanisms, published 29 Mar 2003.

<sup>64</sup> ComReg Consultation Document No. 04/111 - Local loop unbundling line share, Consultation on pricing principles, dated 12th November 2004.

incremental cost per line per month. By spreading the incremental cost across all access paths, wholesale and retail, ComReg is being consistent with the principle set out in relation to interconnection billing in ComReg Decision No. D14/03<sup>65</sup> where the cost of administration of interconnection should be recovered from all operators, including Eircom retail, therefore ensuring there is no discrimination from one retail operator to another.

**Conclusion:** ComReg remains of the opinion that the incremental cost associated with wholesale billing and administration should be included in the cost of LS. ComReg has reviewed Eircom's submission and estimates the incremental costs of wholesale billing and administration at €0.35 per line per month based on the calculations detailed above.

### Recommended incremental cost of Line Share

3.268. Section 6.1 of Consultation Document No. 08/106 set out the component parts that make up the LS service and analysed the associated incremental cost, deriving an initial estimated price of €0.75 per line per month.

**Figure 7 – Incremental costs of providing LS in Ireland**

<b>Cost Category</b>	<b>Relevant</b>	<b>Cost</b>
Pair Gain Removal	Yes	€0.36
Clearing the Additional faults reported on Shared lines	No	0
Product development and management	No	0
Wholesale Billing and administration	Yes	€0.39
<b>Total</b>		<b>€0.75</b>

### Consultation Question

*Q.23. Do you agree or disagree that ComReg has reasonably assessed the per line incremental costs for providing LS? Please explain in detail your response?*

### View of respondents

3.269. ComReg received five responses to this question.

3.270. **Eircom** disagrees and believes, as answered in previous questions, that the incremental costs proposed by ComReg are incorrect. Eircom made a confidential submission outlining their proposed incremental costs.

3.271. **BT** believes that, other than the cost of pair gain system removal, ComReg has reasonably assessed the incremental costs of providing LS for the Eircom network.

<sup>65</sup>Response to Consultation and Decision Notice on Fixed Interconnection Charging Mechanisms dated 29 May 2003 ComReg Decision No. D14/03

- 3.272. **Magnet** is of the view that the cost of pair gain system removal should be excluded and the LS price should thus be €0.39 per line.
- 3.273. **Smart** believes that the costs outlined are a fair representation of those incurred by Eircom.
- 3.274. **Vodafone** broadly agrees, however it considers that the depreciation period should be 15 years, rather than the 10 year period proposed by Tera. The cost of pair gain removal included should be €0.29, therefore the total monthly price of LS per line should not exceed €0.68

### **ComReg's Position & Conclusion**

- 3.275. ComReg acknowledges the views of respondents.
- 3.276. ComReg believes that lines with pair gain systems should be included and has revised the incremental cost, based on an asset life of pair gain systems of 20 years, at €0.26 per line per month. Please refer also to ComReg's response to Question 18.
- 3.277. ComReg remains of the view that that the costs of faults relating to LS are already recovered by Eircom through fault repair charges, therefore there is zero incremental cost.
- 3.278. ComReg has reached the conclusion that the incremental cost associated with the product management of LS should be included. ComReg reviewed Eircom's submissions and concludes that the incremental costs of product management are €0.16 per line per month. Please refer also to ComReg's response to Question 21.
- 3.279. ComReg remains of the view that the incremental cost associated with wholesale billing and administration should be included in the cost of LS. Having reviewed Eircom's submissions ComReg concludes that the incremental costs of wholesale billing and administration are €0.35 per line per month. Please refer also to ComReg's response to Question 22.
- 3.280. ComReg has thus concluded that the revised incremental cost of providing LS services is €0.77 per line per month.

**Figure9 – Revised incremental costs of providing LS in Ireland**

<b>Cost Category</b>	<b>Relevant</b>	<b>Cost</b>
Pair Gain Removal	Yes	€0.26
Clearing the Additional faults reported on Shared lines	No	€0.00
Product development and management	No	€0.16
Wholesale Billing and administration	Yes	€0.35
<b>Total</b>		<b>€0.77</b>

**Conclusion:** ComReg is of the view that the incremental costs of LS are the appropriate costs to include in the LS monthly rental price. Having reviewed all of the material before it and applying a consistent methodology, ComReg

directs that a new maximum LS price of €0.77 per line per month be applied by Eircom.

### Consultation Question

*Q.24. Is there anything else in the attached report from Tera, Consultation Document No. 08/106a, which you would like to comment on or correct? Please explain in detail any additional points you would like to make?*

### View of respondents

- 3.281. ComReg received five responses to this question.
- 3.282. **Eircom** provided a response to the Tera Report in the Indecon Report that formed part of its response to Consultation Document No.08/106. The Indecon report is published as ComReg Document No. 09/66a and key points raised were further summarised by ComReg in its position and conclusion in relation to Question 1.
- 3.283. **BT** believes that the LLU electrical diagram, although it would work fine, appears to align more with the French solution than the LLU LS solution in Ireland and therefore attributes more costs to Eircom than to which it is entitled. For example, the splitter is owned by the OAO and there will be less jumper/tie than shown.
- 3.284. **Magnet** has no additional comments on the Tera Report.
- 3.285. **Smart** believes that all current consultations in relation to the WUA/WPNIA market need to be rapidly concluded to avoid parts of the market looking more attractive than others. While at the end of the entire process, there should be a certain regulatory position, the "overlap" and time lag during ongoing consultations and in particular consultation responses and decisions should be minimised.
- 3.286. Vodafone has no additional comments on the Tera Report.

### ComReg's Position & Conclusion

- 3.287. ComReg acknowledges the views of respondents.
- 3.288. ComReg engaged Tera to review the Indecon Report that was provided by Eircom as part of its response to Consultation Document No. 08/106. As previously referenced, Tera compiled the Tera Response to provide its expert opinion on the substantive points raised by Indecon. Please refer directly to the Tera Response and to ComReg's position and conclusion in relation to Question 1.

**Conclusion:** After analysing the Indecon Report and Tera's response to the Indecon Report, ComReg remains of the view that the incremental cost approach is the most practical and appropriate methodology to determine the monthly rental price of LS in Ireland.



## **Direction and Decision**

### **Consultation Question**

*Q.25. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please explain your view and, if relevant, propose alternative wording.*

### **View of respondents**

- 3.289. ComReg received five responses to this question.
- 3.290. **Eircom** disagrees and believes it is unclear as to the basis for the price point. As Eircom has an obligation of cost orientation, the Decision Instrument should indicate the basis of recovery of Eircom common costs and incremental cost from providing the LS service. Eircom notes that the Decision Instrument revoked ODTR Decision No. D8/01 insofar as it relates to LS recurring charges, but lacks any clarity as to the new basis in costs for the proposed charges published. Eircom believes the Decision Instrument is silent as to the timetable for further reviews of LS charges. Eircom believes the implication of the Decision Instrument if read as a stand-alone document could be that the next review of the cost structure for LS price will not take place for years. This puts telecommunication providers in Ireland in an impracticable position given current pressures on prices and volumes.
- 3.291. **BT** considers that ComReg Decision is clear and unambiguous, with the exception of the inclusion of the cost of pair gain system removal.
- 3.292. **Magnet** is in overall agreement with the Decision Instrument however, it suggests a LS monthly price of 0.39 cent.
- 3.293. **Smart** agrees with the Decision Instrument.
- 3.294. **Vodafone** generally agrees with the Decision Instrument, however, in sections 1 and 2 of the Draft Decision, Vodafone notes reference to the specific Consultation Documents relevant to the decision, such as the Decision Instrument designating Eircom with SMP in the relevant market, have not been included from the Draft Decision. Vodafone assumes this omission was intended in the context of the Draft Decision but that the specific references will be included in the text of the Final Decision.

### **ComReg's Position & Conclusion**

- 3.295. ComReg acknowledges the views of all respondents. As in the case of all regulated prices, ComReg will keep any imposed price under constant review and ensure it remains appropriate. At present ComReg does not intend to review this price for at least two years from the date of this decision: however, ComReg reserves the right to intervene in the event of exceptional circumstances that render this decision out of date or where it becomes clear that costs have materially changed and Eircom is not recovering the efficient costs of providing the service.
- 3.296. ComReg is issuing two Directions as follows:

Response to Consultation and Decision - Rental Price for Shared Access to the Unbundled Local loop

- Decision A revokes ODTR Decision No. D8/01 in so far as it set out the mechanism for setting the LS monthly rental price charged by Eircom.
- Decision B amends the existing charge of €8.41 to a maximum charge of €0.77 per line per month based on the incremental costs approach.

3.297. A maximum charge of €0.77 per line per month, per Decision B, shall apply as soon as possible after 28 days from the publication of this Document.

<p><b>Conclusion:</b> ComReg is issuing two Directions: Decision A will revoke Decision No. D8/01 in so far as it sets out the mechanism for setting the LS monthly rental price charged by Eircom; and Decision B will amend the existing charge of €8.41 to a maximum charge of €0.77 per line per month based on the incremental costs approach.</p>
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3.298. Any comments made by respondents or any issues raised which are not directly relevant to the appropriate methodology for setting LS, will be dealt with separately by ComReg, where relevant.

## **Annex A - Legal Basis**

1. The legal basis for the imposition of a price is pursuant to Regulations 14 and 17 of the Access Regulations and is laid out below:
  - 1.1.1. *Price control and cost accounting obligations 14 (1) The Regulator may in accordance with Regulation 9 impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection, access or both such interconnection and access in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze to the detriment of end-users.*
  - 1.1.2. *Directions 17 (1) The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an undertaking to do or refrain from doing anything which the Regulator specifies in the direction.*
  - 1.1.3. In addition, pursuant to ComReg Decision D8/04, section 9 provides that as the undertaking designated with SMP, Eircom has the obligation of cost orientation.

## **Annex B - Decision A**

### **1. STATUTORY AND LEGAL POWERS**

1.1 This Direction is made by the Commission for Communications Regulation:

- i. Pursuant to Regulations 9, 14 and 17 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003<sup>66</sup>;
- ii. Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom Limited contained in Decision No. 08/04<sup>67</sup> which found Eircom Limited to have SMP under the provisions of Regulations 25, 26 and 27 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003<sup>68</sup>;
- iii. Having, where appropriate, complied with Policy Directions made by the Minister<sup>69</sup>;
- iv. Having taken account of the submissions received in relation to Document No.08/106<sup>70</sup>;
- v. Having had regard to the analysis and reasoning set out in Document No. 08/106 which shall, where necessary, be construed together with this Direction;
- vi. Having regard to the provisions of and the individual decisions in the Response to Consultation and Decision in Document No. 09/66 (Decision No. D04/09) which shall where necessary be construed as forming part of this Direction;
- vii. Having notified the draft measure to the European Commission, further to Regulation 20 of the Framework Regulations whereby it was also made accessible to national regulatory authorities in other EU Member States, and the European Commission having informed the Commission for Communications Regulation that it had examined the draft measure and that it had no comments in

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<sup>66</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

<sup>67</sup> Designation of Significant Market Power and Decision on Obligations – Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops, Doc. No. 04/70, dated 15 June 2004

<sup>68</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007)

<sup>69</sup> Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004

<sup>70</sup> Consultation Paper – Rental Price for Shared Access to the Unbundled Local Loop, Document No. 08/106, dated 23 December 2008

relation thereto and that pursuant to Article 7 of the Framework Directive<sup>71</sup>, the Commission for Communications Regulation could adopt the resulting draft measure and;

- viii. Having regard to its functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007<sup>72</sup>.

## 2 DEFINITIONS AND INTERPRETATION

### 2.1 In this Direction:

**“Access Regulations”** means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I. No. 305 of 2003 as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007);

**“ComReg”** means the Commission for Communications Regulation, established under section 6 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007);

**“Line Share”** means the product whereby the high frequency capacity of a line is provided to other authorised operators, as more fully described in Annex C, Service Schedule 103 Appendix 1 to Eircom’s Access Reference Offer, as may be amended from time to time;

**“ODTR”** means the Office of the Director of Telecommunications Regulation which was dissolved under section 8 of the Communications Regulation Act, 2002 on the establishment day of ComReg;

**“Recurring Charge”** means the Line Share monthly rental charge, as currently set out in the Price List contained in Section 1.3 of Annex C, Service Schedule 103 to Eircom’s Access Reference Offer under the heading Recurring Charge, as may be amended from time to time;

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<sup>71</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33)

<sup>72</sup> No. 22 of 2007

“**SMP Decision**” means ComReg Decision No. D8/04<sup>73</sup> which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations;

### **3 SCOPE AND APPLICATION**

- 3.1 This Direction applies to Eircom Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls Eircom Limited, and its successors and assigns (“Eircom”).
- 3.2 This Direction is binding upon Eircom and Eircom shall comply with it in all respects.

### **4 REVOCATION OF ODTR DECISION D08/01**

- 4.1 The SMP Decision imposed *inter alia ex ante* regulatory obligations pursuant to Regulation 14 of the Access Regulations. The obligations imposed on Eircom under Regulation 14 of the Access Regulations include obligations relating to price control and cost orientation of prices.
- 4.2 Under Regulation 17 of the Access Regulations, ComReg may issue directions to Eircom to do or refrain from doing anything which ComReg specifies in the direction, for the purpose of further specifying requirements to be complied with by Eircom relating to its obligations under the Access Regulations.
- 4.3 This Direction is issued pursuant to Regulation 17 of the Access Regulations, in conjunction with Regulation 14 of the Access Regulations and Section 9 of the SMP Decision.
- 4.4 Decision D8/01 of the ODTR entitled Local Loop Unbundling – Eircom’s Access Reference Offer Decision Notice D8/01 and Document Number ODTR01/27R dated September 2001 is hereby revoked insofar as it relates to Line Share Recurring Charges and the methodology for the calculation of Line Share Recurring Charges.
- 4.5 Section 4.4 shall apply 28 days after the effective date.

### **5 MAINTENANCE OF OBLIGATIONS**

- 5.1 For the avoidance of doubt, nothing in this Direction shall in any way (either expressly, or by implication) affect the continuing validity of Decision D8/01 of the ODTR entitled Local Loop Unbundling – Eircom’s Access Reference Offer; Decision Notice D8/01 and Document Number ODTR01/27R dated September 2001 insofar as it does not relate to Line Share Recurring Charges and the methodology for the calculation of Line Share Recurring Charges.

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<sup>73</sup> Designation of Significant Market Power and Decision on Obligations – Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops, Doc. No. 04/70, dated 15 June 2004.

- 5.2 If any section, clause or provision or portion thereof contained in this Direction is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Direction, and shall not in any way affect the validity or enforcement of this Direction.

## **6 STATUTORY POWERS NOT AFFECTED**

- 6.1 Nothing in this Direction shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the effective date of this Direction) from time to time as the occasion requires.

## **7 EFFECTIVE DATE**

- 7.1 This Direction shall be effective from the date of its publication and shall remain in force until further notice by ComReg.

**Mike Byrne**  
**Commissioner**  
**THE COMMISSION FOR COMMUNICATIONS REGULATION**  
**THE 18<sup>TH</sup> DAY OF AUGUST 2009**

## Annex C – Decision B

### 1. STATUTORY AND LEGAL POWERS

- 1.1 This Direction is made by the Commission for Communications Regulation:
- i. Pursuant to Regulations 9, 14 and 17 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003<sup>74</sup>;
  - ii. Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom Limited contained in ComReg Decision No. 08/04 which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003<sup>75</sup>;
  - iii. Having, where appropriate, complied with Policy Directions made by the Minister<sup>76</sup>;
  - iv. Having taken account of the submissions received in relation to Document No.08/106<sup>77</sup>;
  - v. Having had regard to the analysis and reasoning set out in Document No. 08/106 which shall, where necessary, be construed together with this Decision;
  - vi. Having regard to the provisions of and the individual decisions in the Response to Consultation and Decision in Document No. 09/66 (Decision No. D04/09) which shall where necessary be construed as forming part of this Decision;
  - vii. Having notified the draft measure to the European Commission, further to Regulation 20 of the Framework Regulations whereby it was also made accessible to national regulatory authorities in other EU Member States, and the European Commission having informed the Commission for Communications Regulation that it had examined the draft measure and that it had no comments in relation thereto and that pursuant to Article 7 of the

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<sup>74</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

<sup>75</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007)

<sup>76</sup> Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004

<sup>77</sup> Consultation Paper – Rental Price for Shared Access to the Unbundled Local Loop, Document No. 08/106, dated 23 December 2008



Framework Directive<sup>78</sup>, the Commission for Communications Regulation could adopt the resulting draft measure and;

- viii. Having regard to its functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007<sup>79</sup>.

## 2 DEFINITIONS AND INTERPRETATION

### 2.1 In this Direction:

**“Access Regulations”** means European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I. No. 305 of 2003 as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007);

**“ComReg”** means the Commission for Communications Regulation, established under section 6 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007);

**“Line Share”** means the product whereby the high frequency capacity of a line is provided to other authorised operators, as more fully described in Annex C, Service Schedule 103 Appendix 1 to Eircom’s Access Reference Offer, as may be amended from time to time;

**“ODTR”** means the Office of the Director of Telecommunications Regulation which was dissolved under section 8 of the Communications Regulation Act, 2002 on the establishment day of ComReg;

**“Recurring Charge”** means the Line Share monthly rental charge, as currently set out in the Price List contained in Section 1.3 of Annex C, Service Schedule 103 to Eircom’s Access Reference Offer under the heading Recurring Charge as may be amended from time to time;

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<sup>78</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33)

<sup>79</sup> No. 22 of 2007

“**SMP Decision**” means ComReg Decision No. D8/04<sup>80</sup> which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations;

### **3 SCOPE AND APPLICATION**

- 3.1 This Direction applies to Eircom Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls Eircom Limited, and its successors and assigns (“Eircom”).
- 3.2 This Direction is binding upon Eircom and Eircom shall comply with it in all respects.

### **4 PRICE CONTROL**

- 4.1 The SMP Decision imposed *inter alia ex ante* regulatory obligations pursuant to Regulation 14 of the Access Regulations. The obligations imposed on Eircom under Regulation 14 of the Access Regulations include obligations relating to price control and cost orientation of prices.
- 4.2 Under Regulation 17 of the Access Regulations, ComReg may issue directions to Eircom to do or refrain from doing anything which ComReg specifies in the direction, for the purpose of further specifying requirements to be complied with by Eircom relating to its obligations under the Access Regulations.
- 4.3 This Direction is issued pursuant to Regulation 17 of the Access Regulations, for the purpose of further specifying requirements to be complied with by Eircom relating to obligations imposed upon it Eircom under Regulation 14 of the Access Regulations and Section 9 of the SMP Decision.
- 4.4 Eircom is hereby directed to apply no more than a maximum of €0.77 per month as a Line Share Recurring Charge.
- 4.5 The Recurring Charge noted at Section 4.4 shall apply to all Eircom bills issued, as soon as possible, 28 days after the effective date.

### **5 MAINTENANCE OF OBLIGATIONS**

- 5.1 If any section, clause or provision or portion thereof contained in this Direction is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Direction and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Direction, and shall not in any way affect the validity or enforcement of this Direction.

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<sup>80</sup> Designation of Significant Market Power and Decision on Obligations – Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops, Doc. No. 04/70, dated 15 June 2004.

## **6 STATUTORY POWERS NOT AFFECTED**

- 6.1 Nothing in this Direction shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the effective date of this Direction) from time to time as the occasion requires.

## **7 EFFECTIVE DATE**

- 7.1 This Direction shall be effective from the date of its publication and shall remain in force until further notice by ComReg.

**Mike Byrne**  
**Commissioner**  
**THE COMMISSION FOR COMMUNICATIONS REGULATION**  
**THE 18<sup>TH</sup> DAY OF AUGUST 2009**

## **Annex D – Regulatory Impact Assessment**

### **Introduction**

- 1.1. A Regulatory Impact Assessment (RIA) is an analysis of the likely effect of a proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 1.2. ComReg's approach to RIA is set out in the Guidelines published in August 2007, in ComReg Document No. 07/56 & 07/56a. In conducting the RIA ComReg will take into account the RIA Guidelines<sup>81</sup>, adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended, requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003 requires that ComReg before deciding to impose regulatory obligations on undertakings shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme.
- 1.3. In conducting the RIA ComReg will have regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA ComReg will take into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation a decision appears to have relatively low impact, then ComReg would expect to carry out a lighter RIA in respect of those decisions.
- 1.4. In determining the impacts of the various regulatory options, current best practice appears to recognise that full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review will be taken when necessary.
- 1.5. ComReg would like to point out that as it is not imposing a new regulatory obligation on an undertaking, it is not mandatory for it to provide a RIA. However it has decided to do so in order to demonstrate that it has considered and evaluated the alternative options available. The main objective of this review is to ComReg's proposed amendment to the monthly rental price of LS is justified and proportionate.

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<sup>81</sup> See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, [www.betterregulation.ie](http://www.betterregulation.ie)

### Identify and Describe the Regulatory Options

- 1.6. ComReg Consultation Document No. 08/106 was published 23 December 2009
- 1.7. The policy issues which ComReg initially considered were to:
- Detail its review of the monthly rental price of LS in Ireland; and
  - Make recommendations, if any, on the most appropriate monthly rental price of LS in Ireland.
- 1.8. In doing so ComReg was of the initial view that it had two options:
- 1.9. *Option 1 would be to do nothing and wait for the outcome of the LLU pricing review consultation. The price of LS remains the same.*
- 1.10. Currently the price set for LS is based on a principle that 50% of the loop cost should be attributed to LS where broadband services are provided over that line. However this methodology creates the anomaly where costs are over recovered where the low frequency part of the loop continues to be charged at 100% of the cost.
- 1.11. *Option 2 would direct a maximum price based on the incremental cost of LS, which ComReg estimates to be €0.77 as Decision B. ComReg would also revoke previous Decision Notice No D08/01, insofar as it relates to the monthly rental price of LS, which sets out the current pricing methodology as Decision A.*
- 1.12. In ComReg’s preliminary view Option 2 was considered more appropriate as the current 50:50 methodology must be amended to ensure the current obligation of cost orientation is respected. As the 50:50 methodology was directed by the ODTR, Eircom contests that it has no option but to charge LS at its current price unless this direction is withdrawn. The revised methodology is a result of a detailed study carried out by consultants on behalf of ComReg. Following from a detailed consideration of this study and on detailed discussions with Eircom’s accounting staff on the cost allocation process, it has been decided that of a number of cost allocation methods available, the incremental cost approach is the most reasonable, practical and proportionate approach to take which complies with the cost orientation obligation.
- 1.13. OAOs, in Response to Consultation No. 08/106, have complained that the current monthly rental price of LS and Eircom’s Bitstream products represents a margin squeeze.

1.14. LS Monthly Rental Price	1.15. Bitstream Connect 1024K	1.16. Bitstream Expand 3072K
1.17. €8.43	1.18. €9.48	1.19. €11.55

- 1.20. The current monthly rental price of LS is €8.41, compare to a low in the Netherlands of €0.19 and an EU 14 average (excluding Ireland) of €2.63 (See Graph 1). There is no apparent reason why Ireland should be so out of line with its European peers. While Ireland has one of the highest full LLU and LS prices in the EU, LLU products represent a small market share of DSL access and overall broadband penetration.

- 1.21. LS is growing, albeit from a low base (See Graph 2). LS currently accounts for less than 1% of DSL access in Ireland (See Graph 3). Ireland is at the lower end of countries in the EU in terms of LLU products as a % of total DSL access (See Graph 4). These low levels of LLU product penetration have a significant impact on Ireland's overall penetration rates where Ireland is below the average broadband penetration rates in the EU (See Graph 5). Ireland is at the lower end of Broadband speeds, especially when compared to comparable EU15 countries (See Graph 6)
- 1.22. The growth of LS and Full LLU is likely to act as a stimulus for increased fixed line demand to counteract the recent decrease in the number of fixed lines in Ireland. These reductions are influenced by a range of factors from short term economic fluctuations, to longer-term infrastructure competition and other structural factors such as fixed-mobile substitution ("FMS"). LS and Full unbundling encourages OAOs to invest in infrastructure and develop innovative and differentiated products that will result in a greater retail offering to the consumer. The recent report by Arthur D Little on "reviving the fixed line"<sup>82</sup> observes that there has been a global reduction in fixed lines, but there are several opportunities for incumbents and OAOs to react to this in a positive way. Arthur D Little observed that in several countries, the launch of triple-play has enabled the incumbent to considerably slow or even stop line losses. This is the case notably in Austria and Sweden. The growth of LLU products in France also acted as a stimulus, where the successful growth of LLU products acted a spur for the growth of fixed lines, where fixed line volumes were decreasing (See Graph 7).
- 1.23. There is clearly pent up demand for LS and Full LLU services as demonstrated from recent press releases from large operators such as BT Ireland and Vodafone. These operators including others such as Magnet, Smart etc are investing heavily in their own broadband equipment and full LLU and LS services are key to these companies being in a position to offer competitive retail offers. On the 27 June 2008 ComReg made a decision, D3/08<sup>83</sup>, to direct Eircom to reduce its current LS price from €8.41 to a maximum price of €2.94 for an interim period of one year. This decision was subsequently appealed and set aside. ComReg had made this decision based on the knowledge that there is significant pent up demand for LS and that competition by direct investment in infrastructure could be constrained by what OAOs claim to be an excessive price as it allows for an over recovery of the cost for providing local loop services. This reduction was publically welcomed by OAOs<sup>84</sup> signifying the potential demand for LS. In addition, BT and Vodafone have recently announced an agreement to significantly boost competition and network investment in Ireland<sup>85</sup>. BT will make investments, by unbundling up to 58

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<sup>82</sup> Reviving the Fixed Line. Arthur D Little, February 2009  
[http://www.adl.com/fileadmin/editorial/press/ADL\\_Reviving\\_the\\_fixed\\_line.pdf](http://www.adl.com/fileadmin/editorial/press/ADL_Reviving_the_fixed_line.pdf)

<sup>83</sup> ComReg Document No. 08/46, Response to Consultation 08/23 and Decision: Rental price for shared access to the unbundled local loop, published on 27 June 2008

<sup>84</sup> BT - <http://www.siliconrepublic.com/news/article/10914/comms/eircom-ordered-to-slash-llu-line-share-by-65pc/> and Magnet Networks - <http://www.siliconrepublic.com/news/article/11291/comms/comreg-backs-down-in-llu-fight-with-eircom/>

<sup>85</sup> Press Release: [http://www.btireland.ie/pr\\_2009\\_07\\_22\\_vodafone.shtml](http://www.btireland.ie/pr_2009_07_22_vodafone.shtml) , 22 July 2009

additional exchanges to provide a platform for the delivery of up to 24Mbps broadband services to approximately two thirds of Ireland's available broadband lines. To date, BT has already unbundled 22 exchanges in Ireland for high speed broadband. OAOs understanding the future roadmap of wholesale charges, including LS monthly rental charges, are very important and could be key to driving investment decisions. Inappropriately set wholesale charges could act as a disincentive to investment in Ireland. OAOs always have the opportunity to make investments elsewhere.

- 1.24. It is incumbent on ComReg to ensure a level playing field is in place to allow for effective competition in a key retail market such as broadband. Increasingly the Irish business community together with state services such as schools, hospitals and government departments require high speed broadband services and the inclusion of multiple operators in the market will ensure all stakeholders will have choice of product and price.

### Impact on stakeholders

- 1.25. In determining the impact upon stakeholders in relation to the regulatory options above ComReg considered the following:

<b>Option 1</b> – Do nothing and wait for the outcome of the LLU pricing review consultation.		
<b>Impact on incumbent</b>	<b>Impact on OAOs</b>	<b>Impact on consumers</b>
No immediate impact, the incumbent retains the status quo. The current LLU price remains based on the 50:50 methodology. However should the Full LLU price change, the price of LS will reduce accordingly. However, Eircom remains subject to competition law in the event of an issue in relation to margin squeeze.	An over recovery of efficient costs by the incumbent may lead to inappropriate or inefficient investment by the OAO. It could also disincentivise OAOs from committing substantial capital to the broadband market for the delivery of high speed broadband. OAOs may be left with no choice but to act as a reseller of Eircom based broadband which is not seen by OAOs as an appropriate way of being able to differentiate products and compete against Eircom retail and other platforms such as cable.	Regulatory objectives of ensuring effective competition and consumer welfare could be impeded where costs are not recovered in the appropriate way (i.e. an over recovery of common costs of the local loop).
Incumbent is not	A margin squeeze may	Lack of choice of

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<p>complying with its cost orientation principle as there is an over recovery of efficient costs of the service provided on the high frequency of the local loop, as the low frequency already recovers 100% of the cost through PSTN, retail lines rental and Full LLU.</p>	<p>exist between the incumbent 1Mb/s and 3Mb/s Bitstream products and the current price of LS.</p>	<p>offerings by OAOs to retail customers where wholesale pricing is over or under inflated.</p>
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<p><b>Option 2</b> – ComReg directs a maximum price based on the incremental cost of LS, to be €0.77 and also revoke previous Decision Notice No D08/01 which sets out the current pricing methodology.</p>		
<p><b>Impact on incumbent</b></p>	<p><b>Impact on OAOs</b></p>	<p><b>Impact on consumers</b></p>
<p>Incumbent will be complying with its cost orientation obligation. The incremental cost methodology will ensure that while the incumbent recovers 100% common cost of the local loop through PSTN, retail lines rental and Full LLU it will now recover the necessary costs for LS going forward.</p>	<p>Wholesale prices conform to cost orientation principle.</p>	<p>Appropriate regulation may lead to increased level of offerings - faster speeds and lower prices for consumers.</p>
<p>By revoking D8/01 in so far as it relates to the monthly rental price of LS, means that the monthly rental price of LS is independent of the Full LLU price. However ComReg will keep the relative dynamics of the overall price basket under review to ensure this remains appropriate</p>	<p>Incentive for OAOs to increase level of investment and reduce likelihood of stranded assets.</p>	<p>May lead to the possibility of increased purchasing activity by consumers of differing and additional services.</p>
	<p>The European Commission endorsed ComReg’s proposal noting that Broadband competition in Ireland is currently being held-up by</p>	<p>The European Commission endorsed ComReg's proposal as good news for competition and consumers. Alternative operators will have to pay</p>



	<p>the high access prices Eircom charges its competitors and the Irish regulator is now making very important efforts to foster competition by promoting direct investment in broadband infrastructure. This move will allow for greater flexibility and innovation in the provision of broadband internet services.</p>	<p>considerably less for access to Eircom's broadband network. They will thus be in a position to make more attractive retail offers and consumers will get a better choice.</p>
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1.26. For the reasons set out above ComReg considers that it is appropriate for it to direct a maximum price based on the incremental cost of LS, which ComReg estimates to be €0.77 as Decision B. ComReg would also revoke previous Decision Notice No D08/01, insofar as it relates to the monthly rental price of LS, which sets out the current pricing methodology as Decision A. This will allow for the following:

- Ensure that Eircom recovers no more than 100% of the common costs of the local loop and that there is no over recovery of efficient cost from elsewhere;
- Foster competition by promoting direct investment in broadband infrastructure;
- A lower cost oriented price sends the correct investment decisions to OAOs to invest in broadband through the use of the LS product; and
- Consumers should get a better choice with more attractive retail offers from OAOs and Eircom Retail.

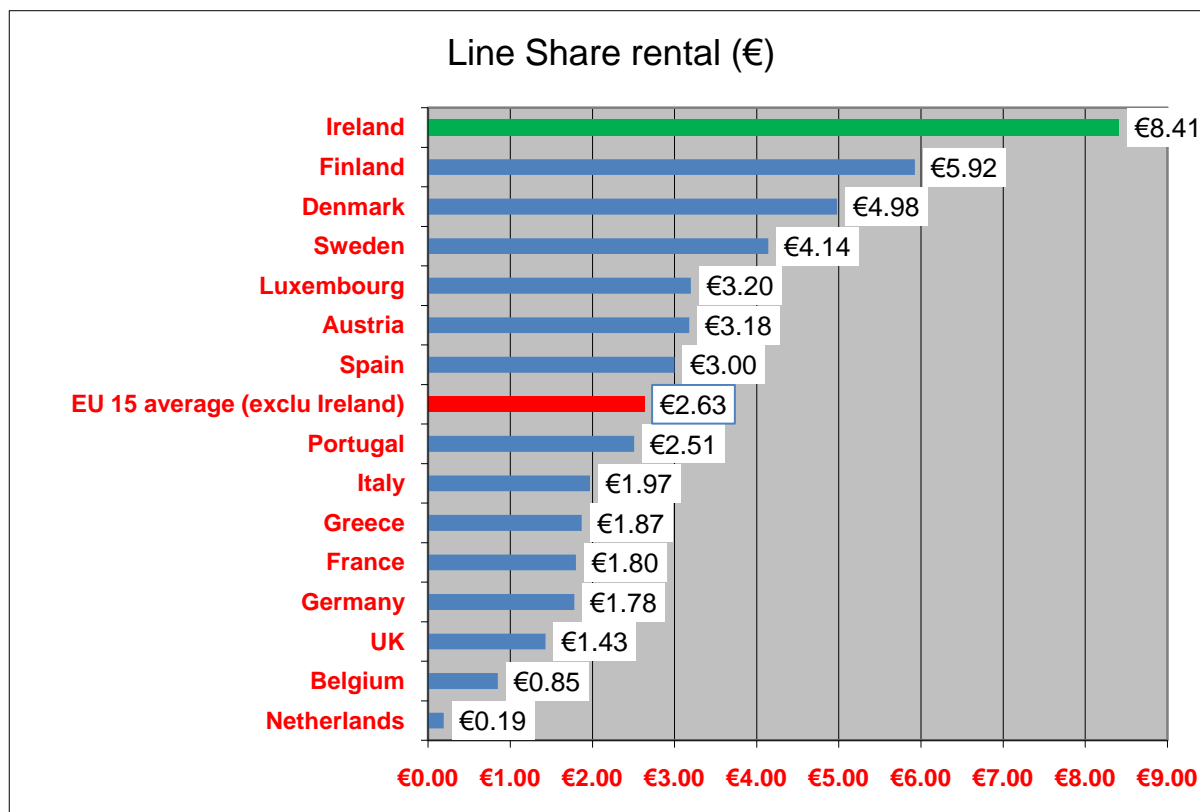
1.27. ComReg considers that it has taken account of the six principles of “Better Regulation” as follows:

- ComReg has clearly outlined why it is **necessary** to undertake this review. ComReg attempted to rectify the pricing anomaly in 2008, however the decision made to set a LS based on a benchmark price of the EU 15 member states was appealed to the courts by Eircom. ComReg decided to set aside that decision until a full analysis of the pricing options was considered and consulted on. This is now complete and any further delay could have very negative consequences for potential investors. ComReg is aware that there are existing and new players in the broadband market who wish to invest significant capital in their own broadband hardware and cost oriented prices from the incumbent is an essential stepping stone to making build or buy decisions. The Irish broadband market is moving fast and regulatory inefficiency could negatively impact on the roll out of key infrastructure in Ireland. The European Commission has commented negatively on the current progress of competition in Ireland and in particular the high access prices

being charged by Eircom, it is important that ComReg ensures Ireland keeps pace with its European peers to ensure Ireland can compete for medium to large business investment;

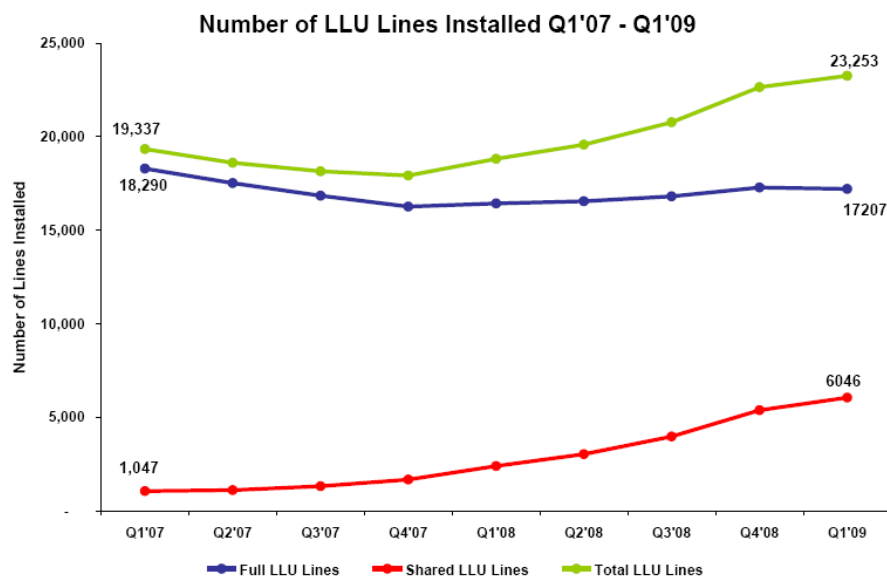
- ComReg considers that it has been **effective** in its review in that it will ensure Eircom's compliance with its cost orientation obligation. ComReg has been very clear from the outset of the Consultation, that it believes there is an over recovery of efficient cost, based on the current 50:50 methodology, as 100% of the common costs of the local loop are recovered through PSTN line rental. ComReg also considers it has been effective in addressing an anomaly that is acting a constraint to the growth of innovative and differentiated consumer Broadband offerings, that OAOs may provide using a cost oriented LS service;
- ComReg considers that it has been **proportionate** in its review. It has not imposed any new obligations upon Eircom. A full analysis of the pricing options was considered and consulted on. This is now complete and any further delay could have very negative consequences for potential investors;
- ComReg considers its approach offers complete **transparency** in the determination of the LS monthly rental price. ComReg has published a public consultation, has reviewed response to the consultation before making a final decision. ComReg has also pre-notified the European Commission of its proposal;
- ComReg considers that it has been **accountable** in its review and that it has clearly outlined its approach, necessary information and findings that informed its decision;
- ComReg considers that it has been **consistent** in its review and that it has fully considered all available data, submissions and responses to consultation. ComReg has also paid all due attention to best practice among NRAs and ERG.

**Graph 1: Monthly Line Share Rental in the EU 15 – June 2009**



Source: Based on data from Cullen International - Cross Country Analysis June 2009

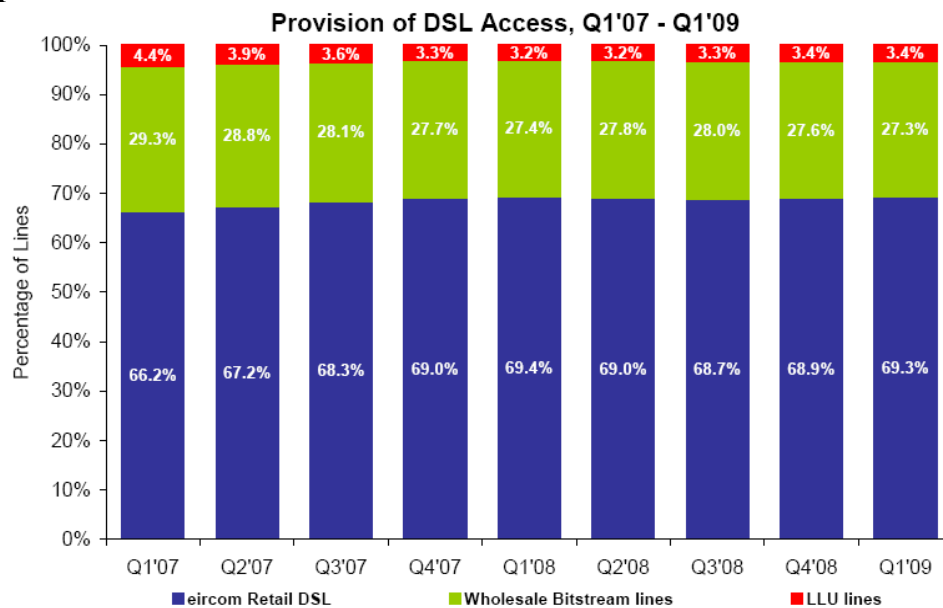
**Graph 2: Number of Local Loops Unbundled**



Source: Quarterly Key Data Questionnaire

Source: ComReg Quarterly Data report (ComReg Document No. 09/50) p.31

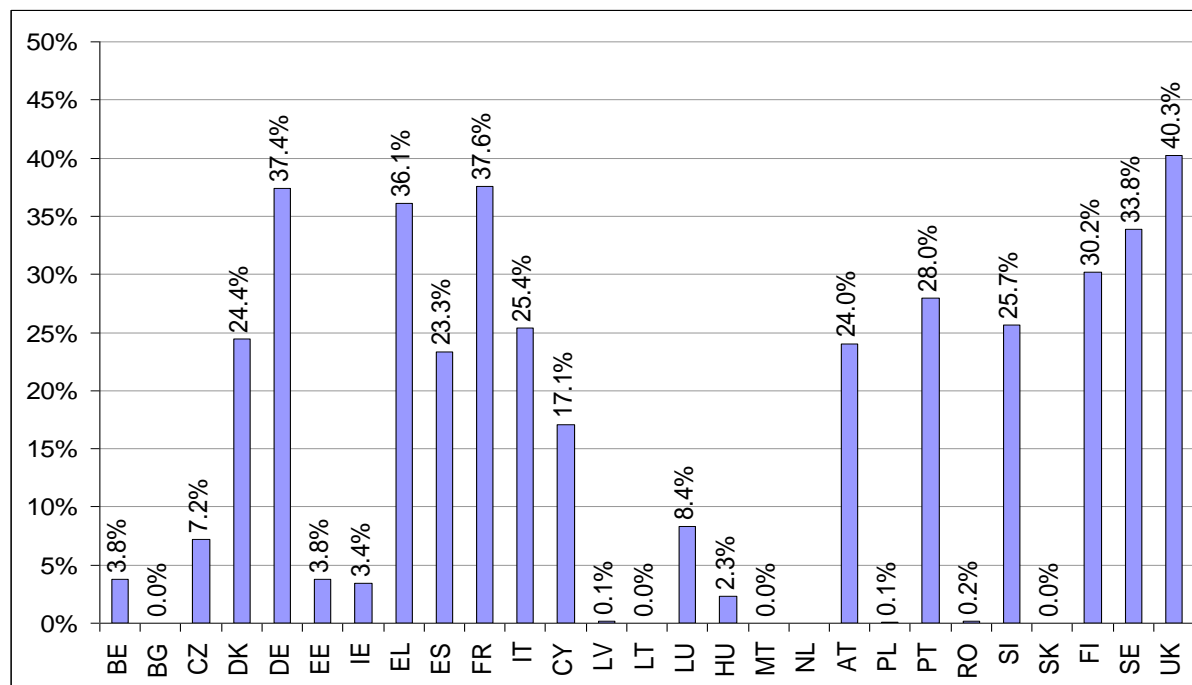
**Graph 3: Provision of DSL Access**



Source: ComReg Quarterly Data report (ComReg Document No. 09/50) p.30

Note: Line share represents approx 25% of LLU lines. DSL represents less than 1% of DSL access

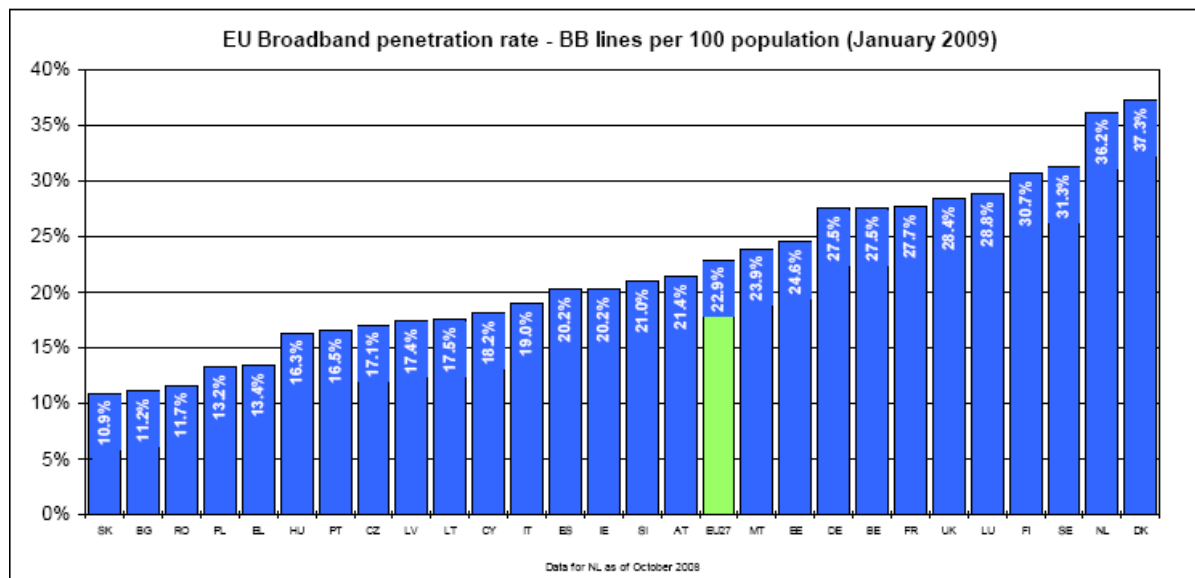
**Graph 4: DSL lines offered on the basis of unbundled local loops as a percentage of all DSL lines**



Source: Based on data from European Commission, 14th Implementation Report, 2009, p. 103.

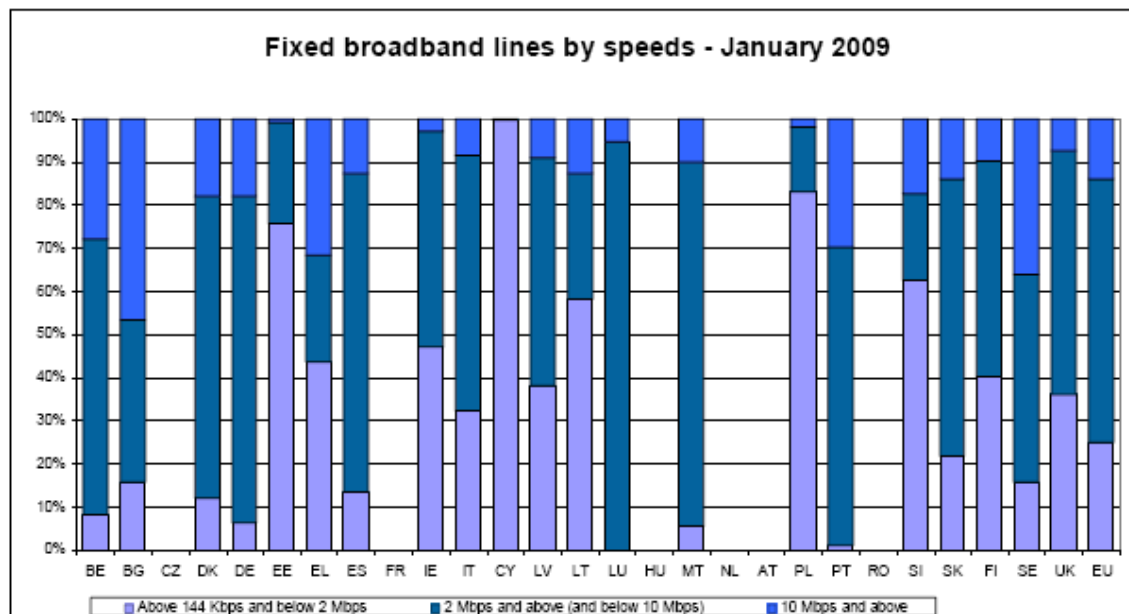
Note: Line share represents approx 25% of LLU lines in Ireland. DSL represents less than 1% of DSL access as a percentage of all DSL lines.

**Graph 5: Broadband penetration the EU**



Source: Based on data from European Commission, 14th Implementation Report, 2009

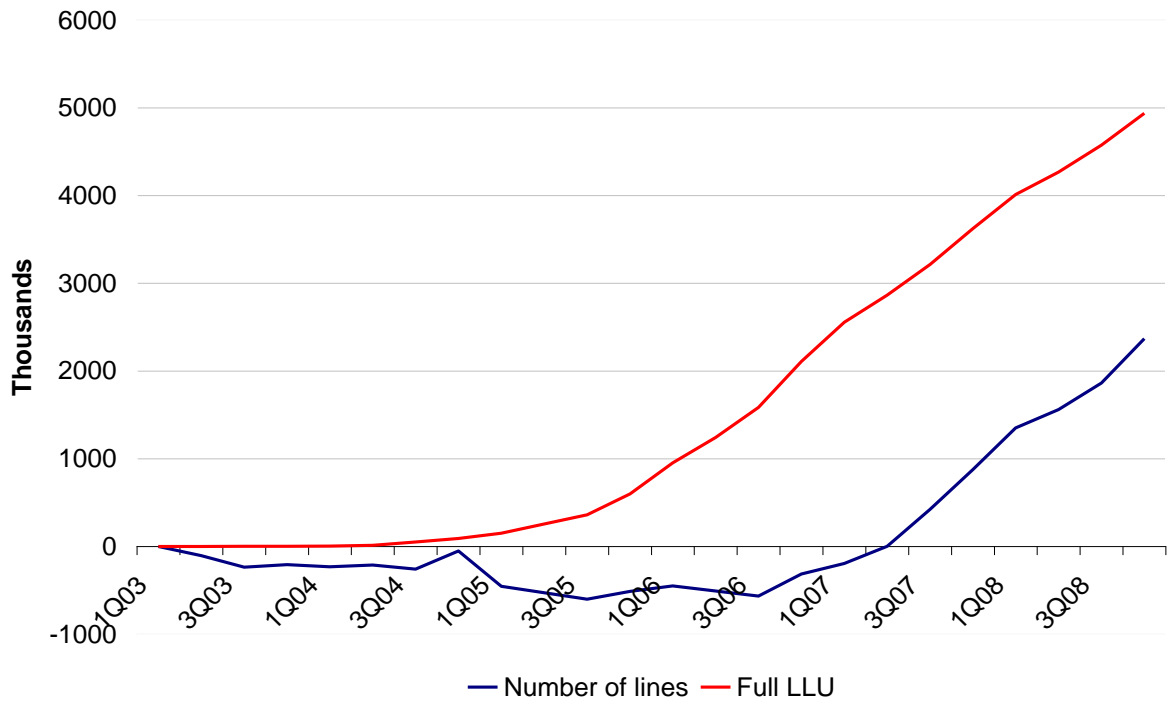
**Graph 6: Broadband speeds within the EU**



No data for CZ, FR, HU, NL, AT and RO.

Source: Based on data from European Commission, 14th Implementation Report, 2009

**Graph 7: Increase in number of LLU and fixed lines in France from Q1 2003**



Source: ARCEP

## **Annex E – Updated competition assessment in the market for wholesale unbundled access**

### **The existing SMP designation and decision on obligations**

- 1.1. A Decision Notice on Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops was published on 15 June 2004.<sup>86</sup> (“the WUA Decision”) The notified Wholesale Unbundled Access (“WUA”) market included the following products:
  - Fully unbundled local metallic path (“ULMP”).
  - Shared loops (line sharing).
  - Fully unbundled sub-loops.
  - Shared sub-loops.
  - Co-location.
  - Associated facilities.
- 1.2. WUA and wholesale broadband access (“WBA”) were considered to fall within distinct product markets, due to differences in functionality and pricing. ComReg considered that access via alternative technologies such as cable and fixed wireless access (“FWA”) were excluded from the WUA market on the grounds that they would be unlikely to pose a competitive constraint in the WUA market within the period of the review. Accordingly, ComReg formed the view that there was a distinct relevant market in Ireland for WUA (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.
- 1.3. Having regard to the market definition and the associated SMP analysis carried out at that time, ComReg considered that Eircom had 100% share of the WUA market, and that this was unlikely to change over the lifetime of the review. The threat of competitive constraint posed by potential competition and countervailing power over the review period was considered to be low, due to high barriers to entry and expansion in the WUA market.
- 1.4. On that basis, Eircom was designated with SMP. ComReg imposed a number of obligations upon Eircom in relation to the provision of WUA. One such obligation imposed on Eircom was that of price control and cost orientation. Since the publication of the WUA Decision in June 2004, ComReg has been involved in the implementation of those obligations.<sup>87</sup>

### **Proposed amendment to the monthly rental price of LS**

- 1.5. The WUA Decision set out the principles to guide the implementation by ComReg of a detailed price control methodology. ComReg notes that the proposal to amend the monthly rental price of LS does not constitute a material change to the price control and cost orientation obligation in the WUA

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<sup>86</sup> Designation of SMP and Decision on Obligations- Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops. ComReg Decision D8/04, dated 15 June 2004.

<sup>87</sup> For example, on line share ComReg 04/111 and ComReg 05/22; and Consultation on the Rental price for Shared Access to the Unbundled Local Loop (ComReg Document Number 08/23).

Decision. Rather, the proposed change relates only to the methodology and implementation of the existing price control and cost orientation obligation established by ComReg in the WUA Decision. The proposed change therefore does not require amendment of the actual price control and cost orientation obligation established in the WUA Decision.

- 1.6. The proposed change to the pricing methodology is intended to better effect ComReg's regulatory objectives, pursuant to Section 12 of the Communications Regulation Act, 2002 as amended, and Regulation 14 of the Access Regulations, as amended, which include the promotion of competition, by ensuring that there is no distortion or restriction of competition in the market and by encouraging efficient investment in infrastructure. The proposal is consistent with, and falls within, the scope of the existing obligation of price control and cost orientation.

### **Analysis of Wholesale Physical Network Infrastructure Access Market**

- 1.7. ComReg is in the process of conducting a full analysis of the Wholesale Physical Network Infrastructure Access ("WPNIA") market. This market was introduced by the European Commission in December 2007<sup>88</sup> as an updated and technology-neutral version of the WUA market. The updated WPNIA market is technology neutral, and is not limited to metallic loops and sub loops (as was the case in the previous WUA market). Therefore, the WUA market, defined in the WUA Decision, is contained within the broader WPNIA market. Accordingly, the final WPNIA market analysis decision will ultimately supersede the WUA decision which remains in force.
- 1.8. On 23 December 2008 ComReg published its Response to Consultation and Draft Decision for the WPNIA market analysis<sup>89</sup> (the "Response and Draft Decision document 08/104").
- 1.9. ComReg was of the preliminary view that Eircom still has SMP on the expanded WPNIA market, with a market share at or approaching 100%. Metallic loops still account for all but a very small number of access paths that fall within the WPNIA market. It is therefore reasonable to assume that, in the context of the existing WUA Decision that is solely based on metallic loops, Eircom continues to have a market share at or close to 100%.
- 1.10. ComReg's preliminary view as set out in the Response and Draft Decision document 08/104 is that the barriers to entry and expansion within the WPNIA market remain high, due to the high cost and lengthy timeframe associated with building a fixed broadband network. As a result, the competitive threat posed by potential competition remains limited. ComReg's preliminary view is that countervailing power in the WPNIA market also remains limited for the reasons set out in the Response and Draft Decision document 08/104.

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<sup>88</sup> EU Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>89</sup> Market Review: Wholesale physical network infrastructure access (Market 4). Response to ComReg Document 08/41 and Draft Decision



- 1.11. ComReg's preliminary conclusion is that Eircom has SMP in the WPNIA market.
- 1.12. ComReg notified the European Commission of the proposed SMP designation in accordance with Regulation 20 of the Framework Regulations. In its response letter to ComReg, the European Commission approved ComReg's proposal in the Response and Draft Decision document 08/104 to designate Eircom with SMP in the WPNIA market (forgoing the right to veto ComReg's draft decision). The European Commission invited ComReg to reconsider its treatment of fibre in defining the product market, but noted specifically that its invitation did not affect the regulatory outcome with respect to the SMP designation.
- 1.13. In view of its analysis of the WPNIA market, ComReg considers that:
- Countervailing power in the existing WUA market remains limited;
  - Barriers to entry and expansion within the WUA market remain high;
  - The threat posed by actual and potential competition remains limited;
  - Eircom has a market share at or close to 100% in the existing WUA market; and
  - Competition problems would be likely to occur in the WUA market in the absence of effective remedial obligations.
- 1.14. Based on the up-to-date analysis conducted by ComReg on the WPNIA market and, having regard to the subsequent approval of that preliminary view by the European Commission, ComReg is of the view that Eircom's existing SMP designation in the WUA market as set out in the WUA Decision is an appropriate instrument on which to amend the LLU pricing model.

### **Conclusion**

- 1.15. This appendix note assesses whether the competitive conditions that are present within the WUA market justify the continued imposition of a price control obligation on Eircom.
- 1.16. ComReg considers that the competitive conditions in the WUA market, as observed by ComReg and described in the WUA Decision, remain present at this time. As such, the decision to amend the pricing methodology remains equally valid. ComReg therefore considers that the continued imposition of the price control and cost orientation obligation is consistent with ComReg's objectives as set out in the Access Regulations and that the price control and cost orientation obligation should remain in place.