



Commission for
Communications Regulation

Response to Consultation & Consultation on Draft Decision

Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops

(Response to Consultation Document 03/146 and Draft Decision)

Document No:	04/40
Date:	16 April 2004

All responses to this consultation on the draft decision should be clearly marked:-

“Reference: Submission re ComReg 04/40” as indicated above, and sent by post, facsimile, e-mail or on-line at www.comreg.ie, (*current consultations*), to arrive on or before 5.30 pm, 17th May 2004 to:

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Please note ComReg will publish all submissions with the Response to Consultation, subject to the standard confidentiality procedure.

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1 Executive Summary

- 1.1 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive. The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“the *Relevant Markets Recommendation*”) by the European Commission.¹ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation*² and the Commission's Guidelines on Market Analysis and Significant Market Power (“*The SMP Guidelines*”).³
- 1.2 As part of this process, this document is both a response to the consultation document 03/146 and a further consultation on the draft decision in Annex B. Details with regard to the submission of comments on this draft decision are provided on the cover page to this document, at the end of this section and in section 8.
- 1.3 The European Commission's *Relevant Markets Recommendation* states that there is, at the wholesale level, a market for “wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services”.. The ‘local loop’ is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber premises to the main distribution frame or equivalent facility.
- 1.4 The European Commission takes the view that an operator using unbundled local loops will not consider wholesale broadband access to be a substitute. The European Commission considers that it is equally unlikely that an entity using wholesale broadband access could easily switch to unbundled loops to provide equivalent retail service(s). ComReg agrees with this view that the level of substitution is limited between these two products.
- 1.5 In ComReg’s view it would also not be economically viable for a new entrant to attempt to replicate the incumbent’s local access infrastructure. Alternative technologies such as wireless local loops, cable or satellite do not provide the level

¹ Framework Regulations 26 and 27.

² EU Commission Recommendation of 11 February, 2003 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.

³ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3

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of ubiquity of the local loop network and are not likely to do so in the time frame of this review.

- 1.6 There are a number of products currently available in Ireland to allow new entrants access to the metallic local loop:
 - fully unbundled local metallic paths (ULMP)
 - shared loops (line sharing)
 - fully unbundled sub loops
 - shared sub loops
 - collocation
 - associated facilities
- 1.7 Access to the local loop allows access seekers the ability to offer narrowband and broadband services. Therefore provision of local loop access allows operators to offer services which compete in a number of retail markets. It should be noted however that to date access seekers have concentrated on offering broadband products. Given the Carrier Pre Select (CPS) options available in Ireland, it may not make commercial sense to use local loop unbundling access for PSTN services. There is growing demand at the retail level for broadband access services and although broadband access via other technologies is available, roll-out and take up have been limited. This is mainly due to the fact that the incumbent local loop network has a widespread geographic reach which is not matched by other technologies.
- 1.8 ComReg takes the view that there are clear and distinct functional differences between bitstream services and unbundled loops which preclude their inclusion in the same relevant product market. This conclusion is supported by the view taken by the European Commission as stated in the *Relevant Markets Recommendation*. ComReg also believes that there are significant differences between the pricing of bitstream and wholesale unbundled access services (both fully unbundled and line sharing), which reflect the functional differences between the services. In effect, the service operates at entirely different functional layers.
- 1.9 The wholesale unbundled access acquirer must make not insignificant investments in its exchange equipment and must play a much greater role in managing its services (in that it bears responsibility for identifying faults). The significant differences between the pricing of bitstream and LLU services (both fully unbundled and line sharing), reflect the functional differences between the two services. As such, the service price and other cost differences suggest that wholesale unbundled access services are not in the same relevant market as bitstream services.
- 1.10 ComReg is of the view that there is limited scope for network operators currently operating in Ireland to provide effective supply-side substitutes for wholesale unbundled access to metallic loops. Operators of existing networks capable of supporting uni-directional or narrowband access services would be required to make significant investments in upgrading their networks to support broadband access. ComReg is unaware of any such operators intending to make such investments in "brown-field" networks during the timeframe of this review.

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- 1.11 ComReg has formed the view that there is a distinct relevant market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. ComReg also takes the view that the relevant geographic market for the provision of wholesale unbundled access is national in scope, to include the whole of Ireland.
- 1.12 This view is based primarily on the fact that services offered nationally by eircom fall within these relevant markets and are homogeneous in nature. It is also the case that the market conditions are not significantly different across the country and eircom's local access infrastructure is the ubiquitous network across the whole of Ireland.
- 1.13 ComReg having first identified a "relevant market"⁴ relating to wholesale unbundled access in Ireland is required to conduct an analysis of the relevant market to decide whether or not it is effectively competitive. Where it concludes that the market is not effectively competitive it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.
- 1.14 eircom currently supplies 100% of the market for unbundled metallic local loops. In terms of future competition, ComReg takes the view that there is little likelihood of the development of an alternative local access network which could provide comparable services during the timeframe of this review. While there is likely to be some expansion in the medium-term in the roll-out of platforms using alternative technologies (e.g., satellite, wireless services using licence-exempt frequencies (e.g., based on the 802.11b standard), mobile wireless or power line platforms) the extent of such expansion is uncertain and is unlikely to provide effective competition in the local loop during the timeframe of this review.
- 1.15 The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. The issues are also associated with economies of scale and scope, leverage of facilities (both historic and new), ubiquity and access to customers which limit the feasibility of self-supply by new entrants.
- 1.16 Having regard to the above, ComReg is of the view that, in accordance with the *Framework Regulations* eircom should be designated as having SMP on the markets for "wholesale unbundled access" (including shared access) to metallic loops and sub-loop for the purpose of providing broadband and voice services.
- 1.17 According to the *SMP Guidelines*,⁵ the purpose of imposing *ex-ante* obligations on undertakings designated as having Significant Market Power (SMP) is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets. ComReg can only impose *ex-ante* regulation in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient.

⁴ Framework Regulation 27.

⁵ *SMP Guidelines* at paragraph 16.

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- 1.18 Due to the nature of the market, competition problems of both a structural and a behavioural nature will exist. Such generic competition problems as entry deterrence, exploitative behaviours and productive inefficiencies lead to effects on competing operators which hinder their ability to compete, or even enter their desired markets. The kind of competition problems which may appear, centre on issues including refusal to deal and denial of access, as well as price and non-price issues which are likely to occur with mandated access.
- 1.19 ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power.⁶ ComReg also has the obligation⁷ under Regulation 6 to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations⁸ which include transparency, non-discrimination, accounting separation, access to specific network facilities and price and cost accounting obligations.
- 1.20 ComReg is proposing to place obligations on eircom under all of the headings above. The nature of these remedies is set out in detail in section 6 below.
- 1.21 As noted earlier, this document is both a response to consultation document and a consultation on the draft decision attached in Annex B. ComReg welcomes all comments that were submitted by interested parties on the questions that were posed in this market review, and has considered all comments in coming to its conclusions on market definition, market analysis and remedies. As required by Regulation 20 of the Framework Regulations, the draft measure is now being made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.
- 1.22 ComReg would also welcome comments from all interested parties on the draft decision attached in Annex B. In particular:

Q. 1. Do respondents believe that the draft text of the proposed decision set out in Annex B is, from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed? Please elaborate your response.

⁶ Regulation 27(4) states 'Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate'

⁷ Framework Regulation 6(1-5)

⁸ Access Regulation 9(1) states 'Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 26 of the Framework Regulations, the Regulator shall impose on such an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate'

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1.23 Comments are to be supplied only in writing on or before 17th May 2004. Under Article 5 of the *Framework Regulation* and in order to promote further openness and transparency, ComReg will publish the names of all respondents and may publish and make available for inspection responses to the consultation at its Offices.⁹

⁹ComReg may publish submissions with the Response to Consultation, subject to confidentiality. ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.

2 Introduction

Objectives under the Communications (Regulation) Act 2002

2.1 Part 2 Section 12 of the Communications (Regulation) Act 2002 outlines the objectives of ComReg in exercising its functions. These are, in relation to the provision of electronic communications networks, electronic communications services and associated facilities:

- (i) to promote competition
- (ii) to contribute to the development of the internal market, and
- (iii) to promote the interests of users within the European Union.

2.2 This review is in line with the objectives set out in the Communications (Regulation) Act 2002, in particular as ComReg seeks to promote competition and ensure that end-users derive the maximum benefit in terms of price, choice and quality. ComReg has also had regard to the regulatory objectives as set out by and the Ministerial Directions of February 2003.¹⁰

Regulatory Framework

2.3 Four sets of Regulations,¹¹ which transpose into Irish law four European Community directives on electronic communications and services,¹² entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, was transposed into Irish law on 6 November 2003. The Minister for

¹⁰ Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s.13 of the Communications Regulation Act 2002, 21 February, 2003

¹¹ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the Framework Regulations"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the Authorisation Regulations"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the Access Regulations"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the Universal Service Regulations").

¹² The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the Framework Directive"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the Specific Directives"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the Authorisation Directive"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the Access Directive"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the Universal Service Directive"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the Privacy and Electronic Communications Directive"), OJ 2002 L 201/37.

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Communications, Marine and Natural Resources has consulted on the draft regulations.¹³

- 2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*.¹⁴ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.¹⁵ Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP in that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.¹⁶ Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market. If ComReg has previously imposed sector-specific regulatory obligations on undertakings in that relevant market, it must withdraw such obligations and may not impose new obligations on those undertaking(s).¹⁷
- 2.5 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of the *Relevant Markets Recommendation* by the European Commission.¹⁸ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the Commission's Guidelines on Market Analysis and Significant Market Power (*"The SMP Guidelines"*).

ComReg procedure

- 2.6 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services (“ECNS”), and from consumer surveys commissioned by ComReg, in order to carry out thoroughly its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of the *Relevant Markets Recommendation* and the *SMP Guidelines*.
- 2.7 On 11 December 2003, ComReg issued a national consultation on its market analysis for wholesale unbundled access (including shared access) to metallic loops and sub-loops. Interested parties were asked to submit comments by 31 January 2004 on a number of questions pertaining to the preliminary findings of the

¹³ ComReg Document No. 03/99 outlines ComReg’s response to the draft regulations.

¹⁴ Framework Regulation 26.

¹⁵ Framework Regulation 27.

¹⁶ Framework Regulation 27(4).

¹⁷ Framework Regulation 27(3).

¹⁸ Framework Regulations 26 and 27.

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analysis. ComReg received submissions from the four respondents listed below by the close of the consultation period.

The four respondents to the Consultation were:

- eircom ltd.
- EsatBT
- Alternative Operators in the Communications Market (also known as ALTO)
- MCI

2.8 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its proposals regarding the market analysis process. Comments relevant to each consultation question are addressed in the following sections. Respondents have tended to address their response to consultation questions 1-3 in combination so, for consistency, ComReg has structured its response accordingly. All responses received are available for inspection (with the exception of material supplied on a confidential basis) at ComReg's office.

Liaison with Competition Authority

2.9 There is a requirement on National Regulatory Authorities (NRAs) to co-operate with National Competition Authorities (NCAs) throughout the process of market definition and analysis. In December 2002, ComReg signed a co-operation agreement with the Competition Authority for a period of three years.¹⁹ To facilitate market review decision-making, a Steering Group including a representative from the Competition Authority was established by ComReg. Through this forum, the Competition Authority has been informed and involved throughout the market review decision making process. The views of the Competition Authority are at Annex D.

Structure of Document

2.10 The remainder of this document is structured as follows:

- section 3 presents ComReg's conclusions on the definition of the market for "wholesale unbundled access" (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments at the wholesale and retail level;
- section 4 presents ComReg's market analysis of the market above and presents ComReg's view on whether this market is effectively competitive;

¹⁹ ComReg Document No. 03/06
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- section 5 presents ComReg's view on those undertakings with significant market power in the market;
- section 6 provides a discussion of the general principles associated with remedies and outlines a range of possible, as well as our proposed remedies, under the new regulatory framework;
- section 7 outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention markets; and
- section 8 provides details with regard to the submission of comments on the Draft Decision in Annex B.

3 Relevant Market Definition

- 3.1 The *Framework Regulations* require ComReg to define relevant markets appropriate to national circumstances, in particular the relevant geographic markets within Ireland, in accordance with the market definition procedure outlined in the *those Regulations*. This obligation applies to both the relevant markets identified in the *Relevant Markets Recommendation* and to additional relevant markets that ComReg may consider to merit investigation (*i.e.*, so-called “Article 7” markets). In accordance with the *Framework Regulations*,²⁰ the market definition exercise must be carried out in accordance with the principles of competition rules and must take “utmost account” of the *Relevant Markets Recommendation*, as well as the *SMP Guidelines*.
- 3.2 The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that providers of ECNS encounter, thereby also facilitating the subsequent market analysis procedure. According to the European Court of Justice,²¹ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question.
- 3.3 The definition of the relevant market concentrates on identifying constraints on price setting behaviour of operators. The principal constraints to consider are demand-side and supply-side substitution. For the purpose of defining the relevant market ComReg will take into account a range of measures in assessing demand and supply substitution, including the SSNIP test where practicable.²² The market definition exercise is concerned with the likely competitive response of a body of customers, which is not necessarily the majority of customers.²³

²⁰ Framework Regulation 27.

²¹ See, for example, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law (“the Commission Notice on Market Definition”), OJ 1997 C 372/3, and the *SMP Guidelines*.

²² See the Commission Notice on Market Definition, the *SMP Guidelines* and ComReg’s Market Data Information Notice for additional guidance. Applying the SSNIP test, one tries to ascertain whether customers purchasing a particular product or service would switch to readily available substitutes or to suppliers located elsewhere if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level, thereby rendering such a rise in prices as being unprofitable.

²³ See, for example, Case 85/76, *Hoffman-La Roche & Co. A. G. v. Commission*, [1979] ECR 461, as well as Case 66/ 86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803.

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- 3.4 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Scope of Review

- 3.5 The European Commission's *Relevant Markets Recommendation* states that at the wholesale level, there is a market for “wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services”.
- 3.6 The European Commission takes the view that an operator using unbundled local loops will not consider another form of wholesale broadband access to be a substitute, even if such other access allowed the supply of the same retail services provided over the unbundled loops, because the use of such other access would require that the "DSL technologies or equivalents used over the loops were compatible at every level of the network".²⁴ Even if such synchronous deployment of technology existed, it would require continued synchronous technology development in the future, making it difficult for service differentiation at a technical level to evolve.
- 3.7 The European Commission considers that it is equally unlikely that an entity using wholesale broadband access could easily switch to unbundled loops to provide equivalent retail service(s). It finds that such an entity would only do so if it has all the other network/infrastructure elements needed to self provide an equivalent service. Similarly, supply-side substitution is dependent on the same condition. It is clear, from the European Commission, therefore, that unbundled local loops and wholesale broadband access constitute distinct markets.

Background

- 3.8 The primary platform for access services in Ireland is the copper loop, with some cable connections. The ‘local loop’ is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility. With the exception of some cable infrastructure the copper loop is the primary telephony connection to end users in Ireland.
- 3.9 eircom is the incumbent provider of local loops in Ireland, with a network of approximately 1.6 million connections²⁵ with a wide geographic reach. eircom’s local loop infrastructure was rolled out over a significant period and the incumbent operator was protected for most of that time by exclusive rights.
- 3.10 The incumbent has significant economies of scale and increasing economies of scope which act as a significant barrier to entry for other operators.

²⁴ Explanatory Memorandum, *Relevant Markets Recommendation*

²⁵ ComReg (03/144) Key Data for Irish Communications Market – December 2003

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- 3.11 ntl and Chorus are television distribution companies which operate nationally with a combination of cable and MMDS (Multipoint Microwave Distribution System) networks in a number of regional areas in Ireland. There are also a number of smaller cable providers who provide a range of services in their locality. Currently cable networks pass approximately 87% of all households in Ireland. However at this point cable networks have generally not been upgraded to the point where they are able to provide services other than broadcasting services.
- 3.12 In 1999 Ireland offered eight nationwide licences for the provision of broadband and narrowband access, using fixed wireless links in the 3.5 GHz, 10.5 GHz and 26 GHz frequency bands. Six were taken up, of which three had to be subsequently revoked for failure to comply with licence conditions, or bankruptcy. Currently eircom and EsatBT offer services at 26 GHz while eircom is the only licensed operator to provide services in the 3.5 GHz band via Fixed Wireless Access (FWA).²⁶ Both voice and Internet services can be delivered to end users over the platform. However this is limited by eircom to areas where it is more economical in the delivery of local loops and for backhaul.
- 3.13 In order to encourage entry into the FWA market on a smaller scale, in light of the difficulties in respect of national licences, ComReg adopted a competitive procedure to assign licences on a base station by base station basis. In the second half of 2003, ComReg offered fifty nine licences to eight applicants for the provision of fixed wireless access local level services using the spectrum from the 3.5 GHz, 10.5GHz and 26GHz frequency bands.²⁷ Thirty eight of the initial offers have been accepted, and further awards may be made following this first round. While there is sufficient spectrum to provide national coverage, it is not clear that all areas will be licensed. It is expected that services will become available by year end 2004.
- 3.14 Fibre optic cables can support the provision of local loops. They are mainly used for high capacity users, which are almost always non-residential and are generally installed as part of a corporate network. ComReg takes the view that currently the impact of fibre local loops is minimal and will remain insignificant within the timeframe of this review.²⁸ ComReg will, however, monitor the development of fibre based infrastructure.

The relevant product market

- 3.15 There are a number of products currently available in Ireland to allow new entrants access to the metallic local loop:
- fully unbundled local metallic paths (ULMP)
 - shared loops (line sharing)
 - fully unbundled sub loops
 - shared sub loops

²⁶ Currently, there are approximately 2,800 residential and business (authorised and exempt) FWA subscribers in the country.

²⁷ ComReg (03/32) Request for Expressions Of Interest - 3.5 GHz Local Licences for Wireless Broadband

²⁸ There are currently very few fibre end user connections in the country.

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- collocation
- associated facilities.

3.16 Based on the types of wholesale services currently available and technologies in use in Ireland, ComReg's market definition analysis considers:

- the downstream retail services capable of being supported by the relevant wholesale services;
- whether notional cable access (*i.e.*, self-supply by the operator of a digitised bi-directional cable network) should be included in the wholesale market analysis, given that some retail cable services compete with xDSL services at the retail level;
- whether functional differences at the wholesale level suggest that LLU and bitstream services are not in the same relevant market; and
- price differences (including costs attributable to additional equipment) suggest that LLU and bitstream services are not in the same relevant market.

3.17 In doing so, ComReg will consider demand-side substitution at both the retail and wholesale levels and supply-side substitution at the wholesale level.

Demand-side substitution (retail level)

3.18 Access to the local loop allows access seekers the ability to offer narrowband and broadband services. Therefore provision of local loop access allows operators to offer services which compete in a number of retail markets. It should be noted however that to date access seekers have concentrated on offering broadband products.

3.19 The local loop network has a widespread geographic reach which is not matched by other technologies such as FWA and cable infrastructures.

3.20 There is growing retail demand in Ireland for broadband access services. The total number of retail broadband subscribers, as at the end of 2003, was 31,550, including 1,350 FWA subscribers, 4,900 broadband cable subscribers and 25,300 Asymmetric Digital Subscriber Line (ADSL) subscribers (including both eircom's subscribers and other authorised operators). These numbers have increased from 3,330 ADSL subscribers and 2,300 cable subscribers and have fallen from 5,000 FWA subscriptions, since the beginning of 2003. Other broadband subscribers receive services via leased lines (3,300).

3.21 The surveys conducted on ComReg's behalf indicate that there is a clear perception among end users that there are distinct narrowband and broadband access markets. End users indicate that they perceive that broadband cable connections and ADSL connections as being functionally substitutable services, where the former are available.²⁹ However, the small number of broadband subscribers via cable is

²⁹ TNS MRBI Broadband & Data Communications Survey, May 2003; MRBI Broadband Internet Survey – Residential, August 2002.

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aggregated in a number of geographic locations³⁰ and is not, for reasons outlined below, expected to increase significantly in the period of this review.

3.22 Where DSL is available, coverage is likely to be broader for fixed line networks because FWA may be restricted by line of sight, so that within any given area fixed line penetration will represent a higher percentage of subscribers than FWA. Further, there has, as yet, been no competitive response by eircom to pricing of FWA or cable broadband products while there has been a substantive response to the deployment of fixed network competition. Thus, ComReg considers that FWA will not act as a sufficient competitive constraint on fixed access networks at the retail level within the timeframe of this review.

Wholesale demand-side substitution

3.23 There are a number of potential demand-side substitutes at the wholesale level. Cable infrastructure, which has coverage of approximately 87% of Ireland, could over time provide a substitute to the metallic local loop. However, this would require substantial investment and is unlikely within the timeframe of this current review. Given the existing state of the cable networks it is not possible to offer a functionally equivalent substitute to the local loop in the timeframe of this review. As much as 90% of cable connections cannot provide access to support the provision of data services at all. Of the remaining 10%, there are fewer than 4,900 subscribers and services are spread across areas of Limerick, Cork, Dublin, Kilkenny, Tipperary, Waterford and Longford, thus limiting any competitive constraint that could be exerted on the local loop within these areas. This is not expected to change within the timeframe of this review.

3.24 Presently, FWA is equally unfeasible as a substitute due to the limited roll out of FWA technology and the unavailability of a wholesale product.

Substitution between bitstream and wholesale unbundled access

Functional substitutability

3.25 There are a number of functional differences between wholesale unbundled access and bitstream services for acquiring entities.

3.26 The local loop is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility.³¹

3.27 In the case of full unbundling the local loop the copper pair is rented to a third party for its exclusive use. The lessee has full control of the relationship with its

³⁰ Cable modem services are available to subscribers in areas of Limerick, Cork, Dublin, Kilkenny, Tipperary, Waterford and Longford

³¹ Regulation(EC) No 2887/2000 of the European Parliament and of the Council on unbundled access of the local loop.

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customer for the provision of a full range of services over the local loop, including deployment of DSL.

- 3.28 Shared use of the copper line allows the incumbent operator to continue to provide telephone service, while the new entrant delivers high-speed data services over the same local loop using its own high-speed ADSL modems. Telephone traffic and data traffic are separated by means of a splitter before the incumbent's switch. The local loop remains connected to and part of the public switched telephone network. The diagrams in Annex C of the document, illustrate the different types of local loop unbundling.
- 3.29 Bitstream services may limit the extent to which the purchaser can produce innovative services for retail supply or, for that matter, depart significantly from the retail services made available by eircom. The wholesale provider of bitstream currently controls both the bandwidth (or speed) and geographic coverage of retail service development.
- 3.30 With wholesale unbundled access, purchasing operators have the scope to choose the geographical areas most appropriate for them which may not be the case with bitstream products. Purchasing operators, having the scope to provide a wider range of services across the local loop, can develop a range of products, for example variants of xDSL to compete for leased line customers.
- 3.31 Unbundled local loops (both full and shared) give control to the purchasing operator of the local loop connection to the end user. As such, the purchasing operator has almost complete discretion in relation to the bandwidth of services offered. In addition, the purchasing operator, by installing its own DSLAM and related equipment, has a greater degree of control over geographic coverage and roll-out of new retail services.
- 3.32 High speed bitstream access³² refers to the situation where the incumbent installs a high speed link to the customer's premises (by installing its preferred ADSL equipment and configuration in its local access network) and then makes this access link available to third parties to enable them to provide high speed services to customers.
- 3.33 Consequently, ComReg takes the viewpoint that there are clear and distinct functional differences between bitstream services and unbundled loops which preclude their inclusion in the same relevant product market. This conclusion is supported by the view taken by the European Commission as stated in the *Relevant Markets Recommendation* and outlined in the scope of the review above.

Price comparisons

The current standard charges for (fully) unbundled local loops are as follows:³³

³² Bitstream can be defined as the provision of transmission capacity (upward/downward channels may be asymmetric) between the end-user connected to a telephone connection and the point of interconnection available to the new entrant. ERG Document, November 21st 2003.

³³ All charges are exclusive of VAT.

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Service	Charges
Successful connection for existing metallic path	€121.52
Successful connection for existing metallic path (with survey option to allow connection of spare path)	€154.25
Cancelled connection order	€24.12
Upgrade from line sharing to full unbundling	€80.70
Monthly rental charge	€16.81
Line testing	€49.18
Fault clearance	€117.31
Disconnection Charge	€49.58

eircom's current standard charges for line sharing connections are as follows:

Service	Charges
Successful line sharing connection for existing path	€123.41
Successful shared connection for existing path (with survey option to allow connection of spare path)	€156.14
Cancelled connection order	€24.12
Monthly rental charge	€9.00
Line testing	€18.09
Fault clearance	€117.31
LS Disconnection	€75.00

eircom's current standard charges for (sub) unbundled local loop – Full are as follows:³⁴

Service	Charges
Cabinet Survey	€99.17
Cabinet Site Offer	€81.96
Subloop ULMP	€168.65
Monthly rental charge	€15.25
Line testing	€49.18
Sub Loop ULMP Disconnection	€69.03

eircom's current standard charges for (sub) unbundled local loops – Line Sharing are as follows:³⁵

³⁴ Attendance charges will also apply, which are dependent on an initial charge for the first 30 mins and subsequent charge thereafter and whether the visit is planned/unplanned/ standard/after-hours.

³⁵ Attendance charges will also apply, which are dependent on an initial charge for the first 30 mins and subsequent charge thereafter and whether the visit is planned/unplanned/ standard/after-hours.

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Service	Charges
Cabinet Survey	€99.17
Cabinet Site Offer	€81.96
Subloop Line sharing	€172.51
Monthly rental charge	€8.22
Line testing	€18.09
Sub Loop (Line sharing) Disconnection	€92.34

eircom's current standard charges for collocation facilities are as follows:

Service	Charges
Pre-ordering charges	
Information requests	€318 per site
Full survey reports	ranging between €1143 and 2845 per distant site
Site inspections	ranging between €1143 and 2845 per distant site
Site offers	€6133
Occupancy charges	varying by location
Basic rental	
Licence fees	For generator provision, flooring and air-conditioning, the MDF and cabling
Capital contributions	For generator provision and air-conditioning
Power charges, process charges and charges for attendance services	(both planned and unplanned).

eircom's current standard charges for bitstream access are as follows:

Service	Charges
Service establishment per access seeker (not per line)	€8,035
Port connection charge	€60
Monthly service charge for 512 kbps port	€55
Monthly service charge for 1,024 kbps port	€89
Monthly service charge for 512/128 kbps 24:1 Rate Adaptive Port	€27
Monthly service charge for 512/128 kbps 48:1 Rate Adaptive Port	€20.10
Port Transfer Charge	€60

3.34 ComReg notes a number of difficulties in both setting and assessing prices for broadband access services including: identifying the range of services across which the costs of broadband investments should be allocated, the appropriate method of apportioning such costs, the period over which costs should be depreciated and

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appropriate methods for allowing for the fact that IP and ATM networks are dimensioned for anticipated demand, not demand at the time of service launch (impacting significantly on unit costs).

- 3.35 Noting this however, ComReg believes that the higher prices associated with bitstream as opposed to pricing for wholesale unbundled access services (both fully unbundled and line sharing) reflect the functional differences between the services. In effect, the services operate at entirely different functional layers. The wholesale unbundled access acquirer must make not insignificant investments in its exchange equipment and must play a much greater role in managing its services (in that it bears responsibility for identifying faults). The pricing data available to ComReg indicates that it is unlikely that an access acquirer would respond to a 5 to 10% increase in bitstream prices by switching to unbundled loops or that an unbundled loop acquirer would respond to a similar increase by switching to bitstream. As such, the service price and other cost differences suggest that wholesale unbundled access services are not in the same relevant market as bitstream services.

Development of customer numbers

- 3.36 By the end of the fourth quarter of 2003, the number of unbundled lines and bit stream access lines provided by eircom to other operators was as follows:

	Number of lines	Number of contracts
Fully unbundled lines	300	2
Shared access lines	1,100	2
Bit stream access	4,400	3

- 3.37 Accordingly, there were approximately 1,400 unbundled lines and 4,400 bit stream access lines (of eircom's 1.6 million fixed access lines).³⁶

- 3.38 While these figures indicate that the supply of such services to third parties is in the early stages of development, ComReg notes that eircom's retail ADSL subscriber growth patterns indicate that self-supply by eircom is somewhat more mature (e.g., 19,500 ADSL subscribers).

Conclusions

- 3.39 ComReg takes the view that at the wholesale level there is limited demand side substitutability.

Wholesale supply-side substitution

- 3.40 ComReg is of the view that there is limited scope for network operators currently operating in Ireland to provide effective supply-side substitution for wholesale unbundled access to metallic loops (in response to a 5 to 10% increase in price by a

³⁶ Currently over 1 million lines are served from DSL enabled exchanges.

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hypothetical monopolist supplier). Operators of existing networks capable of supporting uni-directional or narrowband access services would be required to make significant investments in upgrading their networks to support broadband access. ComReg is unaware of any such operators intending to make such investments in "brown-field" networks during the timeframe of this review.

- 3.41 In particular, ComReg believes that the majority of cable networks are currently technically incapable of providing broadband access services (at either the wholesale or retail levels). The upgrading of these networks to the point at which they could provide such services will require the types of investment referred to above, and that the operators of such networks do not intend to make such investments (at least within the timeframe of this review).
- 3.42 The network architecture and management tools for such upgraded cable networks do not currently allow the supply of control over the cable connection to a particular end user (in contrast to unbundled local loops). As such, ComReg does not anticipate that there will be significant supply-side substitution for unbundled local loops from such cable networks.
- 3.43 Fixed wireless access providers have rights to use frequencies and have constructed networks that would allow the provision of broadband access. However, ComReg notes that the fragmented nature of the coverage and ownership of such networks limits the extent of the competitive pressure that these networks exert on the incumbent provider.
- 3.44 Finally, there are high sunk costs associated with building green-field access networks. Together with the economies of scale and density that characterise access networks, these costs significantly increase the barriers to entry for entities considering constructing new extensive local access networks capable of supporting the provision of broadband access. As such, ComReg takes the view that the possibility of entry using access to satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms, should be considered as potential competition rather than supply-side substitution and is more appropriately considered in the assessment of market power.

Conclusion

ComReg has formed the view that there is a distinct relevant market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops.

The relevant geographic market

- 3.45 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of services for which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those in those areas.
- 3.46 Although FWA coverage is reasonably good in fragmented areas across the country, this coverage is far from ubiquitous. ComReg does not consider that

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the dynamics of competition faced by the national local loop within these regions will change significantly within the timeframe of this review in a manner that would justify defining distinct geographic markets. There are approximately 2,800 residential and business FWA subscribers across the country (focussed in Dublin and Cork), while eircom provides service to over half of these subscribers. Eircom is currently the only operator offering narrowband services over FWA. As such, approximately 1,350 subscribers acquire broadband services over FWA. Thus, it appears unlikely that FWA would act as a competitive constraint on the services provided over the ubiquitous eircom local loop network. This view is also reflected in the findings of the Commerce Commission in New Zealand.³⁷

- 3.47 In addition, as much as 90% of cable connections cannot provide access to support the provision of data services at all. Of the remaining 10%, there are fewer than 4,900 subscribers and services are spread across areas of Limerick, Cork, Dublin, Kilkenny, Tipperary, Waterford and Longford, thus limiting any competitive constraint that could be exerted on the local loop within these areas. This is not expected to change within the timeframe of this review.
- 3.48 On this basis, ComReg takes the view that the relevant geographic market for the provision of wholesale unbundled access is national in scope. This view is based primarily on the fact that eircom offers its services that fall within this relevant market on a national basis, on the same terms and conditions. It is also the case that the market conditions are not significantly different across the country and eircom's local access infrastructure is the ubiquitous network across the whole of Ireland.

Conclusions

- 3.49 ComReg has formed the view that there is a distinct relevant market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. On this basis, ComReg takes the view that the relevant geographic market for the provision of unbundled local loops is Ireland.

³⁷ The Commerce Commission has, as part of its investigation into LLU, considered that FWA will not by itself represent a sufficient competitive constraint on fixed access networks during the next five years, in particular due to the sharing of spectrum across users - *Section 64 Review and Schedule 3 Investigation into Unbundling the Local Loop Network and the Fixed Public Data Network, December 2003*

Response to Consultation Questions 1-3

[Q.1. Do you agree with the scope of ComReg's review of wholesale unbundled access? Please elaborate your response.

Q.2. Do you agree that the relevant geographic market for wholesale unbundled access is Ireland? Please expand in your response.

Q.3. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.]

- 3.50 Three of the four respondents agree with ComReg's view that unbundled local loops and wholesale broadband access constitute distinct markets. One respondent disagrees with this view, stating that ComReg fails to present a reasoned argument, based on evidence and available data, in favour of a distinct market for unbundled loops. The same respondent disagrees with ComReg's views relating to the existence of economies and scale and scope for the incumbent operator. This respondent also feels that ComReg should have considered the economics of new technologies and the possibility of sub-national competition emerging in the near term.

ComReg's Position

- 3.51 In line with the European Commission³⁸ and the European Regulators Group,³⁹ ComReg believes that LLU and bit stream services are complementary, and the existence of one should not preclude the need for any other access obligation. Although ComReg has discretion under the new Framework to depart from the *Relevant Markets Recommendation* in relation to national circumstances, no circumstances have been identified (either through its own inquiries or in responses to this consultation) that would warrant departure from the definition provided in the *Relevant Markets Recommendation*.
- 3.52 ComReg notes that the wholesale provider of bitstream currently⁴⁰ controls the bandwidth (or speed) and geographic coverage of retail service development (e.g., eircom, at the present time, controls the location of DSLAMs). In contrast, an operator purchasing unbundled loops has almost complete discretion in relation to the bandwidth of services offered and has the scope to choose the geographical areas most appropriate for them. Further, the wholesale unbundled access acquirer must make not insignificant investments in its exchange equipment and must play a much greater role in managing its services than with bitstream. ComReg, therefore, shares the European Commission's view that there is limited demand– and supply-

³⁸ Communication on Local Loop Unbundling 2000/C 272/10.

³⁹ ERG Common Position on Bitstream Access

⁴⁰ ComReg's consultation paper on wholesale broadband access (document 04/25) proposes that eircom move to a regime where they are obliged to meet reasonable requests for access.

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side substitution possibilities and that unbundled local loops and wholesale broadband access constitute separate markets.

- 3.53 One respondent has noted that the Commerce Commission of New Zealand decided, in November 2003, not to recommend unbundling of the local loop because they believe that the costs and difficulties of that solution may outweigh the potential benefits. However, ComReg also notes that, the Commerce Commission has highlighted its intentions to revisit the case for regulated unbundling if the proposed alternatives have failed to yield a suitable outcome by the end June 2004. Further, the United States Court of Appeals found in January 2004 that regulated unbundling was unjustified on the basis that there was existing competition from cable operators who controlled 60% of the broadband market share. However, cable operators in Ireland control only 15% of the broadband market share, a share which is also falling as ADSL take-up increases rapidly.
- 3.54 In addition, ComReg believes that the market developments in Italy show that introducing both local loop unbundling and regulated bitstream access need not undermine significant investment in xDSL and alternative access infrastructure, and can bring significant benefits to end-users. For example, Wind uses LLU (local loop unbundling) to serve customers in over 165 municipalities, covering more than 30% of households, and has announced its intention to serve areas covering over 70% of the population by the end of 2004. Telecom Italia has extended its retail ADSL-based broadband services to over 60% of households, and Fastweb continues to extend its fibre-to-the-building access infrastructure in major cities, serving both business and residential customers with a range of narrow and broadband services.
- 3.55 ComReg also notes that, while one respondent criticises the argument relating to the existence of economies of scale in access networks, the same respondent appears to acknowledge that there is a distinction between the economics of copper loop networks (high sunk costs with economies of scale and density), on the one hand, and the economics of green-field access networks on the other. ComReg believes that it is these 'economies' of the copper loop networks which increase the unlikelihood of the development of new networks in the review timeframe.
- 3.56 A number of studies have been undertaken on the extent of economies of scale in the local loop. These rely either on engineering cost models or on econometric estimations of cost. The engineering models regularly find significant economies of density- an inverse relationship between the average cost of providing local access via a copper pair and the density of connections in a given geographical area. Econometric evidence on the question of whether service at a given density is provided more cheaply over a larger or a smaller area is less clear.⁴¹ Overall, such econometric evidence supports ComReg's view that, by virtue of its historic monopoly in the local loop and the high market share which it enjoys, eircom enjoys a cost advantage over the operators of other actual or potential wire line networks which are unable, by virtue of their lower market shares, to benefit in the same way from the economies of density.
- 3.57 ComReg does not share the view of one respondent that eircom's USO obligations negate any cost advantages from economies of scope. Economies of scope occur

⁴¹ see M Cave, S Majumdar and I Vogelsang, Handbook of Telecommunications Economics Volume 1, Elsevier (2002), Chs5,6 and 15

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when a firm achieves cost savings by increasing the variety of goods and services that they produce (joint production). Such effects arise when it is possible to share components and to use the same facilities and personnel to produce several products. A USO operator like eircom, operating in markets that have been fully liberalised, would be expected to incur some losses in scale and scope economies, due to the increase in competition resulting in a loss of traffic to new entrants and, in turn, lower volumes. However, unlike eircom, new entrants may not enjoy the cost benefits of sharing components and using the same facilities and inputs to produce a range of products across several markets (given that the entrant might not compete in some of those markets).

- 3.58 Further, the same respondent also argues that the multinational ownership of the incumbent's principal competitors means that, on a global scale, the economies of scope are more likely to accrue to its competitors. Conversely, one could also argue that if such cost savings, accruing from multinational economies of scope, were present in this market, there would have been greater investment in local access infrastructure (both cable and copper loop networks) and less need for wholesale access products. However, like other Member States, the exclusivity of the incumbent's ubiquitous network persists, a situation which is not expected to change within the review timeframe.
- 3.59 Finally, ComReg has noted in its consultation that the eircom local loop network has a widespread geographic reach which is not matched by other technologies such as FWA and cable infrastructures. Although FWA coverage is reasonably good in fragmented areas across the country, this coverage is far from ubiquitous. ComReg does not consider that the dynamics of competition faced by the national local loop within these regions will change significantly within the timeframe of this review in a manner that would justify defining distinct geographic markets. There are approximately 2,800 residential and business FWA subscribers across the country (focussed in Dublin and Cork), while eircom provides service to over half of these subscribers. Eircom is currently the only operator offering narrowband services over FWA. As such, approximately 1,350 subscribers acquire broadband services over FWA. Thus, it appears unlikely that FWA would act as a competitive constraint on the services provided over the ubiquitous eircom local loop network. This view is also reflected in the findings of the Commerce Commission in New Zealand.⁴²
- 3.60 In addition, as much as 90% of cable connections cannot provide access to support the provision of data services at all. Of the remaining 10%, there are fewer than 4,900 subscribers and services are spread across areas of Limerick, Cork, Dublin, Kilkenny, Tipperary, Waterford and Longford, limiting any competitive constraint that could be exerted on the local loop within these areas. This is not expected to change within the timeframe of this review.
- 3.61 ComReg agrees with the European Commission's view that this market experiences high and non-transitory barriers to entry, does not tend towards effective competition and competition law alone would not be sufficient to ensure

⁴² The Commerce Commission has, as part of its investigation into LLU, considered that FWA will not by itself represent a sufficient competitive constraint on fixed access networks during the next five years, in particular due to the sharing of spectrum across users - *Section 64 Review and Schedule 3 Investigation into Unbundling the Local Loop Network and the Fixed Public Data Network, December 2003.*

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effective competition. ComReg is, therefore, not minded to change its conclusions that there is a distinct relevant national market in Ireland for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.

4 Relevant Market Analysis

Background

- 4.1 Having first identified a relevant market, ComReg is required to conduct an analysis of whether the market is effectively competitive by reference to whether any given undertaking or undertakings is/are deemed to hold SMP in that market. Recital 27 of the *Framework Directive* states that a relevant market will not be effectively competitive “where there are one or more undertakings with significant market power”. Regulation 25(1) of the *Framework Regulations* states that:
- “A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers”.
- 4.2 Accordingly, an undertaking may be deemed to have SMP either individually or jointly with other undertakings in a relevant market. In addition, where an undertaking has SMP on a relevant market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.⁴³
- 4.3 ComReg is obliged under the *Framework Regulations* to assess SMP in accordance with European Community law and to take the utmost account of the *SMP Guidelines*.⁴⁴ Those criteria considered to be most relative in this market on the issue of SMP are discussed below.

Market shares

- 4.4 There is only one supplier of wholesale metallic local loops in Ireland (eircom). Accordingly, it has 100% share of the relevant market.
- 4.5 The *SMP Guidelines* state that the existence of a dominant position cannot be established on the sole basis of large market shares and that NRAs should undertake a thorough and overall analysis of economic characteristics of the relevant market before coming to the conclusion as to the existence of significant market power.⁴⁵ However the *SMP Guidelines* state that according to established case law, very large market shares – in excess of 50% - are in themselves save in exceptional circumstances, evidence of the existence of a dominant position.⁴⁶

⁴³ Framework Regulations, Regulation 25(3).

⁴⁴ Framework Regulation 25(2).

⁴⁵ SMP Guidelines, Paragraph 78

⁴⁶ SMP Guidelines, Para 75

Potential competition and barriers to entry

- 4.6 The threat of market entry, either on a long-term or "hit and run" basis, is one of the main potential competitive constraints on incumbent firms, where such entry is probable (rather than hypothetical), timely and appreciable. The threat of entry will be reduced by the existence of barriers to entry.
- 4.7 ComReg considers that entry to the market for wholesale unbundled access would require significant investment, predominantly as sunk costs.⁴⁷ As noted above, these high sunk costs, together with the economies of scale and density that characterise access networks, significantly increase the barriers to entry for entities considering constructing new local access networks. As such, ComReg takes the view that there is little likelihood of new fixed entry to provide services in the period of the review.
- 4.8 In addition, ComReg does not anticipate there being sufficient competitive constraint on the incumbent in the medium-term through alternative platforms (*e.g.*, satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms), given the asymmetry of the positions of the incumbent and new entrants. While there is likely to be some expansion in the medium-term in the roll-out of these platforms, the extent of such expansion is very uncertain and cannot at this point be relied upon to provide effective competition in the local loop. The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. In addition, the incumbent has better access to potential retail customers for the new downstream services. These and other differences in risk and return might conceivably lead to a higher required rate of return on investment for new entrants. As such, they might, collectively (as well as individually), constitute another barrier to entry.
- 4.9 Currently eircom is the only licensed operator to provide services in the 3.5 GHz band via Fixed Wireless Access (FWA). In the second half of 2003, ComReg offered fifty nine licences to eight applicants for the provision of fixed wireless access local area services using the spectrum from the 3.5 GHz, 10.5 GHz and 26 GHz frequency bands.⁴⁸ Thirty eight of the initial offers have been accepted, and further awards may be made following this first round. While there is sufficient spectrum to provide national coverage, it is not clear that all areas will be licensed. It is expected that services will become available by year end 2004. ComReg notes that the roll out of such services, will not pose a competitive threat to the local loop within the timeframe of this review.
- 4.10 In response to the market analysis industry questionnaires circulated by ComReg, operators other than eircom referred to the economies of scale and scope enjoyed by eircom in relation to local access networks, the ubiquity of the network and services.

⁴⁷ eircom local access network business, mean capital employed was €897 million for the year ended 31 March 2003.

⁴⁸ ComReg (03/32) Request for Expressions Of Interest - 3.5 GHz Local Licences for Wireless Broadband

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- 4.11 ComReg is not aware that any new entrant is intending to build a new access network (capable of supplying such services) replicating all or part of eircom's network or that sufficient investment will be made in existing infrastructure to upgrade it to the point at which it is able to support the provision of replicable access.

Absence of Countervailing Buying Power

- 4.12 If an operator engages in practices that are potentially exploitative, customers might be able to exert countervailing buyer power against such practices. Where buyers are large and powerful, they can effectively respond to any attempt to increase prices by sellers. ComReg has considered the likelihood and/ or existence of such countervailing power, given that countervailing power is often a relevant factor in wholesale markets.
- 4.13 However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (*e.g.*, not to purchase or to switch supplier) in response to a price increase or threatened price increase. ComReg does not believe that any purchaser of wholesale unbundled access has credible alternatives to eircom. As such, ComReg does not believe that any purchaser has countervailing market power that would offset eircom's overwhelming market power in these markets.

Conclusions

- 4.14 eircom currently supplies 100% of the market for unbundled metallic local loops. In terms of future competition ComReg takes the view that there is little likelihood of an alternative local access network of whatever technology on any significant scale during the timeframe of this review.
- 4.15 In addition, ComReg does not anticipate medium-term market entry on any significant scale using alternative platforms (*e.g.*, satellite, wireless services using unlicensable frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms), given the asymmetry of the positions of the incumbent and new entrants. The incumbent is likely to have cost advantages over new entrants (even where the same investments are being made), and the incumbent is likely to have economy of scope opportunities that flow from its investments in broadband equipments which need not necessarily accrue to new entrants. ComReg therefore has come to the conclusion that the market is not effectively competitive. The structure of the market for unbundled local loops is conducive to eircom charging rates above the competitive level, if unregulated. As shown above there is no credible threat to constrain eircom's prices. The issues associated with economies of scale and scope, leverage of facilities (both historic and new), ubiquity and access to customers limit the feasibility of self-supply by new entrants.

Response to Consultation Question 4

[Q.4. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response.]

4.16 All four of the respondents agreed with ComReg's preliminary conclusions regarding market analysis, in particular that eircom should be designated as an SMP operator in this market. However, one respondent criticised ComReg's analysis for not being a thorough and overall analysis of the economic characteristics of the relevant market. In particular this respondent criticises ComReg for basing its analysis on two significant market power criteria. The same respondent also states that, due to their multinational ownership, economies of scope are more likely to accrue to eircom's principal competitors rather than to eircom.

ComReg's Position

4.17 Although market shares alone are not in themselves indicative of the presence or lack of market power, according to established case-law under EC competition rules a market share in excess of 50% is, in the absence of exceptional circumstances, in itself evidence of a dominant position. Further, an undertaking with a large market share may be presumed to have SMP, if its market share has remained stable over time.⁴⁹ As stated above, there is only one supplier of wholesale metallic local loops in Ireland (eircom). Accordingly, it has 100% share of the relevant market. In addition, this market share has remained stable over time. ComReg feels that this is strong evidence that eircom has SMP in this market.

4.18 However, ComReg has identified further evidence of SMP through the existence of barriers to entry and the absence of countervailing buyer power. It is also evident that eircom has control of infrastructure that is not easily duplicated. The metallic local loop network is a large network that a competitor would find costly and time-consuming to replicate.

4.19 Finally, the respondent claims that eircom's principal competitors are more likely to have economies of scope due to their multinational ownership. However, no evidence to support such an assertion has been provided by this respondent.

4.20 ComReg feels that there is ample evidence of the existence of SMP in this market and that no evidence has been provided by any respondent that would alter the conclusion that eircom should be designated as having SMP in this market.

⁴⁹ Case *Hoffmann-La Roche v Commission*, op. cit., at point 41, Case C-62/86, *Akzo v Commission* [1991] ECR I-3359, at points 56, 59.

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5 Designation Of Undertakings With Significant Market Power

- 5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the *Framework Regulations*:
- eircom should be designated as having SMP on the market for “wholesale unbundled access (including shared access) to metallic loops and sub-loops”.
- 5.2 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Market Remedies

What are the competition problems?

- 6.1 In its consultation paper, ComReg set out that, due to the nature of the local access market, competition problems of both a structural and a behavioural nature will exist. The most obvious problem was identified as mandated access/refusal to deal. Without mandated access, competing operators would not be able to enter their desired market at all – or only through uneconomic investment. In this paper ComReg also stated that mandating access to the bottleneck facility (i.e. the mandating of Local Loop Unbundling) does not eliminate all competition problems, as the SMP operator may still attempt to leverage its position from the wholesale market into the retail market (vertical leveraging) in a number of ways. These can be divided into two basic categories – non-price (for example, discrimination through quality or undue requirements) and price (for example, excessive prices or price discrimination).

Response to Consultation Question 5

[Q.5. Do you agree with this analysis of competition problems? Are there any further competition problems which you believe ComReg should consider? Please elaborate your response]

- 6.2 In the consultation paper ComReg identified a number of competition problems including:

Refusal to deal and denial of access

Non-price problems:

- Withholding of information
- Low quality information or services
- Delaying tactics
- Undue requirements
- Strategic design of product
- Discriminatory use of information

Price problems:

- Excessive prices/cross-subsidization
- Price discrimination
- Predatory Pricing

- 6.3 Three respondents agree with ComReg's analysis of the competition problems in this market. One of these respondents, the alternative operator which has taken up LLU in Ireland, states that the competition problems identified by ComReg are entirely reflective of the issues in this area. This respondent notes that no other operator has attempted to secure unbundled access and attributes this to the fact that the barriers presented today are so high that only an undertaking that is prepared to commit vast amounts of time and money to the process is likely to

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enter the market. They contend that eircom's actions have signalled that it intends to make entry more difficult for third parties.

- 6.4 With reference to the specific competition issues that are detailed in the paper this respondent illustrates this with examples. When commenting on competition problems such as **refusal to deal and denial of access**, the respondent contends that they came across many stalling issues with regards to the build associated with unbundling the exchanges. They state this took many months to resolve and was a major issue in trying to roll out their 40 sites.
- 6.5 Once access had been gained, the respondent alleges that eircom **withheld information**, for example in respect of bulk data which its downstream retail arm had access to. They go on to comment that often the **information was low quality** or classifications were arbitrary. They also state that eircom employed **delaying tactics** by repeatedly not complying with actions laid down within steering group meetings thus further delaying the roll-out of the programme. Additionally this operator stated that eircom insisted on both overly **onerous non-disclosure agreements** and prejudicial limitation of liability provisions.
- 6.6 On the specific area of **price problems** this respondent agrees with the pricing issues that ComReg raises i.e. excessive prices, cross subsidisation, price discrimination and predatory pricing and suggests that the issue of price squeeze should also be added to the list.
- 6.7 One respondent states that the competition problems identified by ComReg are a 'text book' of probable competition problems which relies on the probable remedies outlined in the draft Joint Approach of the EU and the ERG paper on remedies rather than "factual" abuses. This respondent contends that ComReg does not cite any actual competition problems which it believes does not conform to the obligations on ComReg from Article 7 of the Framework Directive nor Section 4 of the *SMP Guidelines*. In addition this respondent states that it does not provide any insight into the proportionality and justification of the remedies subsequently proposed in Section 6.
- 6.8 This respondent is also concerned with ComReg's understanding of the difference between structural and behavioural problems. They add that while ex-ante regulation can help remedy structural barriers to competition, behavioural problems are best dealt with in an *ex post* fashion, particularly where there is no evidence of such behaviour in the past from SMP operators. The respondent states that this focus on the expected behaviour of eircom is based on a purely theoretical analysis, will lead to over intrusive intervention and, will conflict with the principle of regulatory forbearance.

ComReg's position

- 6.9 ComReg does not agree with the assertion that the competition problems identified are purely theoretical; instead ComReg has used the evidence gathered through market analysis and also its own experience in the regular Steering Group⁵⁰ meetings held in the time before and since the introduction of LLU to identify these competition problems. In common with other NRAs, ComReg also participated in a

⁵⁰ ComReg has chaired a number of LLU fora to agree the details of implementing LLU; and continues to chair a regular LLU Review Forum.

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‘stock taking’ exercise to feed these into the Joint Approach of the ERG and the EC Commission Services on Remedies.

- 6.10 ComReg considers that, in line with other NRAs, when imposing *ex ante* remedies it may not actually be possible to observe a certain type of anti-competitive behaviour and ComReg will instead have to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. In line with the *SMP Guidelines*, ComReg has conducted its market analysis on a forward-looking basis, similar to that carried out in a merger analysis, rather than *ex-post*, as would be carried out under Article 82 of the EC Treaty or Section 5 of the Competition Act. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour was unconstrained by regulation.
- 6.11 ComReg also notes that the alternative operator which has taken up LLU in Ireland has stated that the competition problems identified by ComReg are entirely reflective of the issues in this area. ComReg has set out above specific examples of competition problems that have been identified by respondents, including, for example, refusal to deal and denial of access, withholding of information, provision of low quality information, delaying tactics and onerous non-disclosure agreements. Further, the alternative operator which has taken up LLU in Ireland agrees with the pricing issues that ComReg raises, i.e. excessive prices, cross subsidisation, price discrimination and predatory pricing, and suggests that the issue of price squeeze should also be added to the list. ComReg therefore considers the problems wholly representative of those faced without – and indeed with – mandated access to the local loop.

Principles to be applied when selecting remedies

- 6.12 In its consultation, ComReg set out the remedies which may be applied from Regulations 10-14 (inclusive) of the Access Regulations.
- 6.13 ComReg then stated that when selecting appropriate remedies to address the competition problems identified it has an obligation to consider the objectives of Section 12 of the Communications (Regulation) Act 2002 (to promote competition, to contribute to the development of the internal market, and to promote the interests of users) and of Regulation 6 of the Access Regulations (to promote efficiency, promote sustainable competition, and give maximum benefit to end users). Furthermore, Regulation 9 of the Access Regulations requires that any obligations imposed by ComReg must be based on the nature of the problem identified, and be proportionate and justified in the light of the objectives laid down in Section 12 of the Communications Act 2002.
- 6.14 Given the competition problems identified and the fact that it is most unlikely that, within the period of this review, there is any possibility of the development of significant competition through competing local access infrastructure, ComReg has considered that the remedies imposed must facilitate competitors in entering their

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chosen retail markets by providing access to eircom's local access infrastructure in a manner that resolves the competition problems identified. Furthermore, this access must be provided on terms and conditions that promote efficiency and sustainable competition, while being mindful of the need to encourage efficient investment in infrastructure and promote innovation.

Response to Consultation Question 6

[Q.6. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?]

- 6.15 Three respondents believe that the principles applied by ComReg are appropriate and the rationale for their selection is appropriate.
- 6.16 One respondent stated in their response that ComReg “refer to Regulation 9(6) of the Access Regulations⁵¹ before (in paragraphs 6.21 to 6.58) proposing **to impose on eircom all of the possible remedies** (respondent’s emphasis added) available to it under the legislation despite the fact that:
- a) the “*nature of the problem identified*” is in many cases based on theory and not actual structure/behaviour;
 - b) ComReg is under no obligation to impose all of the remedies available to it;
 - c) an underlying feature of the New Regulatory Framework is to forbear regulation”.
- 6.17 This respondent states that in their view this represents a substantive mis-application of the principle of ex-ante regulation by ComReg. They characterise ComReg’s approach as identifying a list of structural and behavioural competition impediments that eircom may at sometime in the future construct against new entrants, and then ComReg proposes to impose all the remedies possible in advance, to ensure that these impediments cannot happen.
- 6.18 The respondent proposes that broadband should be provided in Ireland based on DSL and bitstream resale with new entrants simultaneously focusing on such viable resale services as CPS, Single Billing, Wholesale Line Rental and in-situ transfer of eircom retail customers.
- 6.19 This respondent suggests that if the ultimate aim of the New Regulatory Framework is to reduce the scope of regulation and foster competition, then ComReg should consider imposing ex-ante regulation to address those issues which may be difficult to deal with ex-post, while leaving the remedying of the more speculative abuses to ex-post intervention. In this way they state that “the recognised “sub-optimal” outcome of ex-ante regulation can be minimised and

⁵¹ Any obligation imposed in accordance with this Regulation shall –

- a) be based on the nature of the problem identified;
- b) be proportionate and justified in the light of the objectives laid down in the Act of 2002 (Communications Act); and
- c) only be imposed following consultation in accordance with regulations 19 and 20 of the Framework Regulations.

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SMP operators can be left with sufficient flexibility to pursue strategic commercial objectives”.

ComReg’s position

- 6.20 ComReg notes that three respondents agree with the principles which ComReg proposes to use in selecting remedies. In response to the remaining respondent, ComReg notes the reality of competition problems experienced by the operator taking up LLU, and therefore does not accept the argument that these competition problems do not exist.
- 6.21 ComReg notes the concern that behavioural competition problems would perhaps be best dealt with using ex-post competition law remedies. However, in order for a market to be designated as requiring ex-ante regulation it must be the case that competition law is insufficient to remedy the identified competition failures. In addition, ComReg notes that the Access Directive states that the imposition of specific obligations on an undertaking with significant market power does not require additional market analysis,⁵² as was suggested by one respondent.
- 6.22 As to the issue of whether ComReg has considered the distinction between “structural” and “behavioural” market failures, ComReg notes that this distinction is made nowhere in the relevant European or National legislation, nor indeed in any of the European Commission guidance on the new framework. The issue of structural and behavioural competition problems is addressed in the ERG Common Position on the approach to appropriate remedies,⁵³ which states in the discussion of principles to be applied in selecting remedies that where infrastructure is not replicable, as is the case in this market, that NRAs should protect against potential behavioural abuses that might occur.⁵⁴
- 6.23 In response to one respondent’s contention that ComReg need not apply all the remedies available to it, ComReg notes that it is proposing to maintain, what is effectively the ‘status quo’ in terms of remedies. ComReg notes that the imposition of these remedies under the mandatory requirements of the LLU Regulation still allowed competition problems to manifest themselves. Hence, it is very unlikely that a regime which is any lighter would address the same competition problems and market realities.
- 6.24 ComReg in this, and in other market reviews, must analyse the markets and impose access obligations where necessary. One respondent states, for example, that a bitstream obligation may be more appropriate than an obligation of LLU. ComReg reminds this respondent that these are clearly defined separate markets, and where deemed suitable for *ex ante* regulation, ComReg is empowered to impose the remedies – including access remedies – available to it.

⁵² Access Directive recital (15)

⁵³ ERG Common Position on the approach to appropriate remedies in the new regulatory framework, Chapter 4

⁵⁴ ERG approved this on April 1st and the final document will be published on 23rd April, see press release www.erg.eu.int

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6.25 Furthermore, and in line with the European Commission⁵⁵ and the European Regulators Group,⁵⁶ ComReg believes that the access remedies of Local Loop Unbundling and Wholesale Bitstream are complementary, and the existence of one should not preclude the need for the other form of access.

Remedies proposed

Access

Summary of Consultation position

- 6.26 Given ComReg's conclusion in its consultation that competing operators were unlikely to build competing access infrastructure, ComReg proposed to impose an access obligation on eircom as it is unlikely, given the experience gained in implementing LLU since its initial consultation in 1999, that this can be achieved voluntarily. ComReg, therefore, concluded that mandating access to the local loop is based on the nature of the problem identified, is proportionate and is justified. ComReg notes that further supporting remedies may also be required. ComReg proposed that the current obligations in respect of LLU should be maintained; that is the services set out in version 1.18 of eircom's Access Reference Offer, cabin collocation as provided at Roches' St. exchange, the obligations in respect of bulk data pursuant to D15/03 and the documents published as Industry LLU documentation.⁵⁷
- 6.27 In addition to the services set out above, ComReg proposed to maintain the obligation for eircom to honour reasonable requests for additional access products, varying forms of collocation (e.g. distant collocation) from those currently available, or associated facilities (e.g. backhaul) made by operators. All products should be subject to Service Level Agreements (SLAs) for each process point, and should include penalties.
- 6.28 ComReg also considered it necessary to mandate associated facilities necessary to ensure access to the local loop and also that eircom should grant open access to technical interfaces, protocols, or other key technologies. Similarly, eircom should be required to provide such operational support systems (OSS) or similar software necessary to ensure fair competition in the provision of services. ComReg also proposed that eircom have the obligation to negotiate in good faith and not to withdraw access to facilities already granted.

Response to Consultation Questions 7 & 8

[Q. 7. Do you agree that an access obligation should be imposed on eircom? Please provide details in support of your answer.]

⁵⁵ Communication on Local Loop Unbundling 2000/C 272/10.

⁵⁶ ERG Common Position on Bitstream Access

⁵⁷ Process Manual for ULMP and line sharing; the Process Manual for physical collocation; the Technical Manual for physical collocation; and the Copper Loop Frequency Management Plan.

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Q. 8. Do you consider that all existing access obligations set out in Section (A) of proposed remedies, should be maintained? Are there any further access obligations which should be imposed? Please detail any further comments.]

- 6.29 Three respondents state that they agree with the entire set of obligations proposed by ComReg, including this obligation.
- 6.30 One respondent notes that, in general, the remedies proposed by ComReg correspond with those already imposed on eircom as detailed in;
- a) Access Reference Offer (Version 1.18);
 - b) a requirement to provide the specific offering of cabin co-location for Roches St. exchange; and
 - c) the requirement in respect of “bulk data” as per ComReg Decision Notice D15/03-Local Loop Unbundling: Provision of Bulk Data.
- 6.31 One respondent raises a number of specific issues. They note that ComReg proposes that “eircom should grant open access to technical interfaces, protocols, or other key technologies and similarly, pursuant to regulation 13 (2) (h) eircom is required to provide such OSS or similar software necessary to ensure fair competition in the provision of services.” This respondent states that direct access to the network related IT systems could precipitate a breach of network integrity. Therefore, this respondent proposes that eircom continue to provide open access to relevant data for third parties through the development of appropriate “gateway” systems, as per the current practice.
- 6.32 They also comment that ComReg propose that “Pursuant to regulation 13 (2) (c) eircom have the obligation not to withdraw access to facilities already granted” and state that this is a new obligation to be imposed on eircom. While under the legislation this respondent agrees that ComReg has the power to impose this remedy, they believe it is unnecessary, onerous and not in the interest of industry or consumers. They add that it is unnecessary because it has not occurred in the past but eircom needs to be able to develop the access and core network to maintain the network integrity. They contend it is onerous because eircom needs to retain the flexibility to discuss access with third parties when it is re-designing its network architecture and re-deploying network infrastructure. Without this flexibility eircom may be forced to maintain facilities which could be withdrawn and replaced elsewhere more efficiently. They state that some access facilities if not withdrawn could impede development completely. Any decision to continue could undermine the support systems and potentially delay or cancel development of services particularly on the edge of the network i.e. new housing and business development parks. As an example of the problems which can arise from the imposition of an obligation like this, one respondent alleges that, in the UK, BT has been forced to maintain facilities in otherwise abandoned and derelict sites. This in turn leads to significant overheads in terms not just of physical maintenance but also in terms of administrative maintenance and systems developments etc.

ComReg’s position

- 6.33 Having reviewed consultation responses, ComReg is still of the opinion that competing operators are unlikely to be in a position to build competing access

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infrastructure over the review period, given the barriers to entry. ComReg now proposes to impose an access obligation on eircom as it is unlikely (from the practical experience gained in implementing LLU over recent years) that this can be achieved voluntarily. ComReg believes that mandating access to the local loop is based on the nature of the problem identified, as eircom has SMP in the market in question and the market is likely to remain uncompetitive in the review period. It is proportionate in that the alternative, not to mandate access, is likely to hinder competition at the retail level for both broadband and PSTN services and would not be in the interests of end users. It is justified in that it relates to the need to promote competition. ComReg notes that further supporting remedies may also be required as access could effectively be denied by other means, for example by excessive pricing or unfair terms and conditions.

6.34 Furthermore, ComReg notes that no respondent has challenged, in their response to this question, the appropriateness of an access obligation. OAOs explicitly state that mandated access is required. Therefore, pursuant to Regulation 13 (2) (a) and (f) ComReg proposes to maintain the obligation on eircom to continue to provide

- Unbundled Local Metallic Paths
- Line Sharing
- Sub loop unbundling (full and shared)
- Collocation
- Associated facilities

as there is no evidence that competition in the market has developed to the point where these obligations are no longer required.

6.35 In practical terms ComReg considers that this requirement can be met by continuing to offer services detailed in eircom's Access Reference Offer (current Version 1.18) and its associated process manuals, technical manual, and Copper Loop Frequency Management plan. In addition, there are two requirements which are currently not captured in the Access Reference Offer – these are the specific offering of cabin co-location for Roches St. exchange; and the cd provided to operators of “bulk data”.⁵⁸ ComReg also proposes that these should be maintained.

6.36 In addition to the services set out above, and pursuant to Regulation 13 (1), ComReg proposes to maintain the obligation for eircom to honour reasonable requests for additional access products, varying forms of collocation or associated facilities made by operators. ComReg considers this to be proportionate and justified as OAOs may require the future development of further LLU products and associated facilities to offer an extended range of products to end users and to gain from possible efficiencies. Without this obligation, OAOs could only order the limited number of LLU products currently offered by eircom, and these are unlikely to be sufficient to meet their future needs. When deciding on the proportionality of implementing any specific product pursuant to this obligation, ComReg will take into account the factors set out in Regulation 13 (4).

6.37 Pursuant to Regulation 13 (2) (b) ComReg also believes that eircom has the obligation to negotiate in good faith. ComReg deems this necessary and proportionate given the level and volume of the interventions required from

⁵⁸ See ComReg Decision Notice D15/03- Local Loop Unbundling: Provision of Bulk Data.

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ComReg at numerous occasions during the implementation of LLU since 1999. ComReg has also taken into account the response from OAOs detailing their experience in negotiating LLU and their allegations of delaying tactics employed and therefore believes this obligation to be justified.

- 6.38 Pursuant to Regulation 13 (2) (e), ComReg is of the view insofar as it is required to avail of LLU, eircom should also grant open access to technical interfaces, protocols, or other key technologies. Similarly, pursuant to Regulation 13 (2) (h) ComReg believes that eircom is required to provide such OSS or similar software necessary to ensure fair competition in the provision of services. In services such as LLU open access to information and protocols is required to address competition problems which may occur such as, for example, possible untimely or overly complex access to systems or provision of information which may be of low quality. Therefore ComReg considers this obligation to be justified. ComReg notes, and is indeed sympathetic to OAOs' concerns regarding access to OSS, but also recognises one respondent's concern regarding issues of integrity. As LLU processes are based on manual processes at present there is little scope for ComReg to mandate OSS access points and forms. Therefore ComReg considers it proportionate to maintain the obligation as volumes are likely to increase in the future and may lead to higher use of automated systems. However any future direction in respect of this obligation will take particular account of issues of integrity together with the factors set out in Regulation 13 (4) which must be taken into account when determining the proportionality of obligations.
- 6.39 ComReg is also of the view that, pursuant to Regulation 13 (2) c eircom should not withdraw access to facilities already granted. ComReg believes that this is justified as such withdrawal may in effect amount to denial of access and does not provide OAOs with the same level of ability to supply end users as eircom's own retail arm. ComReg notes one respondent's concerns in respect of the obligation proposed but believes this respondent to be overly concerned about this obligation, and points them to eircom's access and licence agreements which permit the closure of sites in certain circumstances such as the ones that concern this respondent. Furthermore, and as permitted by the Framework Regulations, ComReg has consulted with Ofcom and notes the guidelines⁵⁹ that apply in the UK in the event of site closure.

⁵⁹

<http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/llu/colo0301.htm#BT%20wishes%20to%20close%20a%20site%20where%20OLOs%20are%20already%20committed/installed>

The relevant section of the guidelines is 4.2 and reads:

BT wishes to close a site where OLOs are already committed/installed

4.2.1 For sites that BT wishes to close, but where OLOs have already installed or have committed to install, BT must give those OLOs at least 12 months notice of any planned closure, in accordance with the ANF Agreement. Additionally BT must provide a comprehensive closure plan to those OLOs at least 12 months in advance of the planned closure.

4.2.2 The closure plan must include provisions to migrate all of the current services provided from the closing site, both by BT and OLOs, to the receiving sites(s). Thus, Oftel would expect BT to include the migration of OLOs services on equal terms to its own services, including the allocation of space at the receiving site.

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These guidelines provide for closure, notice applicable to closure and migration terms. Therefore ComReg does not believe this respondent's position to be tenable and ComReg believes it is proportionate to impose this obligation.

- 6.40 As stated in the Consultation and pursuant to Regulation 13 (3) ComReg may also attach conditions covering fairness, reasonableness and timeliness to the obligations set out above. In this context, ComReg believes that Service Level Agreements (SLAs) are required in respect of all LLU products (whether existing or introduced in answer to a future reasonable request) for all process points such as provision and fault repair. ComReg considered using a non-discrimination obligation to enforce this, but given that eircom's retail arm will not avail of LLU, ComReg considers that this obligation of non-discrimination is not appropriate. For example, introducing SLAs for LLU pursuant to a non-discrimination obligation may be inappropriate as eircom's retail arm will not purchase, for example, ULMP. Therefore ComReg considers that an access obligation, supported by a transparency remedy to ensure visibility of performance, is required. It is ComReg's belief that SLAs are the main tools required to ensure that OAOs are not adversely affected by competition problems related to low quality or delaying tactics. Where SLAs apply, ComReg is also of the view that appropriate penalties should apply. This is necessary to ensure compliance with the terms of the SLA, but ComReg will ensure that any such penalties are proportionate.

Non- discrimination

Summary of Consultation position

- 6.41 In its consultation ComReg proposed that an obligation of non-discrimination is the only remedy which can directly target a number of non-price competition problems such as access to and provision of information and therefore ComReg considers that an obligation of non-discrimination is necessary to ensure that eircom does not discriminate in favour of its own retail arm. ComReg proposed that eircom must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and must provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners. In particular information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to eircom's retail arm and associates. Also, information gained by eircom as a result of their provision of LLU services to another operator should not to be used by eircom's downstream arms in any manner.
- 6.42 Given that eircom's retail arm does not avail of LLU, ComReg stated in its consultation that this obligation of non-discrimination may not be sufficient in all cases. ComReg proposed that obligations of access and transparency should be

4.2.3 The details of any site closures should be discussed between BT and OLOs. However, Ofcom considers that a site closure should not prevent OLOs from continuing to offer their current products or an agreed alternative

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applied, as well as supporting remedies of transparency and accounting separation to monitor non-discrimination.

Response to Consultation Question 9

[Q.9. Do you agree that an obligation of non-discrimination should be imposed on eircom? Please elaborate your answer.]

6.43 Three respondents state that they agree with the entire set of obligations proposed by ComReg, including this obligation.

ComReg's position

6.44 It is key when enabling OAOs to access eircom's local access network through LLU that they have equivalent ability to eircom's retail arm to compete for end users. Barriers to entry such as delays in provision of information, lack of access to information, low quality information, and undue contractual terms have been cited by OAOs as impairing their ability to compete in the market. ComReg notes that eircom have not commented on this proposed obligation, and also notes the support from OAOs for the measures planned. ComReg therefore proposes to maintain its proposals, pursuant to Regulation 11, to impose a non-discrimination requirement for each of the access obligations. This means that eircom must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and must provide services and information to others under the same conditions and of the same quality as eircom provides for its own services, or those of its subsidiaries or partners. In particular, information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to eircom's retail arm and associates. It is important that information gained by eircom as a result of their provision of LLU services to another operator is not used by eircom's downstream arms in any manner, as this may confer an unfair advantage on eircom in competing for customers. ComReg believes these measures to be proportionate in that the alternative is likely to hinder competition and would not be in the interests of end users.

6.45 In addition to the obligation of non-discrimination, ComReg considers that it will also be necessary to impose obligations of transparency and accounting separation, in order to monitor the non-discrimination obligation and address the price competition problems identified earlier. The afore mentioned obligations will enable NRA's to demonstrate the provision of services to other operators under the same conditions (i.e. price) as SMP operators provide for its own services or those of its subsidiaries or partners, and thus address the possible price problems of cross subsidisation, price discrimination and margin squeezes. ComReg considers that that the effectiveness of the transparency and non-discrimination obligations is reliant on the introduction of obligation of accounting separation to facilitate the verification of compliance.

Transparency

Summary of Consultation position

6.46 In its consultation ComReg noted that Regulation 2887/2000 required eircom, as the notified operator, to publish a reference offer for unbundled access to the local loop and related facilities. eircom published such a reference offer and, through lengthy and detailed industry workshops and ComReg interventions, this Access Reference Offer (current version 1.18) has been amended over time and augmented with a series of manuals published as 'Industry LLU documentation' on eircom's website. This corresponds to the Schedule appended to the Access Regulations. In its consultation, ComReg proposed to maintain this to provide sufficient information to alternative operators as well as to assist in monitoring non-discrimination. Regulation 10 also provides for ComReg to require an operator to make public (in relation to any access obligation imposed under Regulation 13) specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. ComReg is of the view that most, if not all, of this information is currently provided by eircom in their Access Reference Offer (version 1.18), Industry LLU documentation, or on request.⁶⁰

Response to Consultation Questions 10 & 11

[Q.10. Do you agree that an obligation of transparency should be imposed on eircom? Please provide a detailed answer.

Q.11. Do you believe that ComReg should require eircom to make public any further information? Please specify if you believe this should be made available in the Reference Offer or otherwise published. Please provide support for your answer.]

6.47 Three respondents state that they agree with the entire set of obligations proposed by ComReg, including this obligation.

ComReg's position

6.48 In order to avail of LLU, it is necessary for OAOs to have access to details of the products available, the terms and conditions applying to purchase of these and applicable prices. ComReg believes that only a transparency obligation can achieve this. Furthermore, ComReg notes that eircom have not commented on this obligation and also notes the support for the planned measures from OAOs.

6.49 Regulation 10 provides for the regulator to require the SMP operator to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. This should include a description of the relevant offerings broken down into components according to market needs, and a description of the associated terms and conditions, including prices. The Schedule provides the minimum list of items to be included in a reference offer for unbundled access to

⁶⁰ Information provided on request as part of the generic information set includes the cd of bulk data and the collocation survey library

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the twisted metallic pair loop. ComReg is of the view that eircom should publish such a reference offer. ComReg believes that eircom's current publications including their Access Reference Offer, version 1.18, and Industry LLU documentation are consistent with this requirement. It is also important that the most up to date offer is available to OAOs and therefore ComReg is of the view that eircom should update the offer and on any update, should notify OAOs and ComReg including a change matrix.

- 6.50 Regulation 10 also provides for ComReg to require an operator to make public (in relation to any access obligation imposed under Regulation 13) specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. ComReg is of the view that most, if not all, of this information is currently provided by eircom in their Access Reference Offer (version 1.18), Industry LLU documentation, or on request.⁶¹ However, ComReg may require eircom to make public further information, for example to ensure non-discrimination in provision of information or services, and will investigate this on a case by case basis where it believes such publication is justified and proportionate.
- 6.51 ComReg believes it will also be necessary to impose obligations of transparency in support of the accounting separation and non-discrimination obligations because it will allow the calculation of costs and price i.e. internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination and address the price problems of cross subsidisation, price discrimination and margin squeezes. ComReg considers that the effectiveness of the transparency and non-discrimination obligations is reliant on the introduction of obligation of accounting separation to facilitate the verification of compliance.

Accounting Separation

Summary of Consultation position

- 6.52 The provision of financial information by operators designated as having SMP has always been an essential part of regulation in Ireland. Indeed ComReg has required those operators to supply financial information to ComReg either on demand to support investigations and pricing reviews, and/or on an annual basis in order to support ComReg's regular monitoring of its decisions since deregulation of the market. Such data provides an essential part of regulation through allowing ComReg to perform its duties to ensure prices are not set at an excessive level, to monitor margin squeeze and provide greater certainty about the cost base.
- 6.53 An obligation of non-discrimination can require, inter alia, the imposition of financial reporting regimes in order to monitor eircom's compliance with such an obligation. With regard to eircom's designation as SMP in this market and the identification of the obligation of non-discrimination as a means to remedy the competition problems discussed earlier, ComReg believes it appropriate to impose an obligation of accounting separation upon eircom in this market.

⁶¹ Ibid

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- 6.54 ComReg is proposing that eircom should have an obligation not to unduly discriminate because where eircom is a vertically integrated undertaking, it has an incentive to provide wholesale services on terms and conditions that discriminate in favour of its own retail activities in such a way that may have a material effect on competition. The obligation of accounting separation will support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services. ComReg intends to implement accounting separation on a by service and/or product basis. ComReg believes it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level.
- 6.55 As discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, must encourage access to the network in order to ensure efficient and sustainable competition and must contribute towards maximising consumer benefits. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of discrimination. In this regard, ComReg believes the imposition of accounting separation upon eircom to be justifiable and based upon the nature of the problem identified.
- 6.56 ComReg proposes to consult further on accounting separation and cost accounting methodologies supporting separated accounting. In the interim ComReg is proposing that it maintains the existing level of accounting separation on eircom until such time as any further consultations are completed.

Response to Consultation Question 12

[Q.12. Do you believe eircom should have an obligation of accounting separation? Please elaborate on your answer.]

- 6.57 Three of the four respondents agreed with the imposition of the obligation of Accounting Separation on eircom in this market.
- 6.58 The remaining respondent believes that the current level of accounting separation imposes an undue burden and should be relaxed in the new regulatory environment. They claim that the separated accounts will be of limited use in monitoring issues of non-discrimination and cost orientation, as if wholesale prices are to be based on forward looking costs, then the cost models that support such prices will contain financial information that is not directly associated with the historical separated accounts. They also expressed concern at the suggested extension of the accounting separation obligation to a product/service level. They claim that the current obligations are time consuming and impose a heavy burden upon SMP operators in respect of data collection, cost modelling, etc. They also claim that accounting separation obligations can only be justified when it can be demonstrated that the information published has sufficient benefits in terms of supporting competition and increasing consumer welfare that out-weigh the cost of producing and reviewing it.

ComReg's Position

- 6.59 ComReg is still of the view that the obligation of accounting separation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion. In this regard, the accounting separation obligation will be designed to help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and margin squeeze, as it will make visible the wholesale prices and internal transfer prices of a dominant operators products and services.
- 6.60 Telecommunications companies are characterised by being vertically integrated organisations with large service/product portfolios with significant joint and common cost. These companies may operate in markets where they are subject to SMP obligations as well as markets that are competitive. ComReg needs to be able to ascertain to what extent services in non SMP markets may impact on services supplied in SMP markets and the obligation of accounting separation can ensure that costs are allocated appropriately between SMP and non SMP markets. Without this remedy ComReg would be unable to logically and efficiently review for margin squeezes. Furthermore the monitoring of prices and non-discrimination would be more difficult to demonstrate as NRAs would be unable to ascertain if the price charged for the provision of services to other operators is under the same conditions (i.e. same price) as SMP operators provide for its own services or those of its subsidiaries or partners. Failure to do so would allow the following such anti competitive practices to prevail i.e. possible price problems of unfair cross subsidisation, price discrimination and margin squeezes.
- 6.61 ComReg considers it necessary to extend the accounting separation obligation to a product/service level. Operators dominant in relevant markets may provide services in a number of markets and may divide the activities required to supply these services among a number of business units. The division of activities relevant to NRAs for regulatory purposes is the division of services, and the activities which underlie them, between relevant markets. These relevant markets may be a regulated market designated with SMP or a non SMP designated market. Therefore NRAs need to be able to ascertain to what extent services in non SMP markets may impact on services supplied in SMP markets. In order to determine the information required for regulatory purposes, it is necessary to explore the nature of the costs incurred by activities undertaken in the course of supplying a service (or combination of services). If ComReg were to impose accounting separation at the market level, it would not be able to identify whether products and services are being provided on a non discriminatory basis.
- 6.62 ComReg notes the concerns that were raised about the limited use of the current separated accounting suite of reports in monitoring non-discrimination. ComReg considers that the transparency of the non-discrimination obligations is one of the areas where enhancements to the separated accounts can be made and ComReg proposes that this be dealt with in future consultations.
- 6.63 One respondent asserts that the current level of accounting separation imposes an undue burden, but does not supply any supporting evidence to support that argument. ComReg contends that large telecommunications companies must

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already have management accounting systems in place to support internal business decision-making and that these systems can support the obligation of Accounting Separation and Cost Accounting Systems. Without such a system, these companies could not take the decisions they do with any confidence and know that they are complying with their current obligations. ComReg also considers that the obligation of accounting separation, where costs and revenues are identified at the product/service level can add significant value to such operators as it allows them monitor costs more accurately and take appropriate decisions in a more timely manner.

- 6.64 If ComReg were to withdraw this obligation, it would not have any means of monitoring non-discrimination or of having any information on margins in the retail business.
- 6.65 ComReg proposes to consult further on accounting separation but in the interim, ComReg is still proposing that it maintains the existing level of accounting separation on eircom until such time as any further consultations are completed.

Price control

Summary of Consultation position

- 6.66 Regulation 14 (1) of the Access Regulation allows ComReg to impose obligations relating to cost recovery and price control on access services where a lack of effective competition means that the SMP operator might sustain prices at an excessively high level to the detriment of end-users. The metallic access network is characterised by a lack of competition, and the high barriers to entry mean there is little likelihood of future competition. In the absence of effective competition, eircom has little incentive to reduce costs and to operate in an efficient manner as they can pass through inefficient costs as excessively high prices to customers who have no alternative to choose from.
- 6.67 These are precisely the circumstances in which ComReg has a duty to implement price controls and to require eircom to provide an adequate service. EU and Irish law means that such price controls should be cost-orientated. Cost-oriented charges would facilitate access to eircom's loops on reasonable terms and thus encourage competition, particularly for providers of higher bandwidth services using local loops. Furthermore, Regulation 6 of the Access Regulations imposes on ComReg the obligations to promote efficiency, promote sustainable competition, and give maximum benefit to end-users. In meeting this obligation, the objective must be to replicate as far as possible the outcomes that would be expected in a normally competitive market, in which competing operators would have access to the metallic network and related facilities, at prices that are consistent with the objectives in Regulation 6, thus allowing eircom a reasonable rate of return on adequate capital employed.
- 6.68 ComReg has considered the option of imposing cost orientation of prices for access to the metallic access network and related facilities on the basis of Full Distributed Historic Costs (FDHC). However, ComReg does not believe that that this would satisfactorily remedy the competition failure of inappropriate pricing. For example, one possibility is that excessively high prices resulting from the absence of

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effective competition may be the result of inefficiency on the part of the SMP operator. An obligation to offer cost oriented prices on the basis of FDHC would not address the issue of inefficient operations: the prices might be reflective of inefficient cost levels. It is also the case that FDHC may provide incorrect investment incentives since current costs may be substantially different from historic costs. Relying on the incumbent's actual costs would therefore not be consistent with ComReg's obligations under Regulation 6 of the Access Regulations.

- 6.69 ComReg proposes to impose an obligation on eircom to offer cost oriented prices for access unbundled local metallic loops on the basis of Forward Looking Long Run Incremental Costs (FL-LRIC). FL-LRIC is a widely used cost accounting methodology that estimates the efficient costs caused by the provision of a defined increment of output, taking a long run perspective. The 'long run' means the time horizon over which all costs (including capital costs) are variable.
- 6.70 ComReg believes that this methodology fulfils the objectives laid down in Regulation 6, and that it is proportionate, appropriate and necessary in order to achieve the objectives legitimately pursued by ComReg in relation to its obligations to promote efficiency and sustainable competition and maximise consumer benefits and that it does not impose an excessive burden in relation to those obligations and the objectives sought to be achieved. Whilst an obligation of cost orientation on the basis of FL-LRIC can be a more burdensome obligation than cost orientation of prices on the basis of FDHC it is proportionate as cost orientation on the basis of FDHC would not, as argued above, be sufficient to remedy the competition failure of inappropriate pricing resulting from the absence of competition.
- 6.71 ComReg proposes to maintain the obligation on eircom to offer prices for the related facilities, including collocation and process charges associated with unbundled local loops on the basis of costing estimates that are consistent with the objectives of the LRIC methodology.
- 6.72 In assessing the cost orientation of prices for LLU and associated facilities, ComReg will have regard to Regulations 14(3) and 14(4) of the Access Regulations and may take account of prices in comparable competitive markets and in calculating the cost of efficient provision, ComReg may use accounting methods independent of those used by eircom. Where appropriate, ComReg may require prices to be adjusted to ensure consistency with the objectives in Regulation 6.
- 6.73 ComReg believes that certainty about future prices significantly promotes competition. Therefore it is considering the merits of a wholesale price-cap regime and may, subject to later consultation, at some point in the future propose such an obligation for wholesale price control.

Response to Consultation Question 13

[Do you agree that eircom should be subject to a cost orientation obligation? Do you agree that FL-LRIC is an appropriate methodology? Please provide details in support of your answer.]

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- 6.74 Three respondents agreed that the obligation of cost orientation was an appropriate obligation to impose upon eircom in this market. All three respondents additionally agreed that forward-looking Long Run Incremental Cost was the appropriate methodology. The remaining respondent, however, had a number of concerns regarding the proposed methodology. They expressed a concern with regard to the different costing methodologies used in order to cost its various wholesale products, pointing out that whilst LLU is currently costed on the basis of a forward-looking bottom-up LRIC model, its core conveyance rates are based upon a Top-Down LRIC methodology. This concern relates to the possible exclusion of a number of joint and common costs as a direct result of using different methodologies for different wholesale products and services. This respondent is additionally concerned that if ComReg chooses to use alternative accounting methods, independent of those used by eircom to calculate the cost of efficient provision, then this may expose a risk that some elements of efficient and relevant cost may not be recovered in the final price.
- 6.75 Additionally in their response, they claim that LLU can only be made attractive if it is made available to new entrants at a price that is below the actual cost of local copper network provision. They also believe that failure to invest in a local access network by alternative network providers stems directly as a result of the regulatory regime imposed by ComReg, whereby access to eircom's network infrastructure is under-priced. They go on to claim that the existence of inexpensive access to eircom's network means that there is no incentive for other operators to invest in alternative infrastructure. They assert that to impose an obligation in relation to the price of access to the metallic access network is as yet unproven. They express concern that ComReg's approach to cost-orientation may lead to below cost unbundling, rates of return capped at the cost of capital, and theoretical models chasing unachievable efficiencies and untenable prices.

ComReg's Position

- 6.76 Markets which are effectively competitive exhibit lower prices and higher efficiency as firms operating in that market are forced by competition to pass efficiencies through to their customers. An effectively competitive market is one where there are minimal barriers to entry, a sufficient number of firms in the market acting as a constraint on the exercise of market power, prices that are charged at a level not much higher than the efficient cost of supply and firms being able to implement new technologies and offer new services as soon as possible after entry.
- 6.77 The success of competition in this market will, inter alia, depend upon having cost estimates and prices for unbundled loops as close to efficient economic cost as possible. Forward Looking Long Run Incremental Costs (FL-LRIC), is the sum of minimised costs paid for all inputs required to supply the unbundled loop. Using an accurate estimate of FL-LRIC as the basis for prices performs a number of functions which, in combination, guarantee economic efficiency, i.e. it sends out the right signals to wholesale customers in making purchase decisions, it directs production to the most efficient suppliers, and it gives the appropriate signal to firms with regard to investment decisions.
- 6.78 ComReg considers that the option of imposing an obligation on eircom to offer cost oriented prices for access to unbundled local metallic loops on the basis of FL-

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LRIC would satisfactorily remedy the competition failure of inappropriate and possibly excessive pricing and achieve the objectives laid down in Regulation 6. While ComReg agrees that it can be a more burdensome obligation than the alternative of an obligation of cost orientation of prices on the basis of FDHC, ComReg does not believe that FDHC satisfies the requirement for economically efficient pricing because charges based on the historic costs of assets and current levels of efficiency may bear no relation to the costs that would be incurred by an efficient operator today. ComReg still believes that FL-LRIC is the appropriate basis for estimating costs of an efficient operator providing the services involved in local loop unbundling. It provides a way of estimating the costs that will result from the continued provision of the services in question, and thus the charges that should be paid by users if cross-subsidy is to be avoided.

- 6.79 ComReg is concerned with one respondent's assertions with regard to the underpricing of its access network infrastructure and the lack of an incentive to invest in that infrastructure. It is important to be clear that under the FL-LRIC methodology, modelled capital costs are estimated on the assumption that the costs are that of an efficient new entrant, valued at current costs. In addition, for estimates of operating costs of the local loop network to be consistent with the estimated FL-LRIC capital costs of the local loop network, they should refer to the LRIC network rather than to eircom's actual network. These two principles imply that it is not possible to permit eircom simply to include its actual operating costs in LLU charges.
- 6.80 ComReg disagrees with the view of one of the respondents that its approach may lead to below cost unbundling, rates of return capped at the cost of capital, and theoretical models chasing unachievable efficiencies and untenable prices. The current eircom price for LLU is the highest in the European Union, over double the level of the lowest price in the EU and some 50% above the average EU price. ComReg is of the view that a carefully implemented application of FL-LRIC with regard to the access network will give the correct signals to the market and will support the introduction of competition with regard to services which make use of the local loop. In addition, ComReg still believes that FL-LRIC is proportionate, appropriate and necessary in order to achieve the objectives legitimately pursued by ComReg in relation to its obligations to promote efficiency and sustainable competition and maximise consumer benefits and that it does not impose an excessive burden in relation to those obligations and the objectives sought to be achieved given that the alternative suggested by the respondent does not address the issue of inefficient costs resulting from a lack of effective competition. Also, ComReg still proposes to maintain the obligation on eircom to offer prices for the related facilities, including collocation and process charges associated with unbundled local loops on the basis of bottom up costing estimates⁶² that are consistent with the objectives of the LRIC methodology.
- 6.81 In assessing the cost orientation of prices for LLU and associated facilities, ComReg will have regard to Regulations 14(3) and 14(4) of the Access Regulations and may take account of prices in comparable competitive markets, and in calculating the cost of efficient provision, ComReg may use accounting methods independent of those used by eircom. Where appropriate, ComReg may require

⁶² As provided for by Regulation 14 of the Access Regulations,

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prices to be adjusted to ensure compliance with the objectives set out in Regulation 6 of the Access Regulations.

6.82 While ComReg acknowledges some of one respondent's concerns with regard to the allocation of joint and common costs to the LLU product, ComReg believes it to be of the utmost importance that the LLU product is allocated with appropriate levels of joint and common costs. However, ComReg considers that there is no reason why all appropriate costs should not be recovered.

6.83 ComReg is still of the belief that certainty about future prices significantly promotes competition. ComReg notes that although respondents to this consultation did not make reference to a wholesale price cap, eircom and OAOs have been supportive of the introduction of such a regime in the past. Therefore ComReg may at some point in the future consult on the matter.

Cost Accounting Systems

Summary of Consultation position

6.84 A cost accounting system will be necessary where an obligation has been imposed on an operator in relation to cost oriented pricing, price controls, recovery of costs and/or retail tariff controls. With regard to this particular market, the obligation of cost orientation has been proposed as an appropriate obligation to be imposed on eircom and therefore ComReg proposes to impose a further obligation with regard to cost accounting systems on eircom.

6.85 The detailed application of this obligation will be included in the future accounting separation consultation, where issues with regard to maintenance of accounting records, on-demand reporting, audit and timeliness with regard to supply of data will be discussed.

6.86 ComReg proposes to consult further on cost accounting and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing that it maintains the existing level of cost accounting obligation on eircom until such time as any further consultations are completed.

6.87 ComReg also notes its obligation to cause to be published a statement by eircom of compliance with relevant cost accounting systems.

Response to Consultation Question 14

[Q. 14. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please elaborate in your answer.]

6.88 Three of the four respondents agree with ComReg's proposals regarding the imposition of obligations of Cost Accounting Systems on eircom in this market.

6.89 The remaining respondent expressed concern that given the various costing methodologies that it is expected to adhere to when developing wholesale prices, it is likely that the development and maintenance of a suitable cost accounting system will impose an even more burdensome obligation than that arising from the existing

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costing system. They believe that such costly obligations should only be imposed when there is a proven requirement that they are necessary for competition to develop.

ComReg's Position

- 6.90 ComReg is still of the view that the obligation of Cost Accounting Systems to be based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion. In this regard, the obligation of cost accounting systems supports the obligations of cost-orientation and accounting separation, and can provide greater assurance to the NRA in monitoring of the obligation of non-discrimination and address the competition problems identified earlier and is appropriate for the purposes of promoting efficiency, promoting sustainable competition, and conferring the greatest possible benefits on the end users of public electronic communications services.
- 6.91 In order to demonstrate cost orientation of a service or product, it is necessary for the dominant provider to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or elements that directly support or are consumed by those services or products. These elements are referred to as network components. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product that should be cost-oriented. The service/product costing methodology applies the utilisation of these components to the appropriate service product.
- 6.92 ComReg is of the view that a dominant operator could maintain some or all of its prices at an excessively high level, or impose a price squeeze so as to have adverse consequences for end users. If ComReg were to relax this obligation, it would not have any means of ensuring the cost orientation of prices in the market and prevent such potential market failure.
- 6.93 As operators may operate in both SMP and non SMP designated markets, the division of services and products, and the corresponding costs, capital employed and revenues between the different markets should be reflected in costing systems, and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service ComReg needs to have visibility as to the basis of, and amount of, allocation across all services. Therefore an obligation of Cost Accounting Systems can provide greater assurances in monitoring non-discrimination and address the competition problems identified.
- 6.94 ComReg disagrees with the view that this obligation will be time consuming and impose a heavy burden on it, as given the size of the company, such organisations must already have management accounting systems in place to support internal business decision-making.
- 6.95 ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing that it maintains the existing level of cost accounting system obligation on eircom until such time as any further consultations are completed.

7 Regulatory Impact Assessment

Introduction

7.1 This assessment reviews the regulatory impact of the decisions relating to the measures put forward in this paper and the previous consultation.⁶³ ComReg has, in undertaking this assessment, had regard to the general legislative environment including the regulatory objectives as set out by Section 12 of the Communications Regulation Act 2002 and the Ministerial Directions of February 2003.⁶⁴ The assessment is set out in general terms, where appropriate, relating to the general objectives of Section 12 including the promotion of competition, the development of the internal market and the promotion of the interests of users within the community.

Legislative Basis

7.2 Regulation 9(1) of the Access Regulations states “*Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate*”. ComReg is therefore obliged to impose at least one obligation where an undertaking is designated to have SMP.

7.3 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the Access Regulations.⁶⁵ Under Regulation 9(6) of the Access Regulations, obligations need to be ‘based on the nature of problem identified, proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations’.

7.4 The regulatory impact assessment is required to assess whether the range of obligations proposed are proportionate and justified and meet the objectives of ComReg in terms of the promotion of competition, the development of the internal market and the promotion of the interests of end-users.

⁶³ Market Analysis – Wholesale unbundled access (including shared access) to metallic loops and sub-loops; ComReg Document No. 03/146

⁶⁴ Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s.13 of the Communications Regulation Act 2002, 21 February, 2003

⁶⁵ European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, S.I No. 305 of 2003

Response to Consultation Question 15

[Q.15. Respondents are asked to provide views on whether the remedies in section 6 are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impacts of these remedies on end-users, competition, the internal single market and technological neutrality.]

- 7.5 Three of the four respondents believe that the remedies ComReg has proposed are proportionate and justified. One respondent has indicated that in carrying out a Regulatory Impact Assessment (RIA), ComReg should undertake a cost/benefit analysis of the different options for achieving any particular outcome and that this cost/benefit analysis should include the direct costs that it implies for the regulated company, as well as the costs that the obligation implies in terms of market distortion. The same respondent has suggested that ComReg should bear in mind the proportionality of remedies and consider the speed of implementation and duration of any remedies imposed.

ComReg's position

- 7.6 ComReg notes the respondents' comments above and continues to believe that the remedies proposed in Section 6 are proportionate and justified. Although one respondent has disputed ComReg's conclusions on market definition and analysis, ComReg considers that no valid reason has been given which would lead it to change its conclusions on the relevant market, as outlined in previous sections. Further, ComReg believes that the remedies it proposes are the least burdensome that would remedy the competition problem identified (i.e. the ability to distort the competitive dynamics at the wholesale level through the conditions of access to and supply of the local loop). As previously outlined, ComReg intends to carry out a more detailed consultation with regard to the obligations of Accounting Separation and Cost Accounting Systems to be imposed in this market.
- 7.7 ComReg does not believe that a cost/benefit analysis (of the type proposed by one respondent) would be practical or indeed necessary in this review. As noted in the Irish Government White Paper, January 2004, it is crucially important to ensure that RIA does not become an overly bureaucratic exercise and that the practical use of a RIA must take precedence over superficial compliance. It is clear that, like other Member States, eircom is the only provider in this market and has also been found to be in a dominant position. ComReg, thus, feels that a cost/benefit analysis of the imposition of remedies in this market would not be practical, but would instead border on an act of "superficial compliance".
- 7.8 ComReg has taken into account in drafting its remedies, the existing obligations already imposed on eircom. Therefore, ComReg does not consider that any additional costs through the imposition of the remedies would be significant. ComReg also considers that any costs involved would be outweighed by the benefits of introducing these remedies into the market.
- 7.9 ComReg has concluded that whereas it is of course possible for competing operators to invest in their own infrastructure, it is unlikely to be desirable or indeed practicable for replication of the local metallic access network. As Recital 6

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of Regulation 2887/2000⁶⁶ states ‘It would not be economically viable for new entrants to duplicate the incumbent’s metallic local access network in its entirety within a reasonable time’.

- 7.10 The only way in which competition on the downstream market can currently be created in such a situation is by forcing the SMP undertaking to grant access to the necessary input it owns. It is obvious that no other remedy from the suite of potential remedies can solve this competition problem and so an **access** obligation according to Regulation 13 is applicable. ComReg concludes that, based on current experience and the take-up of these products, it is feasible for eircom to grant access to the local loop. ComReg has also considered whether access to the local loop safeguards competition in the long term. As access allows new entrants to compete with SMP operators in offering (typically) broadband services, ComReg concludes that mandated access safeguards development of competition and in fact allows for new entrants to further climb the ladder towards infrastructure investment.
- 7.11 ComReg considers that the nature of the competition problem is such that remedies need to be imposed in order to prevent the exercise of market power to the detriment of competition and consumers. ComReg has considered whether a requirement of **transparency** only would suffice. Such an obligation serves to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms.⁶⁷ However, while it would allow the basis for conditions of supply to be made clear and predictable, it would not overcome the basic competition problem, i.e. the ability to distort the competitive dynamics at the wholesale level through the conditions of access to and supply of the local loop.
- 7.12 ComReg considers that a **non-discrimination** obligation can ensure the provision of services and information to other operators under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners. In particular, it is important that information gained by eircom as a result of their provision of LLU services to another operator is not used by eircom’s downstream arms in any manner.⁶⁸
- 7.13 ComReg has also considered whether transparency and non-discrimination would work without an **accounting separation and cost accounting systems** obligation. Accounting separation allows internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination where applicable.⁶⁹ ComReg thus feels that the efficacy of the aforementioned transparency and non-discrimination obligations is reliant on the introduction of some level of accounting separation. Further, to facilitate the verification of compliance with these obligations of transparency and non-discrimination, ComReg has the power to require that accounting records, including data on revenues received from third parties, are provided by eircom on

⁶⁶ Regulation 2887/2000 of the European Council and of the Parliament on unbundled access to the local loop.

⁶⁷ See Recital 16 of Access Directive

⁶⁸ Recital 17 of Access Directive

⁶⁹ Recital 18 of Access Directive

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request. The obligation of Cost Accounting Systems can provide greater assurance to the NRA in monitoring non-discrimination and address the competition problems identified.

- 7.14 In addition, ComReg has considered whether a remedy of **cost-orientation** should be imposed in order to ensure that competition and consumers are protected against the risk of inefficient pricing. Although commercial negotiation is the preferred method for reaching agreement on technical and pricing issues for local loop access, experience shows that in most cases regulatory intervention is necessary due to imbalance in negotiating power between the new entrant and the notified operator, and lack of other alternatives.⁷⁰ In the absence of a fair and efficient limitation on LLU pricing, the charges of the incumbent operator may be expected to operate against the public interest. As a result, assuming that take-up of the wholesale LLU product hasn't been discouraged by excessive pricing in the first place, the costs incurred by OAOs through paying LLU charges that are in excess of the efficient price are wholly or mainly passed through into their customer tariffs, with the result that consumers are charged unattractive prices for broadband and/or voice services. This could discourage the development of LLU at both the wholesale and retail levels. Given the flexibility provided by LLU, in that the lessee has full control of the relationship with its customer for the provision of a full range of services over the local loop and has the scope to choose the geographical areas most appropriate for them, it is evident that cost based rates are, thus, appropriate, proportionate and justified.

The Promotion of Competition

- 7.15 ComReg believes that the effect of its decisions on the promotion of competition in this wholesale market will be neutral to positive. Unbundled access to the local loop allows new entrants to compete with incumbent operators in offering high bitrate data transmission services for continuous internet access and for multimedia applications based on digital subscriber line (DSL) technology as well as voice telephony services.⁷¹ As outlined in the market analysis section, at present, eircom is the only supplier of wholesale metallic local loops in Ireland and therefore has 100% market share. It is a vertically integrated organisation which supplies services to undertakings with which it competes on downstream markets. Due to the characteristics of this market, with sunk costs and network effects, it is highly unlikely that it could be economically replicated. It is also highly unlikely that there will be medium-term market entry using alternative platforms given the asymmetry of the positions of the incumbent and new entrants. One of the objectives of regulation, as is the case in markets with a structure such as these, is to constrain the exercise of market power. Therefore, by imposing the above obligations on eircom, ComReg is attempting to replicate the effects of competition in the provision of services to users of eircom's network (i.e. other authorised operators). Further, the nature of the LLU product (requiring significant investment in exchange equipment by purchasing operators), accompanied by cost-orientated

⁷⁰ Regulation 2887/2000 of the European Council and of the Parliament on unbundled access to the local loop.

⁷¹ Regulation 2887/2000 of the European Council and of the Parliament on unbundled access to the local loop.

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pricing, would encourage ongoing infrastructure investment by OAOs, thus, increasing the likelihood of infrastructure competition in the future.

The Promotion of the Interests of Users within the Community

7.16 ComReg considers that the proposed remedies promote the interests of users within the community. The market analysis presented in Section 5 argues that the level of dominance enjoyed by eircom could lead to excessive pricing of access to the local loop. This could affect the quality and range of broadband and voice services that can be made available to consumers. The implementation of these remedies will allow internal price transfers to be rendered visible while removing the ability to distort the competitive dynamics at the wholesale level through the conditions of access to the local loop. Thus, the remedies as set out in this document will allow the minimum of protection against any excessive pricing or discrimination in non-price terms and conditions.

The Development of the Internal Market and other Technological Issues

7.17 ComReg believes that the effect of its decision on the development of the internal market will be neutral, as the basis for the assessment and proposed remedies is consistent with the terms of the new framework.

7.18 It is clear that new entrants do not have widespread alternative network infrastructures and are unable, with traditional technologies, to match the economies of scale and the coverage of an operator designated as having significant market power in the fixed public telephone network market. This results from the fact that such an operator has rolled out their metallic local access infrastructure over a significant period of time protected by exclusive rights and were able to fund investment costs through monopoly rents. It is clear that, like other Member States, this situation persists; eircom is the only provider in this market and has been found to be in a dominant position under the terms of the new framework.

7.19 The development of the internal market requires the regulator to ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services. ComReg considers that the proposed measure does not discriminate in terms of treatment. It is aimed at ensuring that eircom does not distort competition in view of the fact that it is a vertically integrated organisation which supplies services to undertakings with which it competes on downstream markets. The provision of unbundled access to the local loop would ensure that all providers of broadband and voice services over the local loop are on a level playing field.

7.20 Furthermore, the review also takes account of any potential technological developments in the market, particularly with regard to competition from fixed wireless access and cable networks. The effects of such developments on the level of competition in this market will be monitored at each review.

Conclusion

7.21 ComReg is of the view that the regulatory actions proposed within this document will promote competition in the Irish communications sector, will promote the interests of users and will promote the development of the Internal Market. Further, the actions that are proposed have been selected with a view to imposing the least burdensome obligations that will address the competition problems identified. ComReg, thus, believes that they are the appropriate, proportionate and justified.

8 Submitting Comments

- 8.1 The consultation period will run from 16th April to 17th May 2004 during which ComReg welcomes written comments on the draft decision in Annex B.
- 8.2 ComReg appreciates that many of the issues raised in the decision may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.
- 8.3 Having analysed and considered the comments received, ComReg will review the draft decision and publish a report on the consultation which will inter alia summarise the responses to the consultation.
- 8.4 In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.

Annex A – Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC

Under the obligation in Article 16 of the Directive 2002/21/EC, ComReg, has conducted an analysis of the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops in Ireland.

Under Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 03/146. This consultation ran from 11th December 2003 and ended 31st January 2004. The responses to this consultation have been taken into consideration and ComReg has now reached decisions in market definition, designation of SMP and regulatory obligations, which is contained in ComReg document 04/40.

ComReg hereby notifies the Commission of its proposed remedies and obligations consistent with Article 7(3) of Directive 2002/21/EC. These remedies and obligations are set out in the attached summary notification form. Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. The views of the Competition Authority are attached.

Section 1 - Market Definition

Please state where applicable:

1.1	<p>The affected relevant product/service market (s).</p> <p>Is this market mentioned in the Recommendation on relevant markets?</p>	<p>Wholesale unbundled access (including shared access) to metallic loops and sub-loops, for the purpose of providing broadband and voice services.</p> <p>Yes</p>	Page 22
1.2	The affected relevant geographic market (s)	Ireland	Pages 21-22
1.3	A brief summary of the opinion of the national competition authority where provided;	The Authority supports the approach and findings of this market definition exercise.	Pages 74-76
1.4	A brief overview of the results of the public consultation to date on the proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)	In total four responses were received by the closing date. Three respondents agree with the findings in this consultation, while one respondent disagrees. The proposed market definition remains unchanged after the consultation.	Pages 22-26
1.5	Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to Section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment	Not applicable	

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	of significant market power ⁷² , and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum ⁷³ .		
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Section 2 - Designation of undertakings with significant market power

Please state where applicable:

2.1	The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power	eircom has been designated as having significant market power in the national market for wholesale unbundled access (including shared access) to metallic loops and sub-loops. A reference in this section to any given undertaking shall be deemed to include that undertaking and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant markets defined in section 3.	Page 31
2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> • Market Share • Potential Competition and Barriers to Entry • Absence of Countervailing Bargaining Power 	Pages 27-29
2.3	The name of the main	eircom is the only supplier of	Page 27

⁷² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

⁷³ Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for ECNs and ECSs, C (2003) 497

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	undertakings (competitors) present/active in the relevant market.	metallic local loops in Ireland.	
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	eircom is the only supplier of metallic local loops in Ireland and, accordingly, has 100% share of the relevant market.	Page 27

Please provide a brief summary of:

2.5	The opinion of the national competition authority, where provided	The Authority supports the approach and findings of this analysis exercise.	Page 74
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power (e.g., total number of comments received, numbers agreeing/disagreeing)	All four of the respondents agreed with ComReg's preliminary conclusions regarding market analysis. The proposed designation remains unchanged after the consultation.	Page 30

Section 3 - Regulatory Obligations

Please state where applicable:

3.1	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC (Access Directive))	The following obligations are proposed: <ul style="list-style-type: none"> • Transparency – Regulation 10 • Non-discrimination – Regulation 11 • Accounting Separation – Regulation 12 • Access to, and use of, specific network facilities – Regulation 13 • Price Control and Cost Accounting – Regulation 14 	Pages 34 and 54
3.2	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework	Such information can be found in sections 6 & 7 of this document.	Pages 32-59

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3.3	Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found		
	If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate which are the 'exceptional circumstances' within the meaning of Article 8(3) thereof which justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Not applicable	

Section 4 - Compliance with international obligations

In relation to the third indent of the first subparagraph of Article 8(3) of Directive 2002/19/EC (Access Directive), please state where applicable:

4.1	Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC (Access Directive)	Not applicable	
4.2	The name(s) of the undertaking(s) concerned	Not applicable	
4.3	Which are the international commitments entered by the Community and its Member States that need to be respected	Not applicable	

Annex B – Decision

STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the obligations set out herein, the Commission for Communications Regulation ('ComReg') has taken account, of amongst other things, its functions under Regulation 6 (1) of the Access Regulations,⁷⁴ has assessed the proportionality of these obligations, relative to the objectives of ComReg set out in section 12 of the Act of 2002,⁷⁵ has taken in to account the factors set out in Regulation 13 (4) of the Access Regulations and has (where appropriate) complied with the Policy Directions made by the Minister.⁷⁶ ComReg has also taken the utmost account of the *Relevant Markets Recommendation*⁷⁷ and the *SMP Guidelines*.⁷⁸ This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services,⁷⁹ as part of the consultation process arising from the Consultation Paper entitled *Market Analysis: Wholesale Unbundled Access (Including Shared Access) to Metallic Loops and Sub-Loops (Response to Consultation Document 03/146 and Draft Decision)* (ComReg Document No. 04/40) dated 16th April 2004. The said Consultation Paper forms part of this Decision.
- 1.2 The obligations set out in this Decision are imposed on eircom Limited ('eircom') pursuant to the provisions of Regulations 25, 26 and 27 of the Framework Regulations, Regulations 6, 9, 10, 11, 12, 13 and 14 of the Access Regulations and sections 10 and 12 of the Act of 2002.
- 1.3 eircom shall comply with the obligations imposed by this Decision from its effective date.

⁷⁴ 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 ('the Access Regulations').

⁷⁵ Communications Regulation Act, 2002 (2002 No. 20).

⁷⁶ Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003.

⁷⁷ EU Commission Recommendation of 11 February, 2003 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.

⁷⁸ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁷⁹ As referred to in the Commission's Recommendation.

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2 MARKET DEFINITION

- 2.1 The relevant product market is defined as wholesale unbundled access (including shared access) to metallic loops and sub loops.
- 2.2 The relevant geographic market for wholesale unbundled access (including shared access) to metallic loops and sub loops is defined as Ireland.

3 DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER ('SMP')

eircom Limited ('eircom') is designated as having SMP on the market for wholesale unbundled access (including shared access) to metallic loops and sub loops.

4 ACCESS OBLIGATIONS

- 4.1 eircom shall have an obligation to meet reasonable requests by authorised undertakings⁸⁰ for access⁸¹ to the local loop and access to collocation, or associated facilities, as provided for by Regulation 13 of the Access Regulations.
- 4.2 Without prejudice to the generality of section 4.1, eircom shall provide to authorised undertakings, access to the following services and facilities:-
- I. Full unbundled local metallic path ('ULMP');
 - II. Shared access line sharing;
 - III. Full sub-loop unbundling;
 - IV. Shared sub-loop unbundling;
 - V. Collocation;
 - VI. Associated Facilities;⁸²
 - VII. Cabin collocation at the Roches' Street exchange;
 - VIII. Bulk data pursuant to ComReg's Decision Notice *Decision Notice D15/03 Local Loop Unbundling: Provision of Bulk Data* ('D15/03');

⁸⁰ As defined in Regulation 4 of S. I. No. 306 of 2003 the European Communities (Electronic Communications Networks and Services (Authorisation) Regulations 2003 which transposes Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of, electronic communications networks and services.

⁸¹ As defined in the Access Regulations.

⁸² As defined in the Framework Regulations and also within the meaning contained in the definition of 'access' in the Access Regulations.

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- IX. Technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services related to LLU; and
 - X. Operational support systems or, similar software systems necessary to ensure fair competition in the provision of LLU services.
- 4.3 eircom shall continue to offer access to the services and facilities described in this section in accordance with the product descriptions and on the terms and conditions which are specified in the current *Version 1.18* of the access reference offer ('ARO') and the related manuals published as *Industry LLU Documentation* on its official website: www.eircomwholesale.ie. eircom shall also provide bulk data in the manner and of the type as described in ComReg's Decision Notice *Decision Notice D15/03 Local Loop Unbundling: Provision of Bulk Data*.
- 4.4 eircom shall negotiate in good faith with authorised undertakings requesting access to LLU services and facilities.
- 4.5 eircom shall not withdraw access to facilities which it has already granted to authorised undertakings.

5 CONDITIONS ATTACHED TO ACCESS OBLIGATIONS

Pursuant to Regulation 13 (3) of the Access Regulations, eircom shall conclude service level agreements ('SLAs') in respect of the services and facilities referred to in section 4, if such SLAs have not already been concluded immediately prior to the effective date of this Decision.

6 OBLIGATION OF NON-DISCRIMINATION

- 6.1 eircom shall have an obligation of non-discrimination as provided for by Regulation 11 of the Access Regulations.
- 6.2 Without prejudice to the generality of section 6.1, eircom shall apply equivalent conditions in equivalent circumstances to other authorised undertakings providing equivalent services and shall provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners.

7 OBLIGATION OF TRANSPARENCY

- 7.1 Without prejudice to ComReg's powers under Regulation 10 (5) of the Access Regulations, eircom shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations and shall publish an ARO that is sufficiently unbundled to ensure that authorised undertakings are not required to pay for facilities which are not necessary for the service requested. eircom shall ensure that the ARO includes a description of the relevant offerings broken down into components according to market needs; and a description of the associated terms and conditions, including prices. The ARO shall contain at least the elements

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set out in the Schedule to the Access Regulations.⁸³ eircom shall continue to offer access in accordance with the terms and conditions (and continue to include the same items) which are specified in the current *Version 1.18* of the ARO and the related manuals published as *Industry LLU Documentation* on its official website: www.eircomwholesale.ie.

7.2 eircom shall make public, specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. eircom shall continue to publish the information specified in the current *Version 1.18* of the ARO and the related manuals published as *Industry LLU Documentation* on its official website: www.eircomwholesale.ie.

7.3 eircom shall keep *Version 1.18* of the ARO and the related manuals published as *Industry LLU Documentation* (and shall keep same updated) on its official website www.eircomwholesale.ie.

8 OBLIGATIONS IN RELATION TO ACCOUNTING SEPARATION

eircom shall have an obligation to keep separated accounts as provided for by Regulation 12 of the Access Regulations. The obligations in relation to accounting separation applying to eircom which were in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and eircom shall comply with those obligations until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations. In particular, eircom shall comply with the obligations described in the following Decision Notices of ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators;
- D8/99 – Costing Methodology for use in Accounting Separation;
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators;
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators;
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00;
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net; and

⁸³ Schedule to the Access Regulations entitled: 'Minimum list of items to be included in a reference offer for unbundled access to the twisted metallic pair local loop to be published by notified operators'.

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- D7/01- eircom's Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.

9 OBLIGATIONS IN RELATION TO PRICE CONTROL AND COST ORIENTATION

eircom shall have an obligation to offer cost oriented prices for LLU (both fully unbundled and shared lines) services and associated facilities (except for collocation) on the basis of forward looking long run incremental costs ('FL-LRIC') as provided for by Regulation 14 of the Access Regulations.

10 OBLIGATIONS IN RELATION TO COST ACCOUNTING

eircom shall have obligations in relation to cost accounting as provided for by Regulation 14 of the Access Regulations. The obligations in relation to cost accounting applying to eircom which were in force immediately prior to the effective date of this Decision shall be maintained in their entirety and eircom shall comply with those obligations until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.

11 PROVISION OF INFORMATION

ComReg may, under Regulation 17 of the Framework Regulations require any undertaking to provide (within such time as ComReg shall specify in the document containing the requirement) any information, including financial information, that ComReg considers necessary for the purpose of ensuring compliance with this Decision.

12 DIRECTIONS

ComReg may, for the purpose of further specifying requirements to be complied with relating to obligations imposed by this Decision, issue directions to any undertaking to do or refrain from doing anything which ComReg specifies in the direction and the undertaking shall comply with any such directions.

13 AMENDMENT OR REVOCATION OF OBLIGATIONS

ComReg may, pursuant to Regulation 15 of the Access Regulations, amend or revoke any obligations imposed by this Decision.

Wholesale unbundled access (including shared access) to metallic loops and sub-loops

14 EFFECTIVE DATE

This Decision shall be effective from the date of its publication.

John Doherty
Chairperson
The Commission for Communications Regulation
The 16th day of April 2004

Annex C – Network Diagrams

Figure 1: Unbundled Local Metallic Path

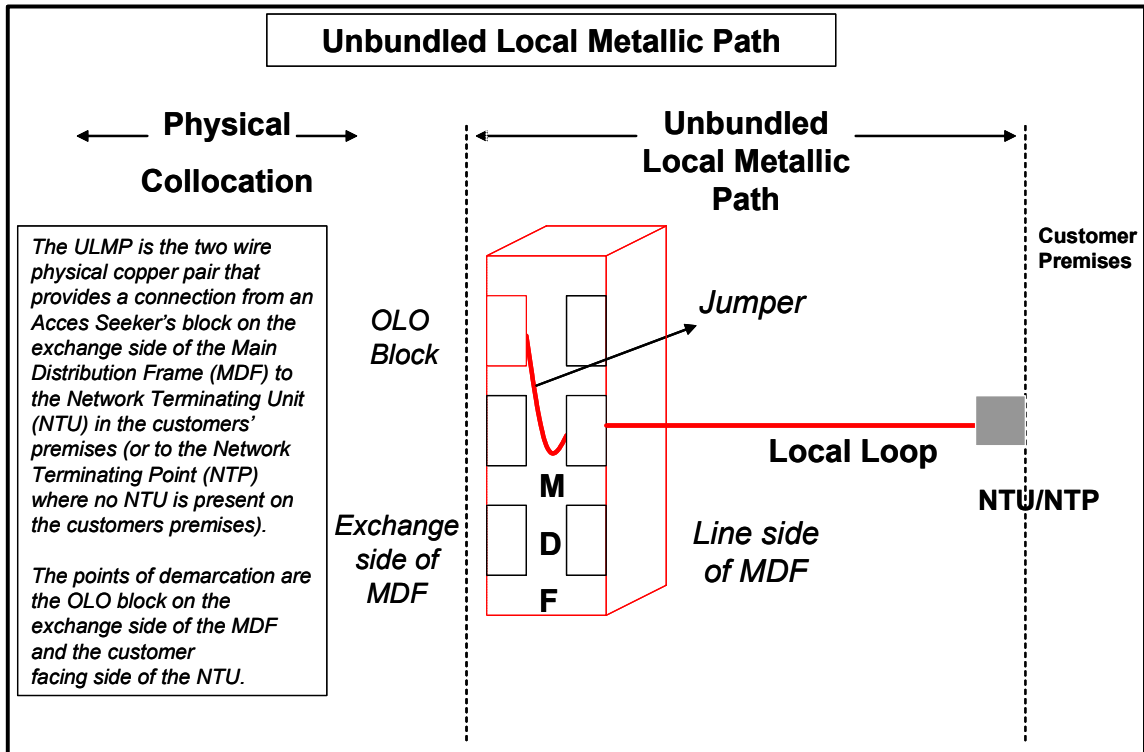


Figure 2: Line Sharing

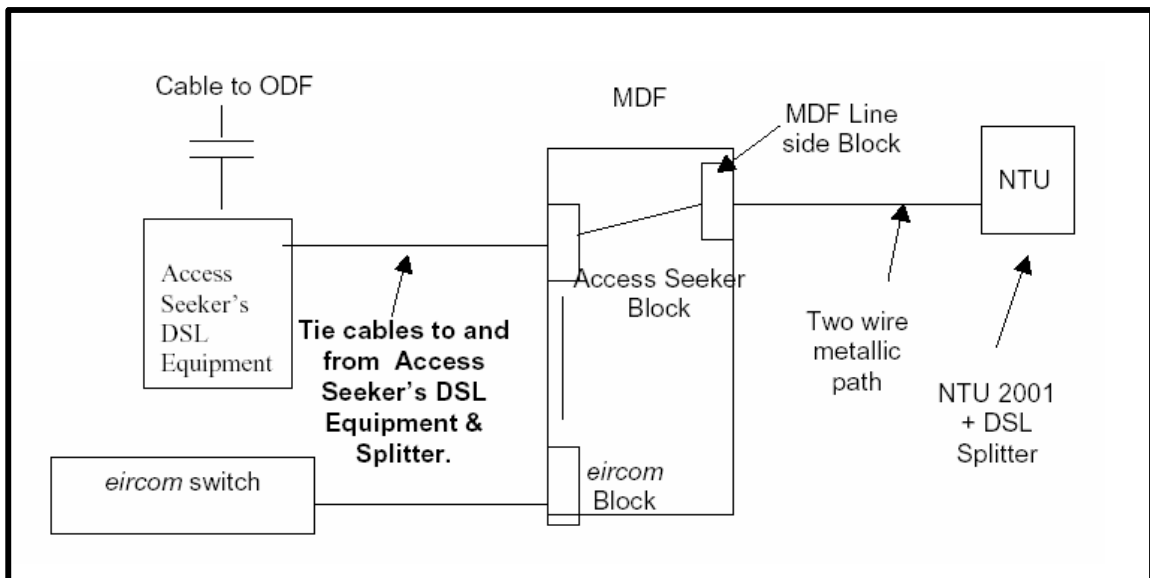
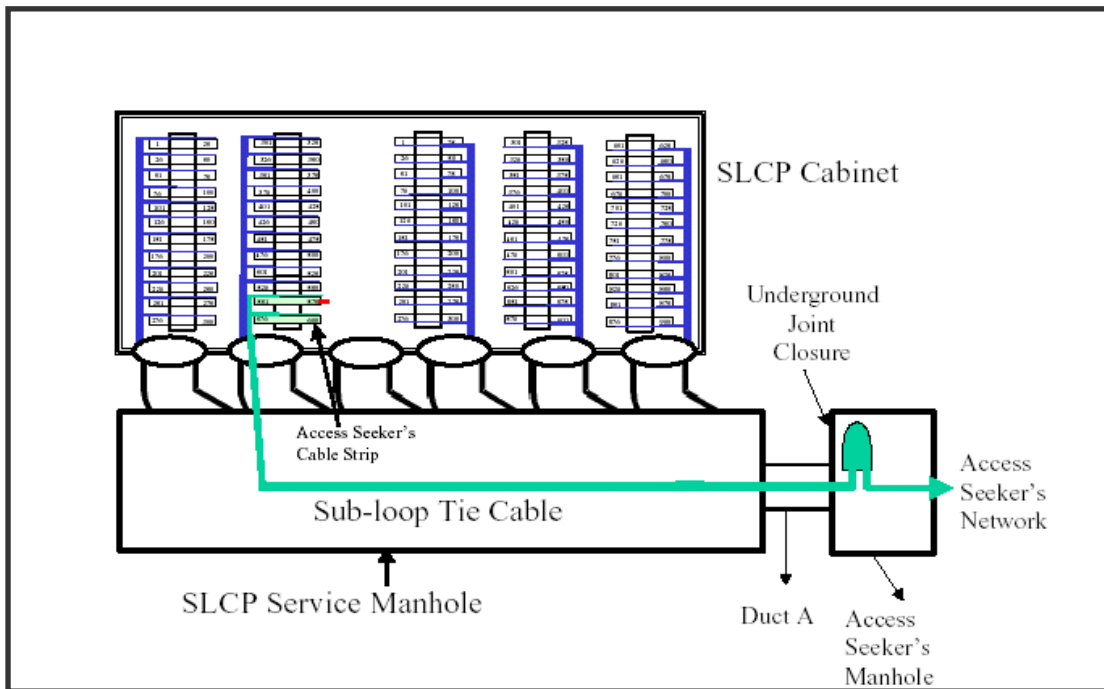


Figure 3 – Sub Loop Unbundling



Annex D - Views of the Competition Authority

Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. The Competition Authority have been asked to provide their view with respect to the outcome of ComReg's review and analysis of the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops, for the purpose of providing broadband and voice services. This view is set out below.



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Direct line:

Your ref.

Our ref. John Doherty
Chairperson
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

5th April 2004

Re: ComReg Market Review – wholesale access to the local loop

Dear Chairperson,

I have been asked, in my capacity as a Member of The Competition Authority ("the Authority"), to provide the Authority's view with respect to the outcome of the Commission for Communications Regulation's ("ComReg") review and analysis of "wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services" in Ireland.

ComReg is obliged under the EU Communications Regulatory Framework to conduct market definition and market analysis activities to determine the relevant markets for the purposes of the new regulatory framework and in accordance with competition law. Under Regulation 27(1) ComReg is required to liaise with the Authority in its process of market definition and analysis of markets that are outside or differ from those recommended by the Commission under the *Relevant Market Recommendation*. In December 2002, a cooperation agreement was signed between the Authority and ComReg in accordance with Section 34 of the Competition Act 2002 to facilitate *inter alia* cooperation in this type of exercise.

Staff at the Authority have participated in the Steering Group, the senior group of advisors and ComReg staff involved in recommending market analysis decisions to ComReg, and have provided comments to the final decisions. The Authority considers that those Authority staff have contributed fully in the process and any comments made by them in the preparation of the consultation documents and recommendations have been duly considered by ComReg in drafting the market proposals.

In its Relevant Market Recommendation, the Commission recommends that National Regulatory Authority's should analyse the market for "wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services" in Ireland. ComReg has considered the characteristics of this market in the context of the Irish national circumstances. In light of the extensive analysis and

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Wholesale unbundled access (including shared access) to metallic loops and sub-loops

volume of data and information collected by its staff, ComReg has concluded that the relevant market proposed by the European Commission is appropriate and supported by the market conditions prevailing in Ireland

Even with a preliminary assessment that eircom Limited ("eircom") holds 100% market share, in line with best practice competition analysis ComReg went on to examine the competitive environment in each of these markets in accordance with the cumulative criteria prescribed in the European Commission's *Relevant Market Recommendation*. ComReg carried out a market analysis, based on an assessment of the competitive environment in each of the markets; barriers to entry, level of countervailing bargaining power, potential competition, patterns of actual market behaviour, to establish whether an undertaking in these proposed markets holds Significant Market Power ("SMP").

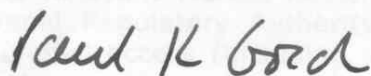
ComReg concluded that the market is characterised by a lack of effective competition and that eircom should be designated as holding SMP on the market for "wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services". The Authority is of the view that ComReg's conclusions in this regard are supported by the evidence.

The Authority is of the view that in conducting its market analysis ComReg has defined markets in accordance with competition law and taken due account of the SMP Guidelines issued by the EU Commission in accordance with regulation 27(1) of the Framework Regulations. The Authority is also of the opinion that ComReg's conclusions are appropriate on the basis of the information in its possession.

We would note in this regard that ComReg's conclusions are consistent with the view taken by the Authority in legal proceedings initiated against eircom's predecessor Telecom Eireann Limited (TE), in May 1999, asserting that TE had abused a position of dominance in the market for access to the local loop by refusing to provide Esat Telecom Limited with access to co-location facilities thereby preventing its entry onto the market. The Authority is of the view that the apparent persistence of a lack of effective competition in this market further supports the case for ex-ante regulation in the market for "wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services" in Ireland.

We would also note that Authority's comments are made in the context of the specific provisions of the SMP guidelines relating to the relationship between markets defined for the purposes of ex ante regulation vis-à-vis competition law enforcement. The Authority reserves the right to re-examine any or all of the issues underlying these recommendations in the light of facts and evidence that may arise in specific future cases before it.

Sincerely,



Dr. Paul K. Gorecki
Member, Competition Authority