



Commission for
Communications Regulation

Response to Consultation and Decision

Intra Migration Premium Charge

Response to Consultation Document No. 08/105 and Decision

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1 Executive Summary

- 1.1 The Commission for Communication Regulation (“ComReg”) is responsible for the regulation of the electronic communications sector in Ireland. Part of ComReg’s remit is the regulation of the unbundled local metallic path (“ULMP”) or as it is commonly referred to, local loop unbundling (“LLU”). LLU is a service that allows Other Authorised Operators (“OAOs”) to rent a local loop from Eircom Limited (“Eircom”). This rental allows OAOs to provide to their customers narrowband and broadband services over Eircom’s copper loop network.
- 1.2 This document is the response to ComReg Consultation Document No. 08/105 ‘Intra Migration Premium: Consultation and draft decision’, dated 23 December 2008 (“Consultation Document No. 08/105”).
- 1.3 At the moment any OAOs that wish to offer telecommunications services nationally, and in particular broadband, need to use Eircom’s network and buy the relevant products from them. Eircom is the only fixed line operator which has a national coverage; other OAOs could not replicate it economically.
- 1.4 In accordance with the EU legislative framework, Eircom is the operator designated with Significant Market Power (“SMP”) in the Wholesale Unbundled Access Market, commonly referred as the LLU market. Eircom also provides another wholesale product, Bitstream. This is covered by the Wholesale Broadband Access Market, of which Eircom has also been found to have SMP in¹. Pursuant to ComReg Decision No. D08/04² (“the SMP Decision”), Eircom is legally obliged, to allow OAOs to access its copper loop network, including LLU, in order to allow OAOs to provide electronic communications services to end-users.
- 1.5 In order to provide broadband services an OAO has three options:
 - 1.5.1 Rent the entire local loop from Eircom (‘LLU’) providing both broadband and traditional voice retail services by providing its own equipment;
 - 1.5.2 Rent merely part of the loop, i.e. that part that allows them to supply broadband by providing their own equipment and leaving the traditional voice retail service to others; or
 - 1.5.3 Buy from Eircom the Bitstream service where Eircom with its own equipment provides a wholesale service that allows the OAO to sell broadband and voice services to the customers.
- 1.6 From 2007, OAOs have been able to move their customers from Bitstream to LLU - a process known as “migration”. In the situation where the wholesale service changes but the retail broadband relationship remains unchanged (i.e. the retail customer remains with the same OAO throughout the process) the agreed term used is “Intra Migration”.
- 1.7 Eircom has a cost orientation obligation, pursuant to the SMP Decision, in the LLU market and it is entitled to recover the cost of these migrations. Migrations involve

¹ ComReg Decision D03/05 ‘Decision Notice - Designation of SMP and Related Remedies: Wholesale Broadband Access’.

² Designation of Significant Market Power and Decision on Obligations – Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops, Doc. No. 04/70, dated 15 June 2004.

certain connection costs³ and these are costs that Eircom currently recovers. These connection charges are not affected by this Decision. However, in addition, Eircom also charges what it refers to as an Intra Migration “Premium” which is not based on any underlying transaction cost. It is this second charge, this Intra Migration Premium (“IMP”) charge, which is the subject of this current decision.

- 1.8 Currently, when an OAO migrates a customer from Bitstream to LLU, Eircom charges a total of up to €95.50⁴. This includes a charge between €45 - €48.50 as the LLU connection charge and €47 being the intra migration “premium” charge on top of the LLU connection charge.
- 1.9 On 29 August 2008 ComReg directed Eircom to demonstrate, with supporting workings/model, that the charge for migration was justified. Eircom at that time did not justify the IMP charge of €47 by reference to any underlying transaction costs. Eircom claimed that the IMP charge is justified because of something akin to a financial option which is granted to the OAO as a consequence of the migration and this should be paid for by the OAO. ComReg has reviewed submissions from Eircom and OAOs and has now decided that the current IMP charge is not justified by any underlying costs, that Eircom’s treatment of any underlying financial options is incorrect and that the IMP should therefore be removed. It also notified the European Commission of its proposals and has received a letter from the European Commission indicating that it has no disagreement with ComReg’s position. Therefore, following this decision OAOs should only have to pay for the physical LLU connection charge of up to €48.50 when migrating their retail customers to LLU. This Decision ensures compliance with the cost orientation obligation imposed on Eircom as the SMP operator⁵.
- 1.10 This document contains the reasons why ComReg is of the view that the IMP charge should be removed. It is not disputed that all transaction costs are already recovered by Eircom. Eircom argues that, in addition, a “Put” option is granted to OAOs and should be paid for. Put options, common in the financial services sector, are contracts which provide the holder the right to sell an asset during or at a specified time, for a specified price. In this instance, Eircom argues that, an operator that uses Eircom’s wholesale broadband service (Bitstream) and which enjoys an implicit option to migrate to LLU has in effect been provided with an option to migrate which should be paid for. ComReg concluded that the option granted to the OAO is already reflected in the wholesale price of the wholesale broadband service (Bitstream). The more so since Eircom is free to set both wholesale and retail broadband prices at any level it chooses provided that it does not engage in a margin squeeze between the two prices and is compliant with its other regulatory obligations. ComReg also believes that it makes no sense to charge a premium when the option is exercised, as the option is given up, not gained, at that point. Any value associated with an option is as a mechanism to mitigate risk and uncertainty which by definition disappears when the wholesale broadband contract is ended.
- 1.11 Eircom argues that it needs to charge a premium when OAOs move to LLU because they are left with stranded assets used to provide wholesale broadband. ComReg, on

³ See Table 1 in this document.

⁴ See Table 1 in this document.

⁵ Section 9 of the SMP Decision.

consideration, does not accept this claim. It is ComReg's view that Eircom can set prices for retail and wholesale broadband to recover any such cost and presumably does so since Eircom faces the same risk of stranding from its own retail customers. ComReg notes that Eircom does not charge any premium to OAOs migrating to any other wholesale product or for leaving Bitstream without migrating to LLU⁶. ComReg would also note that Eircom's own submission to justify the IMP shows that the assets used to provide wholesale broadband can be redeployed within a reasonable period of time.

- 1.12 ComReg considers that the option held at the time of taking the Bitstream service is valuable to all OAOs regardless of whether they choose to exercise it; therefore, it is appropriate that any costs associated with the migration option premium, if any, should be paid by all OAOs that hold the option by using Bitstream, and not only by those that actually exercise it by moving to LLU, otherwise competitive distortions could result.
- 1.13 ComReg has good legal and policy reasons for removing the IMP. Among its principle statutory objectives are the promotion of competition and innovation and furthering the interests of end users. LLU is a powerful mechanism for advancing these objectives because LLU allows OAOs to offer innovative broadband products and services. When using LLU, an OAO merely rents Eircom's copper loop but must supply its own equipment. In contrast an operator which sells Eircom's wholesale broadband product (Bitstream) can, broadly speaking, only replicate what Eircom itself offers and is reliant on Eircom's product development capabilities. Wholesale broadband (Bitstream) therefore does not encourage innovation as strongly as LLU and is less capable of enabling product differentiation by OAOs. A charge such as the IMP discourages the use of LLU, unreasonably in ComReg's opinion, and is ultimately to the detriment of end users. ComReg believes that removal of the IMP charge, together with further investment from OAOs in the necessary infrastructure and services will deepen the level of competition in the broadband market and ultimately lead to faster broadband speeds and lower prices to retail customers.
- 1.14 ComReg is satisfied that this approach is justified in light of ComReg's statutory objectives under Section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007.

⁶ Subject to minimum Bitstream contract term of six months

2 Introduction

Background

- 2.1 As noted by ComReg in Consultation Document No. 08/105, achieving the successful and widespread introduction of LLU is an important element in facilitating and enhancing competition across a number of services, particularly broadband. Migrations are essential for the development and enhancement of competition, particularly in the broadband market, as ComReg believes OAOs migrating their customers from, for example, Bitstream to LLU should result in more innovative and cheaper retail broadband products to the benefit of retail consumers as the OAOs would no longer be constrained to an Eircom wholesale product. Bitstream is Wholesale Broadband Access (“WBA”) and is paired with relevant Eircom retail broadband products, therefore the characteristics of the Bitstream product is determined by Eircom.
- 2.2 The IMP being charged by Eircom relates to a premium over the standard LLU connection fees when an OAO moves its retail customer from one regulated Eircom wholesale service to another without a change in the customer/operator broadband relationship, for example, from Bitstream to LLU.
- 2.3 The current IMP was set at €47 per single Intra Migration by Eircom in May 2007; the migration process was then launched in September 2007. ComReg Information Notice, ComReg Document No. 07/25, noted that the migration charge would be reviewed by ComReg after one year. The IMP is an additional charge on top of the normal LLU connection charges.
- 2.4 In 2008, with the approach of the one year review anniversary noted above, in a series of correspondence with Eircom⁷, ComReg requested submissions from Eircom to demonstrate compliance with its cost orientation obligation when charging for migration. In response to ComReg’s requests, Eircom did not provide any submission in this regard for a number of reasons that included its belief that migrations, and accordingly the premium, was outside the scope of Eircom’s current regulatory obligations. ComReg disagreed with this and therefore, on 29 August 2008, ComReg directed Eircom pursuant to Regulation 14(4) of the Access Regulations⁸ to demonstrate with supporting workings/model that the charge for Migrations was cost oriented.
- 2.5 Eircom responded on 26 September 2008 noting that it did not accept that Eircom had an obligation to provide migrations. Notwithstanding this, Eircom estimated that the premium for a single Intra Migration should actually be revised upwards based on a report provided by Eircom’s consultants, Indecon International Economic Consultants (“Indecon”). ComReg subsequently published the non-confidential version of this report at 08/105a ‘Estimation of the “Intra Migration Option Value” prepared for Eircom by Indecon dated September 2008, on 23 December 2008.

⁷ Letters dated 24 January 2008, 19 March 2008, 7 May 2008.

⁸ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I. No. 305 of 2003 as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007).

- 2.6 Eircom stated that the IMP is justified by an American Put Option – this option is granted to the OAO on taking the Bitstream service and is paid when the option is exercised, that is, when the OAO migrates.
- 2.7 In Consultation Document No. 08/105, ComReg consulted on this justification for the IMP and expressed its own preliminary view that the IMP charge was not justified.
- 2.8 ComReg received five responses to Consultation Document No. 08/105. Upon further consideration and having considered the responses to the consultation and the response from the European Commission, ComReg remains of the view that the IMP charge is not justified and has decided that the premium for Intra Migration should be removed for the following reasons as summarised below and discussed further in this document:
- The Decision ensures compliance with the cost orientation obligation imposed on Eircom as SMP operator⁹;
 - An OAO is not granted a real option (at least not one of any significance¹⁰) at the point it migrates from a Bitstream service to an unbundled loop;
 - The Bitstream service bought by an OAO contains an implicit option to cancel the service (after the minimum contractual term) or to switch to a different wholesale service.¹¹ This implicit option is granted to all OAOs at the point that the Bitstream service is first purchased;
 - This implicit option has already been paid by the OAO when granted as part of the rental price of the Bitstream service;
 - The analysis presented by Eircom in its original submission¹² and Response to Consultation Document No. 08/105 does not characterise the options involved correctly;
 - The benefit that an OAO enjoys from this implicit cancellation or switching option is irrelevant for the purposes of determining what the OAO should pay for it. The only question is whether in providing this option how the efficiently incurred costs, if any, should be recovered, again these issues are not addressed in the Eircom submission;

⁹ Section 9 of the SMP Decision.

¹⁰ At the time of migration, there are other options gained by the OAO, such as the option to switch back from an LLU-based wholesale service to a Bitstream service. However, such an option is not likely to be exercised and in any case will not require Eircom to make any significant new investment. Again any costs associated with Bitstream are charged through Bitstream charges. Therefore, any such options gained as a result of migration are immaterial to the decision being made in relation to the IMP charge.

¹¹ In effect, when the OAO takes a Bitstream service, it is granted a put option that allows it to stop taking the service (subject to contractual restrictions such as minimum term) and a call option to allow it to take a different wholesale service. These are exercised simultaneously if an OAO switches from a Bitstream to an LLU-based service, with the IMP charge being the total exercise price for the OAO.

¹² As published as ComReg Document No. 08/105a 'Estimation of the "Intra Migration Option Value" for Eircom by Indecon International Economic Consultants.

- Providing flexibility is only potentially a risk for Eircom if there are potentially sunk assets required to provide the wholesale Bitstream service to a particular OAO that cannot be redeployed if the OAO cancels or switches to an unbundled loop. However, Eircom has itself noted in its submission to ComReg that the assets used to provide Bitstream services can be redeployed within a reasonable period of time¹³. Eircom has presented no evidence to suggest that the cost to it of providing this implicit option to OAOs is significant;
- Furthermore, even if the costs of providing the implicit option were material, the current wholesale Bitstream rental charge should in any case lead to recovery of these costs even without any premium for Intra Migration being levied. One of the reasons for this is that Eircom already provides an implicit cancellation option to its own retail customers that is comparable to the implicit cancellation or switching option provided to an OAO. The cost to Eircom of providing this implicit option to its own retail customers can be recovered through the retail Broadband rental charge which Eircom itself sets. When determining this rental charge, Eircom presumably takes account of the fact that no cancellation charge is levied if a retail customer terminates its service (after the minimum contractual period). The wholesale Bitstream charge is regulated on a Retail minus basis by subtracting retail costs from the retail price. Therefore, the wholesale Bitstream price should already include compensation to Eircom for the cost of providing a cancellation option on the basis of a zero retail cancellation charge. To set a premium for Intra Migration on top of this in the way that Eircom currently charges it, would lead to Eircom over-recovering its costs;
- In addition to over-recovery of Eircom's costs, the IMP charge can have serious adverse competitive effects by disincentivising OAOs from investing in infrastructure as the IMP charge is an upfront cost payable on migration on top of the normal LLU connection charges and does not provide appropriate build/buy incentives for OAOs; and
- The Decision is consistent with ComReg's statutory objectives under Section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007¹⁴ ("the Act") and Regulation 14(3) of the Access Regulations.

2.9 The remainder of this document is structured as follows:

- Section 3 details the consultation questions posed in Consultation Document No. 08/105 as well as a summary of the views of respondents and ComReg's position and conclusion in relation to each of the 14 questions posed.
- Annex A sets out the legal basis.
- Annex B sets out the Direction that will be imposed under this Response to Consultation and Decision.
- Annex C provides ComReg's Regulatory Impact Assessment ("RIA") in relation to this Decision.

¹³ The actual number of months was redacted by Eircom in its non-confidential submission published as ComReg Document No. 08/105a.

¹⁴ No. 22 of 2007.

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- Finally, Annex D provides the updated competition assessment in the market for Wholesale Unbundled Access (“WUA”).

3 Summary of Responses to Consultation Document No. 08/105 and ComReg's position and conclusion

Introduction

- 3.1 On 23 December 2008 ComReg published ComReg Document No. 08/105. Five responses were received to the consultation from the following:
1. Eircom Limited ("Eircom");
 2. BT Communications Ireland Limited ("BT");
 3. Smart Telecom Holdings Limited ("Smart Telecom");
 4. Vodafone Ireland Limited ("Vodafone"); and
 5. Magnet Networks Limited ("Magnet")
- 3.2 In the following section, ComReg summarises the key points of each non-confidential response received in relation to each of the questions raised in the Consultation Document No. 08/105. ComReg then responds to any significant points raised by the respondents and gives its final view in relation to each of the questions posed in Consultation Document No. 08/105. The Direction which ComReg shall issue to Eircom is set out in Annex B.

ComReg's Obligations and the Obligations of the Dominant Operator

- 3.3 In Consultation Document No. 08/105 ComReg summarised its statutory objectives as defined under Section 12 of the Act, ComReg's statutory objectives are, *inter alia*, to:
- Promote competition;
 - Promote the interests of users within the community;
 - Ensure that there is no distortion or restriction of competition;
 - Encourage efficient investment in infrastructure; and
 - Encourage access to the internet at a reasonable cost to end-users.
- 3.4 In addition, in accordance with Regulation 9(6) of the Access Regulations, ComReg considers that the Direction at Annex B, in relation to IMP charge, is based on the nature of the competition problems identified in this document and Consultation Document No. 08/105, and are proportionate and justified in light of the objectives set out in section 12 of the Act¹⁵. The Direction follows a public consultation under Regulation 19 of the Framework Regulations¹⁶ and the draft measure has been notified to the European Commission pursuant to Regulation 20 of the Framework Regulations.

¹⁵ See Regulatory Impact Assessment at Annex C.

¹⁶ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007).

- 3.5 In accordance with Article 7 of the Framework Directive¹⁷, ComReg notified the European Commission, of the proposed removal of the IMP charge on 18 May 2009. The notified measure was a further specification of a requirement¹⁸ relating to an existing obligation to *“offer cost oriented prices for LLU services, collocation, and associated facilities”*¹⁹. On 18 June 2009, ComReg received a “no comments” letter from the European Commission, stating that the European Commission had no comments on the proposed removal of the IMP charge and as such could proceed to finalising the Decision. The receipt of a “no comments” from the European Commission means that the European Commission supports the approach adopted by ComReg. In addition, this is further evident in a press release by the European Commission in which the EU Commissioner for Information Society and Media, Viviane Reding stated that the actions of ComReg were to allow for *“greater flexibility and innovation in the provision of broadband Internet services and ultimately lead to wider choice and lower prices for consumers”*²⁰. In addition, Competition Commissioner Neelie Kroes said: *“ComReg's proposal is good news for competition and consumers. Alternative operators will have to pay considerably less for access to Eircom's broadband network. They will thus be in a position to make more attractive retail offers and consumers will get a better choice”*²¹.
- 3.6 Regulation 14(2) of the Access Regulations states that when imposing an obligation in accordance with Regulation 14(1) of the Access Regulations in relation to price control and cost orientation of prices, ComReg shall take into account any investment made by the operator, and allow the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved. In relation to the IMP charge, the underlying investment made by Eircom in respect of the IMP is at the Bitstream service level. In relation to the actual physical efficiently incurred costs associated with the process or migrating/moving a customer from one platform to another, these are recovered by Eircom through other wholesale prices – please see

¹⁷ Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive”).

¹⁸ Pursuant to Regulation 17 of S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

¹⁹ ComReg Decision Notice D8/04 (section 9): Market analysis: Wholesale unbundled access (including share access) to metallic loops and the sub-loops, dated 15 June 2004.

²⁰ European Commission Rapid Press Release IP/09/953 dated 18/06/2009 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/953&format=HTML&age_d=0&language=EN&guiLanguage=en also in the same press release: *“I fully support ComReg's proposal, as I am convinced that truly cost-oriented prices will be of great benefit to consumers.”* said EU Commissioner for Information Society and Media, Viviane Reding. *“Broadband competition in Ireland is currently being held-up by the high access prices Eircom charges its competitors and the Irish regulator is now making very important efforts to foster competition by promoting direct investment in broadband infrastructure. This move will allow for greater flexibility and innovation in the provision of broadband internet services and ultimately lead to wider choice and lower prices for consumers.”*

²¹ European Commission Rapid Press Release IP/09/953 dated 18/06/2009 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/953&format=HTML&age_d=0&language=EN&guiLanguage=en

Table 1. Regulation 14(3) of the Access Regulations, provides that ComReg shall ensure that any pricing methodology it imposes, in accordance with the Access Regulations will promote competition, by ensuring that there is no distortion or restriction of competition in the market and by encouraging efficient investment in infrastructure. ComReg believes that not only will the removal of the IMP charge be in line with ComReg's objectives under section 12 the Act, namely to promote competition and to promote the interests of users, it will also be in line with the Regulation 14(3) of the Access Regulations, namely to promote efficiency and sustainable competition and maximise consumer benefits.

- 3.7 Consultation Document No. 08/105 also summarised the obligations of the SMP operator.
- 3.8 In the SMP Decision Eircom was designated with SMP in the WUA market. As a consequence of this, certain obligations were imposed on Eircom whereby it is obliged to offer cost oriented prices for LLU (both fully unbundled and shared lines) services and associated facilities on the basis of forward looking long run incremental cost ("FL-LRIC") in accordance with Regulation 14 of the Access Regulations. The Access Regulations transpose Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive"²²).
- 3.9 ComReg is in the process of carrying out a further Market Analysis for the Wholesale Physical Network Infrastructure Access at a fixed location market ("WPNIA"). The Response to Consultation Document, ComReg Document No. 08/104²³, sets out ComReg's preliminary conclusions which demonstrate that Eircom continues to have SMP in the WPNIA (formerly WUA) market. A final decision in relation to WPNIA has not yet been reached.
- 3.10 ComReg notified the European Commission of the proposed SMP designation in WPNIA in accordance with Regulation 20 of the Framework Regulations. In its response²⁴ letter to ComReg, the European Commission approved ComReg's proposal in the Response and Draft Decision Document No. 08/104 to designate Eircom with SMP in the WPNIA market (forgoing the right to veto ComReg's draft decision).
- 3.11 Given the delay in adopting the final WPNIA decision, arising from ComReg re-consulting on the inclusion of alternative fibre networks in the WPNIA market following upon the invitation of the European Commission, ComReg believes that to wait for the completion of the WPNIA market analysis would be disproportionate as the removal of the IMP charge is urgent as ComReg believes that the IMP charge is not justified and therefore the continuance of the IMP charge, pending the WPNIA

²² 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.

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

²⁴ The European Commission invited ComReg to reconsider its treatment of fibre in defining the product market, but noted specifically that its invitation did not affect the regulatory outcome with respect to the SMP designation or in respect of the proposed remedies.

decision, could result in substantial damage to the market, at both a consumer and wholesale level. This belief is evidenced by the claims made by OAOs in their responses to Consultation Document No. 08/105. The urgency of this decision is set out in detail in Annex C, Regulatory Impact Assessment. As such, it was considered appropriate to take a decision to remove the IMP charge on the basis of the existing SMP designation Decision.

- 3.12 In addition, the competition assessment (at Annex D) has concluded that the conditions of competition in the WUA market in so far as they relate to the IMP charge have remained substantially the same as at the time of the designation of the SMP Decision. In particular, deployment of fibre in the local loop since 2004 has been minimal. As such, the decision to amend the pricing methodology remains equally valid. ComReg therefore considers that the continued imposition of the price control and cost orientation obligation is consistent with ComReg's objectives as set out in the Access Regulations and that the price control and cost orientation obligation should remain in place. The European Commission agrees with ComReg in this regard as per its letter of 18 June 2009. This approach of utilising the existing LLU SMP designation (Decision No. D08/04) raised no comment from the European Commission.²⁵
- 3.13 ComReg believes it must proceed to make a final decision on the removal of the IMP charge now as ComReg believes the IMP charge is not justified and therefore to delay the removal of the IMP charge pending the completion of the WPNIA market analysis could cause considerable market harm. The issues in relation to prospective NGN access in the WPNIA paper are complex and there is no reason to delay the current IMP decision unduly while these issues are examined, given the unchanged nature of the copper network market since 2004. This Decision is required to remove an over-recovery of cost and to stimulate competition. Delay would bear the significant risk that ComReg would fail to meet its statutory objectives. Also, OAOs claim that the current IMP charge is acting as a barrier to their LLU investment and is therefore distorting the market to the detriment of OAOs and retail customers who may avail of better and cheaper retail products by OAOs who utilise LLU. Therefore there is an urgent need for ComReg to act now; these issues are further addressed in the Regulatory Impact Assessment at Annex C.
- 3.14 It is important to note that if the final determination in the WPNIA market analysis shows that Eircom no longer has SMP in the WPNIA market or that an obligation of price control or cost orientation is no longer necessary, then no related regulated price will apply.
- 3.15 Finally, given that the SMP designated Decision has not been withdrawn and will remain in place until such time as the WPNIA decision is finalised, ComReg intends to rely on the current SMP Decision for the purposes of directing Eircom in relation to the IMP charge.
- 3.16 Set out below are the questions that were asked in Consultation Document No. 08/105, together with a summary of the responses from industry. All non-confidential responses will be treated in accordance with normal ComReg practice

²⁵

http://circa.europa.eu/Public/irc/info/ecctf/library?l=/ireland/registerednotifications/ie20090923-0924/ie-2009-0923-0924/_EN_1.0_&a=d

and will be published on the ComReg website within 10 working days of the Decision publication date.

What is classified as Intra Migration?

3.17 In Consultation Document No. 08/105, ComReg asked respondents whether they agreed with what is classified as Intra Migration as follows:

1. Bitstream to Line Share;
2. Public Switched Telephone Network (“PSTN”) with Bitstream to combined geographic number portability and full unbundled local path including full unbundled local metallic path (“GLUMP”);
3. PSTN with Bitstream to full unbundled local path including full unbundled local metallic path (“ULMP”);
4. Single Billing – Wholesale Line Rental (“SB-WLR”) with Bitstream to GLUMP or to ULMP;
5. SB-WLR with Line Share to GLUMP or ULMP;
6. SB-WLR to GLUMP or ULMP;
7. Return paths to wholesale operators or Eircom for all of the above.

Consultation Question

Q. 1. Do you agree or disagree with what is classified as Intra Migration? Please explain your response in detail.

Views of Respondents

3.18 All respondents agree with the classification as outlined in Consultation Document No. 08/105 but some respondents added some suggested amendments and Eircom stated in what instances it would charge the IMP.

3.19 **Eircom** agrees with the definitions and notes that it considers that an IMP is chargeable in respect of the first six of these items. Eircom proposes not to charge for IMP in the fifth & sixth instance, that is, SB-WLR with Line Share to GLUMP or ULMP and SB-WLR to GLUMP or ULMP. Eircom considers that the seventh instance, that is, return paths to wholesale operators or Eircom for all of the above, would not imply the OAOs charging Eircom a reciprocal migration fee, since this decision can also be considered as an option held by the OAOs to migrate back from LLU to Bitstream services.

3.20 **Smart Telecom** agrees with the definitions but suggested that scope for further definition should be left open as new products and services come to market.

3.21 **BT** agrees with the definitions but noted that a scenario is missing which is: OAO with Bitstream and non OAO with SB-WLR to ULMP/GLUMP (an Inter Migration).

3.22 **Vodafone** and **Magnet** agree with the definitions.

ComReg's Position and Conclusion

- 3.23 As all respondents' agreed, ComReg's position as to what is classified as Intra Migration remains the same.
- 3.24 Eircom in its response to this question pointed out that in some instances that are classified as an Intra Migration, Eircom would not charge an IMP. Eircom noted that it would not charge in the fifth and sixth instance, but did not explain why this is so. ComReg considers it must be on the basis that Eircom is of the view that no Bitstream assets are stranded as a result of those migrations; therefore Eircom can offer migrations in the 5th and 6th instance at no premium regardless of ComReg's decision on this matter. In relation to the seventh instance, Eircom considers that this would not imply the OAOs charging Eircom a reciprocal migration fee. However this ceases to be an issue when the IMP charge is removed.
- 3.25 Following Smart Telecom's response that the scope of Intra Migration is left open for further definition as new products and services come to market, ComReg will keep the list of Intra Migrations under review and will intervene, if required, if new products and services come to market that should be considered in the list of migrations that are classified as "Intra".
- 3.26 In relation to BT's comment on the missing scenario, ComReg notes that Inter Migration is outside the scope of this consultation, as Inter Migration is migration between operators (e.g., BT to Smart). The pricing for Inter Migrations will be examined on a case by case basis, where a competition complaint is raised, for example, a complaint that the price of the Inter Migration acts as a switching barrier and could therefore potentially distort competitive.

Conclusion: ComReg has concluded that what is classified as Intra Migration is as follows:

- (a) Bitstream to Line Share;
- (b) PSTN with Bitstream to GLUMP;
- (c) PSTN with Bitstream to ULMP;
- (d) SB-WLR with Bitstream to GLUMP or to ULMP;
- (e) SB-WLR with Line Share to GLUMP or ULMP;
- (f) SB-WLR to GLUMP or ULMP;
- (g) Return paths to wholesale operators or Eircom for all of the above.

ComReg will keep the list of intra migrations under review and will intervene, if required, if new products and services come to market that should be considered in the list of migrations that are classified as "Intra".

Should the premium for Intra Migration be reviewed?

- 3.27 The current IMP charge applied by Eircom is €47 and was set in May 2007 with the process launched in September 2007.

3.28 The purpose of Consultation Document No. 08/105 was to set out ComReg’s preliminary views on the justification and appropriateness of the current IMP charge following a detailed review of the rationale of the Eircom approach. The consultation proposed to remove the IMP charge. The breakdown of the existing and proposed pricing is as per the table below:

Table 1: Detail of existing and proposed connection charge

	Existing LLU Connection Charge - €	Proposed LLU Connection Charge - €
Standard ULMP Connection Fee ²⁶	45.00	45.00
GLUMP Surcharge Connection Fee ²⁷	3.50	3.50
Total GLUMP Connection Fee	48.50	48.50
IMP Charge	47.00	0.00
Total GLUMP and IMP Charge	95.50	48.50

3.29 All other forms of migration to LLU will continue to attract standard Line Share, ULMP and GLUMP charges only.

3.30 ComReg asked respondents whether the premium for Intra Migration should be reviewed.

Consultation Question

Q.2. Do you agree or disagree that the premium for Intra Migration should be reviewed? Please explain your response in detail.

Views of Respondents

3.31 All respondents agree that the IMP should be reviewed.

3.32 **Eircom** agrees it is appropriate to have a periodic review of the level of the price for Intra Migration because the level of some parameters in the proposed put option formula may change over time.

3.33 All the other respondents (**Smart, Vodafone, Magnet, BT**) agree a review should be carried out now.

3.34 In addition, **Vodafone** believes that the current IMP is unjustified and is acting as a significant artificial obstacle to OAOs enhancing their service offerings to existing customers on the basis of LLU wholesale inputs (ULMP and Line Share) to the detriment of competition. **Magnet** also believes that the current IMP is acting as a

²⁶ As per Access Reference Offer price list, this is subject to a 5% discount when 50,000 orders are achieved and a further 5% discount when 100,000 orders are achieved.

²⁷ GLUMP is a combined LLU and GNP product which enables retail customers to keep their existing telephone number when they move to an OAO that will provide their retail service by LLU.

barrier to moving customers up the broadband value chain. **BT** believes that the current IMP has no basis and could be regarded as anti competitive.

ComReg's Position and Conclusion

- 3.35 ComReg notes that all respondents agreed that the review of IMP charge should be carried out now.
- 3.36 At the time the IMP charge was introduced, ComReg was involved in discussions with Eircom to introduce the processes to facilitate migrations. ComReg Document No. 07/25²⁸ includes some detail on the outcome of these discussions with Eircom and noted that ComReg would review the charge for migrations after one year.
- 3.37 Therefore, as noted in the introduction of this document, with the approach of the one year review anniversary, in a series of correspondence with Eircom, ComReg requested submissions from Eircom to demonstrate compliance with its cost orientation obligation for the charge for migration²⁹ and has been conducting a review since Eircom responded on 26 September 2008 following ComReg's direction³⁰ of 29 August 2008 to Eircom.

Conclusion: ComReg has concluded that it was entirely appropriate to carry out the review of Eircom's IMP charge.

No option being bought by the OAO for Intra Migration at the point of Intra Migration?

- 3.38 As noted in Consultation Document No. 08/105, Eircom believes that the current IMP is justified based on the modelling of an "American Put Option". Eircom claims that this is the type of option that an access seeker avails of when choosing to migrate from Bitstream to LLU. The "American Put Option" was priced for Eircom by Indecon International Economic Consultants using the "*Black Scholes formula*", modified by an early exercise premium³¹. ComReg's preliminary views on this were expressed in Consultation Document No. 08/105.
- 3.39 As noted in Consultation Document No. 08/105, ComReg was of the preliminary opinion that no option is being bought by the OAO at the time of Intra Operator Migration, when for example, an OAO migrates from Bitstream to LLU. At the point of migration, an OAO may be exercising an option, but this is an option that it has *already* been granted when it took the Bitstream service from Eircom.
- 3.40 Consultation Document No. 08/105 requested the views of industry on this issue.

²⁸ 'Status Update on Local Loop Unbundling – Issue 8' dated 3 May 2007.

²⁹ Letters dated 24 January 2008, 19 March 2008, 7 May 2008.

³⁰ Pursuant to 14(4) of the Access Regulations.

³¹ See non-confidential version of the submission at ComReg Document No. 08/105a.

Consultation Question

Q.3. Do you agree or disagree with ComReg's preliminary opinion that there is no option being bought by the OAO for Intra Migration? Please explain your response in detail.

Views of Respondents

- 3.41 All respondents except Eircom agree with ComReg's preliminary opinion that there is no option being bought by the OAO for Intra Migration at the point of Intra Migration.
- 3.42 **Eircom** does not accept ComReg's preliminary opinion. Eircom maintains that the option is granted when the OAO takes the Bitstream service and that option could be paid for when granted or when exercised; Eircom charges for the option when exercised. Eircom contends that the IMP charge is justified by an American Put Option as the Bitstream access seeker has the option to put the Bitstream investment back to Eircom at any time from connection of the Bitstream service. Eircom concedes that there may be an American Call Option but it would not be relevant for pricing of the IMP. Eircom considers that the possession of call and put options are not mutually exclusive and can arise from a single investment.
- 3.43 **Smart Telecom** agrees with ComReg's preliminary opinion that no "option" or "put" is being bought by the OAO for Intra Migration. Smart Telecom considers that there is no general formula for an American Put Option but a choice of models to estimate the price, and that the model chosen by Indecon for Eircom also includes a modification for an early exercise premium. It also observes that American Put Options are rarely exercised early as Smart believes that holders prefer to trade them at a point of time rather than exercise. Furthermore, Smart Telecom considers that the model makes no allowance for those OAOs who may hold a Bitstream minimum contract with Eircom and this, per Smart, makes the model immediately flawed as a sound basis for calculating the value of a regulated telecommunications product. Smart concludes that a put option to define an IMP is incorrect, irrelevant and an unrealistic justification.
- 3.44 **Vodafone** agrees with ComReg's preliminary opinion and considers that even if there was a significant put option, Eircom provides this at the point at which Bitstream is sold and the claimed put option is provided, not at the point of migration, at which point there are no option costs to Eircom.
- 3.45 **Magnet** agrees with ComReg's preliminary opinion. It is of the opinion that when an OAO signs an agreement to unbundle an exchange, it obtains a call option which allows an OAO, once it wishes to do so, to call on Eircom to sell the LLU product to them. In the meantime, whilst the OAO is utilising Eircom's Bitstream, Eircom has the benefit of the premium of that call option. Thus the option is bought when purchasing the agreement to unbundle the exchange and not at the point of migration, which is when the OAO exercises the option it has already purchased.
- 3.46 **BT** agrees with ComReg's preliminary opinion that no option is being bought by the OAO for Intra Migration and ComReg's analysis supporting that conclusion. BT considers that the analysis presented by ComReg shows that the OAO freely enters into a contract with Eircom for Bitstream access which can be terminated at any point in time. BT notes that an option to terminate the contract at any point in time

is normally described in the academic literature as a put option. BT notes that the flexibility in a lease contract that can be terminated by the lessee is normally priced into the per period price paid (the Bitstream price in this case). BT considers that in a competitive market, the Bitstream price that reflects this would be that which is expected to recover the value of the original investment – thus the higher the price the lower the expected utilisation rate. BT therefore agrees with ComReg in its assessment that there should be no positive migration charge and that if a positive migration fee was levied; this necessarily entails a lower price for Bitstream access. BT believes that such a pricing combination increases the incentive for undue delay in LLU migrations. BT believes this is because OAOs gain (call) option value from ‘waiting to invest’. BT believes that since there is already some incentive for them to delay LLU migration a positive migration charge will exacerbate this tendency.

ComReg’s Position and Conclusion

- 3.47 Having considered the matter further and pursuant to the responses received, ComReg is of the view that there is no option of any practical significance being bought by an OAO for Intra Migration at the point of Intra Migration. The preliminary view expressed in Consultation Document No. 08/105 was that there was no option being bought by an OAO for Intra Migration at the point of Intra Operator Migration³². ComReg has now slightly extended this preliminary view by adding the text ‘of any practical significance’ as ComReg recognises that, at the point of migration, an OAO gains other options, such as that to switch back from an LLU-based wholesale service to a Bitstream service. However, such an option is unlikely to be exercised and in any case would not require Eircom to make any significant new investment if any at all. It follows that any such options gained as a result of migration are immaterial to the decision being made in relation to the IMP charge. This revised understanding does not fundamentally change the reasoning and preliminary opinion of ComReg as expressed in Consultation Document No. 08/105.
- 3.48 Since all respondents but Eircom agree with ComReg’s preliminary opinion, in the remainder of this section ComReg sets out its reasons why it disagrees with Eircom’s position.
- 3.49 In its reply to Consultation Document No. 08/105, Eircom reiterates the argument that the OAOs are granted an American Put Option and suggests that possession of a put and call option are not mutually exclusive and can arise from a single investment.
- 3.50 ComReg, from a theoretical point of view, agrees with Eircom on this point; a put and a call option can indeed co-exist and in fact in financial markets, these are often bought together in order to artificially construct sophisticated financial instruments aimed at serving different risk-management purposes.
- 3.51 Regardless of whether the option is formulated as a put or call, or a combination of the two, charging a premium at the point of exercise (i.e. as an IMP charge) is inappropriate and risks distorting economic decisions. In the current situation, OAOs are offered the ability to exit an agreement with Eircom (for the provision of Bitstream services) at a price, i.e. the IMP charge. Currently OAOs’ decisions about

³² See, for example, page 2 of Consultation Document No. 08/105.

abandoning Bitstream to offer LLU-based services is affected by this IMP charge, in addition to the direct investment costs, the call option value (the wait-and-see opportunity), and the expected Net Present Value ('NPV') of future cash flow generated by the alternative investment as already explained in Consultation Document No. 08/105.

- 3.52 Having considered the matter further, ComReg believes that the implicit option granted when the OAO takes the Bitstream service can be best described as a Switching Option³³, in that the OAO has an option to stop taking its current service and to start taking a different service from Eircom. ComReg considers that this Switching Option is a combination of a put option and a call option enjoyed by the OAO, but only in the sense that the OAO has a right to cancel its Bitstream service³⁴ and at the same time takes a different service.
- 3.53 ComReg believes that such a Switching Option is granted implicitly when the OAO takes the Bitstream service. It is *exercised* at the point of Intra Migration. Moreover, the Switching Option is not the only option granted to the OAO when the service is taken; an OAO is also granted a Cancellation Option as part of its Bitstream service, in that it could stop taking a service from Eircom altogether (subject to contractual limitations), rather than migrating to a different service.
- 3.54 ComReg disagrees with Eircom that the costs of providing this Switching Option should be paid when exercised. ComReg believes both the Switching Option and Cancellation Option have *already* been paid for when granted as part of the rental price of the Bitstream service. Eircom's rental price should allow it to recover the costs of providing this Switching Option without levying any additional charges at the point of migration³⁵.
- 3.55 Eircom/Indecon criticises ComReg for discussing the option exercised by an OAO that switches from Bitstream to LLU rather than the put option to disconnect from the Bitstream service alone.³⁶ However, ComReg believes an option cannot be valued correctly unless the timing and value of exercising it are accurately assessed.
- 3.56 ComReg believes that calculating the value of the put option to abandon Bitstream on its own does not capture the timing and value of disconnecting from Bitstream for an OAO that is migrating to LLU. ComReg believes that this option must be valued in its own terms. It is more complex than the element granted by Eircom and depends on the cost to the OAO of the infrastructure investment required to make use of LLU, among other things.
- 3.57 This implicit Switching Option is granted when the OAO takes the Bitstream service and is held throughout the time the service is taken and exercised when the OAO

³³ In 08/105, ComReg considered that it may be best thought of as a call option. However this does not change ComReg's position as set out in Consultation Document No. 08/105 that this implicit option is granted at the time of taking the Bitstream service and is paid for at the time of granting the option, therefore there is no option for Intra Migration at the time of Intra Migration.

³⁴ At no charge, if it takes the Bitstream service for the minimum contract period.

³⁵ There is further discussion on this in response to Question 4 later in this document.

³⁶ See Chapter 3 of the document *Indecon Response to ComReg's Draft Determination Setting the LLU Migration Charge to Zero* prepared for Eircom by Indecon International Economic Consultants as of February 2009 at ComReg Document No 09/77s.

migrates to a different service. In the terminology of financial options, the payment from the OAO to Eircom upon exercise (i.e. on migrating) is the strike price. Depending on what the strike price is, there may be costs (in expectation) for Eircom in providing the Switching Option to OAOs. This will depend on the risks of the OAO migrating and the cost of holding assets unused until they can be redeployed. That cost to Eircom represents the option premium.

- 3.58 In financial markets, the option premium is paid up-front when the option is acquired; the option is then exercised (if at all) some time later, at which time the strike price is paid (for a call) or received (for a put). An option has value (over and above the amount that would be gained by exercising it immediately) precisely because there is uncertainty about how valuable it will be in the future and because the option does not have to be exercised, if not desired. It would make no sense to charge the option premium at the point of exercise and only to those that actually exercise it: even when the option is not taken up and lapses without being exercised, it has nonetheless provided positive expected value for its holder up until that time.
- 3.59 Once this is understood, the weaknesses in Eircom's arguments become apparent. First, the put option is granted to, and confers a value upon, any OAO that uses Bitstream and that might subsequently wish to discontinue the service, for whatever reason. Yet Eircom argues that the costs of providing this option should be levied as a migration charge (the IMP); i.e. it should be paid only by those who discontinue Bitstream in order to migrate to LLU, but not to those who discontinue for any other reason. This is inappropriate: there is no reason to charge an option premium to one group of holders and not to others, when all users benefit from this option.
- 3.60 Secondly, the option is valuable to all OAOs regardless of whether they subsequently choose to exercise it. Hence, it is appropriate that the option premium is paid by all OAOs that hold the option by using Bitstream, not only those that actually exercise it, otherwise competitive distortions will result, for example, OAOs will be hindered from investing in LLU. The current IMP charge does not achieve this. Despite Eircom recognising that the option is granted at the time of connection to the Bitstream service and that the same option is then exercised at the time of migration from Bitstream to LLU, it claims that the option could be paid for when granted, or when exercised, which latter approach Eircom adopts.
- 3.61 ComReg believes that it is inappropriate to levy the option premium at the point of exercise: the Switching Option is given up, not gained, at this point. If Eircom believes that it is charging for an option, rather than simply recouping any remaining unrecovered costs, it should levy the option premium up-front at the time the option is granted. ComReg believes that levying an IMP charge at the time of Intra Migration could only have the effect of possibly inhibiting migration to LLU with consequent serious distorting effects on platform competitive in Ireland for the provision of broadband.
- 3.62 These considerations imply that the option premium (if one is to be levied) should be paid up-front as part of the connection or on-going rental charges for Bitstream, not in the form of a migration charge such as the IMP. Such an approach would correctly apply the option premium to all OAOs that use Bitstream and might subsequently wish to disconnect, for whatever reason. It would also reflect the value of holding the option rather than it being levied only on those that exercise it.

Conclusion: ComReg concludes that there is no option (of any practical significance) being bought by an OAO for Intra Migration at the point of Intra Migration.

ComReg concludes that a ‘Switching Option’ is granted implicitly when the OAO takes the Bitstream service. It is exercised at the time of Intra Migration and should *already* have been paid for when granted as part of the rental price of the Bitstream service

ComReg concludes it is inappropriate to levy the option premium at the point of migration: the Switching Option is given up, not gained, at this point. ComReg concludes that the option is valuable to all OAOs regardless of whether they subsequently choose to exercise it. Hence it is appropriate that the option premium is paid by all OAOs that hold the option by using Bitstream, not only those that actually exercise it.

Is the appropriate mechanism for Eircom to recover such a migration option value in the current Bitstream price as set by the current Retail minus price control?

Consultation Question

Q.4. Do you agree or disagree that the appropriate mechanism for Eircom to recover such a migration option value is in the current Bitstream price as set by the current Retail minus price control? Please explain your response in detail.

Views of Respondents

- 3.63 Three respondents agreed. One respondent did not agree and another respondent did not believe there are significant costs to be recovered by migrations.
- 3.64 **Eircom** does not agree that the appropriate mechanism to recover migration option values is the Bitstream price, as the higher level of Bitstream price that this entails would, in effect, be a penalty on those OAOs who did not exercise the option. Eircom considers that even if Eircom had the possibility of setting Bitstream prices at the level to recover the value from the OAO of the option to put the Bitstream investment back to Eircom, it is unlikely that this price structure is the most efficient.
- 3.65 **Smart Telecom** agrees that the appropriate method to recover the option value is in the current Bitstream price, as both connection and disconnection charges apply to the existing LLU and Bitstream portfolio.
- 3.66 **Vodafone** does not believe that there are any significant costs to be recovered by Eircom as most of the relevant assets in which Eircom has invested are either still used in the provision of LLU or can be redeployed with other Bitstream customers or even Eircom retail customers. Vodafone considers that any migration option value is currently fully recovered by Eircom in the current Bitstream price, which Eircom currently determines given its freedom to set the retail price.
- 3.67 **Magnet** agrees that the appropriate mechanism for Eircom to recover such a migration option is through the current Bitstream price. Magnet believes that the OAO should not be penalised for moving a broadband customer up the broadband value chain.

3.68 **BT** agrees that the appropriate mechanism for Eircom to recover such a migration option value is the current Bitstream price as set by the current Retail minus price control. BT agrees with ComReg's analysis as BT believes that Eircom has in its own gift the ability to recover such a migration option value but has chosen not to do so preferring to place excessive prices on OAOs which it knows will stifle competition.

ComReg's Position and Conclusion

3.69 Based on the views of respondents and on further consideration, ComReg remains of the view that that the appropriate mechanism for Eircom to recover the costs of any migration option (ComReg considers that Eircom is providing a Switching Option) and indeed any other Cancellation Option is in the current Bitstream price as set by the current Retail minus price control. Since all respondents but Eircom agree with ComReg's preliminary opinion, in the remainder of this section, ComReg sets out its reasons why it disagrees with Eircom's position.

3.70 In its reply to Consultation Document No. 08/105, Eircom develops two arguments:

- The first one calls into play the impact of Retail minus price control in the regulation of Bitstream wholesale charges.
- The second one argues that a wholesale price structure that includes a migration charge is more efficient than one without a migration charge.

3.71 ComReg's response to each of these arguments is as below.

Point (1): The impact of Retail minus price control in the regulation of Bitstream access pricing

3.72 "Retail minus" is a form of access pricing used in the telecoms arena for the regulation of a number of wholesale products of vertically integrated companies (in the European Union usually the operator with SMP in wholesale markets).

3.73 Under this regime, the access price of the relevant SMP operator's wholesale product is set at a level which is closely interlinked with the same operator's retail price of those products lying downstream to that wholesale product. The price of the relevant SMP operator's wholesale product is obtained by marking down the SMP operator's retail price by a margin that permits recovery of an efficient amount of retail costs.

3.74 Where there is no discrimination between the SMP operator's own retail arm and alternative retailers, i.e. if both retailers are offered the same wholesale products under the same conditions (whether price or non-price), this methodology should establish a wholesale access charge consistent with the retail tariff applied by the SMP operator.

3.75 Eircom argues that as the market has grown and become more competitive retail broadband prices have fallen. Retail customers can choose between several infrastructure competitors and this has driven down Bitstream prices.

3.76 This is exactly what should happen in a Retail minus regime, as the SMP operator reduces its retail prices, the associated Bitstream prices are also reduced.

3.77 Providing flexibility may only be costly for Eircom, if assets which have been efficiently deployed become sunk, where they were required to provide the wholesale Bitstream service to a particular OAO that cannot be redeployed if the OAO cancels or switches to an unbundled loop. However, Eircom in its submission

of 26 September 2008, has stated that the assets used to provide Bitstream services can be redeployed within a reasonable period of time³⁷ and many other respondents contend that the cost to Eircom of providing for such flexibility is small. Eircom has presented no evidence to suggest that it incurs any significant efficiently incurred cost in providing this option.

- 3.78 Furthermore, any costs involved in providing this option should in any case be recovered by the current wholesale Bitstream rental charge, even without levying any premium for Intra Migration. It follows that a charge for IMP leads to the over-recovery of such efficiently incurred costs as may be incurred. One of the reasons for this is that Eircom provides an implicit cancellation option to its own retail customers that is comparable to the implicit cancellation and switching options it provides to OAOs. ComReg believes that the cost to Eircom of providing this implicit option to its retail customers is recovered through its retail Broadband rental charge on the basis that no termination charge is levied by Eircom (after the expiry of the minimum contractual period) if a retail customer terminates its service. The wholesale Bitstream charge is regulated on a Retail minus basis by subtracting retail costs from the retail price. Therefore, as a result of the Retail minus price control, the wholesale Bitstream price already includes compensation to Eircom for the cost of providing a cancellation option on the basis on a zero retail cancellation charge. To set an additional premium for Intra Migration would lead to Eircom over-recovering such costs, if any exist, as it incurs in providing this option. Eircom has presented no evidence to demonstrate that the efficiently incurred costs of providing flexibility to OAOs at the wholesale level (in terms of the Switching option) are greater than the costs of providing flexibility to its own retail customers (in terms of a Cancellation option), therefore Eircom's charge on its wholesale customers could be argued to be discriminatory as Eircom does not charge a similar premium on its retail customers.
- 3.79 Eircom argues that that this issue should be viewed from an "ex ante basis". It states that had it known that no IMP charge would be permissible then the monthly price of Bitstream would have been different and that it would have recovered the cost of stranded Bitstream assets in this way. There are a number of points here. Firstly, it was always clear to Eircom that ComReg would review the migration charge after one year so Eircom cannot argue that ComReg's current proposals could not have been foreseen. Secondly, this argument depends on the assumption that any necessary recovery of stranded assets is not and could not be reflected in the Bitstream rental charge which ComReg does not believe to be the case. In any case, in the past the volume of LLU has been so low as to make the process and cost of migration an immaterial issue. Looking forward, and facing the prospect of increased volumes of migration ComReg has formed the view that no migration charge should be recoverable, principally because it is satisfied that there is no real constraint on Eircom recovering its efficiently incurred costs at the retail and wholesale levels. Thirdly, if there is a material move to migrate as a result of this decision which gives rise to excess DSL capacity, in many respects this would be a consequence of the existing IMP charge itself, and the lengthy delays and litigation that have been an unwelcome feature of LLU in Ireland. Finally, if Eircom finds at any point in the future that the costs of providing flexibility to its customers change (for whatever

³⁷ See 08/105a (p.11) – the actual months to redeploy was redacted as confidential by Eircom.

reason) it has the option of changing the retail price of its retail Broadband services to cover such costs and under the current Retail minus price control regime, this cost may also be reflected in the underlying Bitstream price where it is not considered to be a retail cost.

- 3.80 The table below demonstrates that Eircom has set the minimum terms and connection/disconnection charges at similar levels for its wholesale and retail customers without providing for any corresponding version of the migration premium for its retail customers.

Table 2: Detail of charges for Eircom’s retail and wholesale customers

	Eircom retail customer	Eircom wholesale customers (OAOs)
Connection charge	€24.68	€30 per port
Minimum contract period	6 months	6 months
Cancellation Charge	€0 (may be charges if do not meet minimum contract term)	€60 (when without minimum term)
Migration Premium	€0	€47

- 3.81 ComReg also notes that for many Bitstream products, Eircom has chosen, of its own volition, to set the Bitstream price below the maximum Bitstream price set under the WBA Retail minus price control (ComReg Decision D01/06³⁸). Eircom can therefore raise its Bitstream prices to the maximum under the current WBA price control, which action would not result in an increase in the related retail prices for broadband. Again, it is worth remembering that ComReg only sets the Retail minus, the maximum Bitstream price is determined by Eircom itself by applying the Retail minus to the prices of Eircom’s own retail broadband products. ComReg notes that the WBA Retail minus price control is currently under annual review in accordance with ComReg Decision D01/06 to ensure that the ‘minus’ remains appropriate, therefore the maximum Bitstream monthly prices as set out in the table below may change following this year’s annual review.

Table 3: Detail of maximum Bitstream price allowed under D01/06 and actual prices charged by Eircom (as at 1 October 2009)

	Maximum Bitstream monthly price per D01/06 price control	Monthly Bistream price charged by Eircom	Monthly Reduction made by Eircom beyond price control
Connect	9.48	9.48	0.00
Expand IP	11.55	11.55	0.00
Swift IP	18.41	16.95	1.46
Arrow IP	36.76	34.50	2.26
Sprint IP & Turbo Plus IP	39.80	38.50	1.30

³⁸ ‘Retail minus wholesale price control for the WBA market’ dated 13 January 2006.

3.82 In summary, ComReg believes that the first of Eircom's arguments in response to Question 4, i.e. questioning the impact of the Retail minus regime and its consequences on wholesale cost recovery, does not demonstrate the need to recover additional revenue from OAOs that migrate to LLU to recover efficient costs incurred in relation to Bitstream.

Point (2): the most efficient wholesale price structure

3.83 A number of considerations arise in relation to the second argument that a wholesale price structure that includes a migration premium is more efficient than one without a migration premium.

3.84 In its response to Consultation Document No. 08/105, Eircom notes that even if they had the possibility of setting Bitstream prices at the level to recover the cost due to the OAO of the option to put the Bitstream investment back to Eircom, it is unlikely that this price structure is the most efficient. Eircom believes that the higher level of Bitstream price that this would entail would, in effect, be a penalty on those OAOs who did not exercise the option. However, ComReg notes that OAOs that exit from the use of Bitstream without moving to LLU are not charged the IMP; this could be the case where the retail customer of the OAO decides to cancel their service or where the OAO decides to move their customer to an alternative platform. Eircom also believes that the IMP charge, which allowed for a lower monthly Bitstream rental charge, is optimal, as it allowed OAOs a lower possible Bitstream rental charge, given the uncertainty of when or whether they would later migrate. Eircom believes that the notion that a migration charge reduces OAOs' incentive to migrate is not evidence of the optimal structure of charges, but that OAOs always prefer lower charges/prices. Therefore, Eircom concludes that the IMP charge allows for a lower monthly Bitstream rental charge.

3.85 As noted by ComReg in its response to consultation question 3, ComReg believes that it is efficient and correct for the option premium to be paid as part of the Bitstream rental charge, because this is when the option is gained, and not as a charge for migration, which is when the option is exercised. If there is a cost of providing the option (as Eircom claims) then this payment should be made when the option is taken out and not at the time it is exercised. Furthermore, ComReg believes that Eircom's retail price for Bitstream already allows for the potential recovery of the cost of providing a cancellation option (subject to competition) and, through the mechanism of Retail minus regulation, the wholesale price includes an implicit option premium even without levying any additional IMP charge. ComReg believes that the IMP charge discourages migration to LLU which is not in the interests of promoting competition and risks distorting competition. ComReg believe that the IMP charge is clearly a penalty on those OAOs who migrate their customers to LLU from Bitstream and ComReg believes the IMP charge is unjustified and should therefore be removed. Also as set out in this document, ComReg's position is consistent with its statutory and regulatory objectives.

3.86 In relation to the Retail minus price structure of Bitstream, ComReg notes that with Retail minus regulation, if OAOs feel that, despite the fact that they are put in a position to compete with the retail arm of the incumbent operator, the Bitstream charge they are paying is above an efficient level of wholesale costs, they will try and switch to other wholesale platforms, either through direct investment or through

the purchase of other wholesale products sold by Eircom such as LLU or Line Share. In addition, they may also switch to LLU in order to gain competitive advantage by means of a strategy of product differentiation instead of simply replicating Eircom's own product range which is a feature of Bitstream as the Bitstream product is currently paired with an Eircom retail product. As noted already, ComReg believes that the imposition of an IMP charge, which constitutes an additional switching cost to LLU, effectively hampers this possibility of switching to LLU and therefore impedes competition. Furthermore, ComReg believes that with a strong threat from OAOs utilising LLU infrastructure to offer better and possibly cheaper retail broadband products³⁹, Eircom wishing to keep traffic on its wholesale network may decide to keep the Bitstream prices low and even below the maximum prices set by the Retail minus price control for Bitstream. ComReg believes that this can result in Bitstream prices that are too low relative to the prices of LLU products, thereby creating anti competitive distortions between the relative prices of Bitstream and LLU. ComReg believes that this distortion is contrary to the promotion of platform competition and the promotion of a more competitive market, at a wholesale and retail level. Therefore, ComReg believes that the imposition of the IMP charge hinders OAOs switching to LLU and ComReg believes that low Bitstream prices relative to the price of LLU/Line Share could be having the same anti-competitive effect.

Conclusion: ComReg concludes that the appropriate mechanism for Eircom to recover the efficient costs of any migration option, if any exist, and indeed any other Cancellation Option is in the current Bitstream rental charges as set by the current Retail minus price control. ComReg concludes that it is efficient and correct for the option premium, if any, to be paid as part of the Bitstream rental charge, because this is when the option is gained, and not as a charge for migration, which is when the option is exercised.

Should possible stranded Bitstream assets following a migration be considered in any new Bitstream price control?

Consultation Question

Q.5. Do you believe any issue associated with stranded Bitstream assets following a migration from Bitstream should be dealt with under a review of Bitstream pricing planned for 2009 where a cost plus regime will be considered?

Views of Respondents

3.87 All respondents agree.

3.88 **Eircom** agrees that the issue of stranded assets should certainly be addressed in the cost modelling that will inform Bitstream price setting. Eircom proposes that it is more reflective of the cost causation principle for wholesale price setting that only those OAOs exercising the migration option are charged the cost of that option. Eircom states that there is also no reason why the move from Retail minus to cost

³⁹ Bitstream products are paired with Eircom's retail products thereby limiting OAO's ability to offer differentiated retail Broadband products at possibly lower prices.

based pricing for Bitstream services should lead to a change in the price structure. In particular, Eircom argues that there is no reason why such a move should lead to the removal of the IMP charge.

- 3.89 **Smart Telecom** agrees that the most appropriate and accurate way to reflect the cost of such a scenario arising, if indeed it arises at all, is in the review of Bitstream pricing.
- 3.90 **Vodafone** agrees that it is appropriate to consider the issue of any stranded Bitstream assets in the context of the planned review of Bitstream pricing.
- 3.91 **Magnet** agrees that any issue should be addressed in a further consultation, in which each party can present its view as to how to utilise the assets.
- 3.92 **BT** agrees that any issue associated with stranded Bitstream assets should be dealt with in the planned review of Bitstream pricing. BT notes that there appears at present more likely to be market 'excess demand' for Bitstream access. Therefore, BT believes that it seems unlikely that there is any significant risk of Bitstream stranding at present or in the near to medium term future. BT believes that the data available suggests that Eircom faces growing demand for the Bitstream service and that any migration to LLU can be 'backfilled' by new customers taking up their Bitstream service. BT believes that this means the allowance required in the Bitstream price to compensate for the possibility of future falls in utilisation rates (falls in demand for the service) are likely to be relatively small.

ComReg's Position and Conclusion

- 3.93 ComReg welcomes respondents' agreement that any issue associated with possible stranded Bitstream assets, following a migration from Bitstream, should be dealt with under a review of Bitstream pricing planned for 2009-2010 where a 'cost plus' regime will be considered.
- 3.94 ComReg's position is that no such issue with possible stranded assets arises under the current Retail minus price control for WBA for the reasons set out in ComReg's position to question 4 above (current Bitstream prices already include an implicit cancellation option that covers any cost due to possible stranded Bitstream assets).
- 3.95 However, if there is a revised price control methodology for WBA, ComReg is of the view that any possible issue associated with stranded Bitstream assets will then be considered. If there is a revised price control methodology for WBA, ComReg wishes to note that any consideration of the efficiently incurred costs of Eircom providing flexibility and accommodating churn in either wholesale or retail market should not lead to an implicit compensation to Eircom for loss of market share where such a loss arises from Eircom's historic position of incumbency. ComReg also notes that any issue associated with stranded Bitstream assets may not be due to migrations but to Eircom's own incorrect retail forecasts (among other issues that can arise during a cost review) or OAOs currently using bitstream and deciding to move to other platforms other than LLU. Also, based on Eircom's submission to justify the current IMP charge, it is likely that any possible stranded Bitstream assets can be redeployed in a relatively short timeframe. Finally, ComReg notes that, following the information requests issued to OAOs in February 2009 a consultation on the appropriate price control for Bitstream will issue in due course which will seek industry's views as to whether the Bitstream price control should remain a

Retail minus or should be a 'cost plus'. However, it is not expected that such a review will be completed for some time.

Conclusion: ComReg concludes that if there is a requirement for a revised price control methodology for WBA, that any possible issue associated with stranded Bitstream assets and efficient cost recovery will be considered then.

Does the current IMP charge have an associated negative impact on OAO investment in retail broadband?

Consultation Question

Q.6. Do you agree or disagree that if the current IMP were to continue for Intra Migrations (for example from Bitstream to LLU), that this could have a negative impact on investment by OAOs in retail broadband over the medium to long term?

Views of Respondents

3.96 Four respondents agree, one respondent did not.

3.97 **Eircom** disagrees that the current IMP will have a negative impact on investment in retail broadband. Eircom stated that OAOs invest in retail broadband in three ways (1) Bitstream (2) LLU (3) Bitstream to LLU. Eircom claims that the first two approaches are encouraged by the current IMP. Eircom considers that evidence to date suggests that OAOs seek to avail of lower Bitstream prices set without any mechanism to recover the option cost of a subsequent migration – and then to migrate these services to LLU when ComReg has removed the IMP. Eircom considers that the current ComReg proposal on Line Share pricing makes this OAO strategy all the more compelling⁴⁰.

3.98 **Smart Telecom** agrees that if the current IMP were to continue that it would adversely affect investment by OAOs in retail broadband over the medium to long term. Smart believes that the current IMP is a complete disincentive for OAOs to invest in infrastructure even where they may have an existing customer base placed lower on the ladder of investment.

3.99 **Vodafone** agrees that if the current IMP were to continue, it would adversely affect investment by OAOs in retail broadband over the medium to long term. Vodafone believes that the current IMP materially reduces the business case for investment in LLU over the medium to long term.

3.100 **Magnet** agrees that if the current IMP were to continue, it would not upgrade its Bitstream customers to either Line Share or LLU. Magnet notes that it has Bitstream customers within its LLU footprint but due to the IMP, these customers will not be migrated, as it currently does not make economic sense to migrate them.

3.101 **BT** agrees that should the current premium continue, it would have a negative impact on BT's investment. BT believes that as a matter of logic, the higher the IMP, the lower the likely level of investment in LLU by OAOs. BT analysis suggests that any positive migration charge is likely to have adverse long term welfare effects.

⁴⁰ ComReg's Decision on Line Share is set out in ComReg Document No. 09/66, Decision No. D04/09. Eircom appealed this Decision on 14 September 2009.

Therefore BT considers that it seems clearly preferable to recover the value of Bitstream assets through setting an appropriate Bitstream price that reflects expected utilisation rate over time.

ComReg's Position and Conclusion

- 3.102 Based on the views of respondents, ComReg is of the view that if the current IMP charge were to continue for Intra Migrations (for example, from Bitstream to LLU), then this could have a negative impact on investment by OAOs in retail broadband over the medium to long term and, as a result, adverse effects on the long-run development of infrastructure-based competition.
- 3.103 Since all respondents but Eircom seem to agree with ComReg's preliminary opinion, in the remainder of this section, ComReg sets out its reasons why it disagrees with Eircom's position.
- 3.104 Eircom's argument rests on the assumption that a tariff structure with a migration charge would imply a lower Bitstream rental charge with respect to a tariff structure with no migration charge.
- 3.105 ComReg does not dispute that there is a potential link between any migration charge and the option premium, i.e. the expected cost to Eircom of providing the migration option. Clearly, if expected profits are to be unchanged and the migration charge is lower, the option premium will be higher, other things being equal. However, as already stated previously, there is currently no equivalent of the migration charge (or any cancellation fee) in retail prices. Therefore, Eircom presumably funds the provision of a cancellation option to its retail customers, absent of any additional charge at the point of cancellation⁴¹, through its on-going rental charge. Through the retail-minus regulatory mechanism, any provision made by Eircom for providing such an option is also present in the wholesale price even if OAOs pay no migration charges because no allowance is made in the retail-minus calculation for the provision of the cancellation option to its retail customers. Eircom will over-recover its costs if it charges both a migration charge and at the same time is able to set a wholesale rental fee which can recover the cost of providing a cancellation or switching option, even if no migration or cancellation charges whatsoever are incurred.
- 3.106 The over-recovery of Eircom's costs through higher overall charges for OAOs is inefficient. Moreover, the mechanism of over-recovery specifically penalises OAOs making investments to support unbundled services and so clearly impedes competition.
- 3.107 It is also clear from recent announcements from OAOs, such as BT and Vodafone, that inappropriate regulatory pricing can act as a clear barrier to investment and that

⁴¹ Subject to minimum contract term of six months.

the recent draft decisions by ComReg in relation to LLU prices⁴² have gone some way to give an assurance to industry that costs are appropriate, cost orientated and do not act as a disincentive to investment. In a ‘Silicon Republic’ article on the 23 July 2009, BT (Mr Clark) and Vodafone (Mr Butterworth) stated:

*“In the past year, the Commission for Communications Regulation (ComReg) has moved to reduce LLU access prices and, according to Clarke, this was the spark that allowed Vodafone and BT to pool their resources ... According to Butterworth: Now we have a regulator that is actively engaged in looking at wholesale pricing. The prices have been too high to date, but now we are on a progressive path and look forward to further developments”*⁴³

3.108 It is clear therefore, that the recent BT/Vodafone announcement to invest in LLU is predicated somewhat on ComReg’s decisions in relation to LLU pricing.

Conclusion: ComReg concludes that if the current IMP charge were to continue for Intra Migrations, then this could have a negative impact on investment by OAOs in retail broadband over the medium to long term and would result in adverse effects on the long-run development of infrastructure-based competition.

Is an IMP charge contrary to ComReg’s statutory objectives?

Consultation Question

Q.7. Do you agree or disagree that an Intra Migration Premium is contrary to the principles set out in paragraph 2.2?

Views of Respondents

3.109 Four respondents agree that the IMP is contrary to ComReg’s statutory objectives under section 12 of the Communications Regulation Act, 2002 as amended and as set out in paragraph 2.2 of Consultation Document No. 08/105. One respondent did not.

3.110 **Eircom** disagrees that IMP is contrary to the principles set out in paragraph 2.2:

(1) Promote competition

3.111 Eircom considers that an IMP is the most efficient way to recover the cost put to Eircom. Eircom argues that the alternative is to set Bitstream prices to recover this cost, which would therefore be charged to all Bitstream access seekers, regardless of their intention to migrate subsequently. Eircom claims that such a higher Bitstream

⁴² In Consultation Document No. 09/39, ComReg has proposed that the LLU monthly rental charge should be set at €12.18 and the Sub Loop (‘SLU’) monthly rental charge should be set at €9.79 – a final decision in relation to these is expected in October 2009. In ComReg Decision D04/09 (Document No. 09/66: Response to Consultation Document No.08/105), ComReg has decided that the LLU Line Share monthly rental charge should be set at €0.77, on 14 September 2009 Eircom appealed this decision. With this response to Consultation Document No. 08/105 and decision, ComReg is removing the IMP charge.

⁴³ <http://www.siliconrepublic.com/news/article/13479/comms/bt-and-vodafone-ceos-plan-a-broadband-network-of-scale>

price would depress the level of inter-platform competition between Eircom's asymmetric digital subscriber line ("ADSL") and cable, wireless and satellite.

(2) Promote the interests of users across Ireland

3.112 Eircom considers that the reduction of broadband and Bitstream prices has driven increased retail and wholesale demand for services delivered over the Eircom ADSL platform. This in turn has allowed Eircom to maintain public switched telephone network ("PSTN") access paths – both wholesale and retail – below the level of the price controls applied in the narrowband access markets. Accordingly the existing structure of Bitstream prices has benefited users across Ireland.

(3) Ensure no distortion or restriction of competition

3.113 Eircom considers that a decision that does not allow it to recover the cost of the option exercised by an OAO to put the Bitstream investment back to Eircom is incorrect, since in the absence of a mechanism to raise Bitstream prices, it cannot recover this cost through rental revenues. Eircom considers that a decision to recover the costs of the put option from Bitstream rentals would also distort competition as it would require all Bitstream access seekers to contribute to the costs of the option that would only be exercised by those actually implementing a migration strategy.

(4) Encourage efficient investment

3.114 Eircom considers that the current structure characterised by lower Bitstream prices and the IMP sends the correct economic signals to the OAO when considering an LLU investment. A higher Bitstream rental and no migration charge would simply have the effect of distorting the LLU investment decision for the OAO, thereby encouraging inefficient entry. It would also have the effect of stranding Eircom DSL assets, leading to less efficiency in both the Eircom and OAO platforms.

(5) Encourage access to the Internet at reasonable cost to end-users

3.115 Eircom considers that lower Bitstream prices as a result of the IMP lead to lower costs for high speed Internet access services to end-users.

3.116 **Smart Telecom** strongly agrees the current IMP is contrary to the principles set out in paragraph 2.2 of Consultation Document No. 08/105 as the current IMP:

- (1) Limits competition;
- (2) Hinders the interests of users in the community;
- (3) Ensures that competition is distorted and restricted;
- (4) Is a disincentive to investment; and
- (5) Forces higher costs on operators that are passed on to end-users.

3.117 **Vodafone** agrees that the IMP is contrary to the principles set out in paragraph 2.2 of Consultation Document No. 08/105. Vodafone considers that an IMP set to reflect any incremental costs incurred by Eircom, that are triggered by facilitating IMP requests and that are not already recovered in other charges, would be consistent with the principles of cost causation and would not be contrary to the principles set out in paragraph 2.2.

3.118 **Magnet** strongly agrees that the IMP is contrary to the objectives set out in paragraph 2.2 of Consultation Document No. 08/105 for the following reasons:

- (1) The IMP prevents competition in the generic broadband marketplace. It ensures that OAOs purchase Eircom's Bitstream product rather than innovating within the LLU sphere.
- (2) The IMP makes it unattractive and difficult for OAOs to migrate their customers, thus preventing end-users from receiving the benefit of higher uncontended broadband speeds.
- (3) The IMP restricts investment, thus making unbundling economically inefficient. Hindering investment ensures that competition is restricted and distorted, thereby leaving the end user with no real choice.
- (4) The IMP fetters competition and hinders effective investment.
- (5) The IMP further inhibits an OAO from migrating customers and makes unbundling unattractive as it is a cost borne by the OAO and invariably passed onto the end user, thereby raising broadband prices.

3.119 **BT** agrees. In its opinion the IMP is an excessive premium levied by an incumbent that prevents investment in infrastructure and denies consumer choice, thereby constituting a distortion and a restriction of competition.

ComReg's Position and Conclusion

3.120 Having considered the views of respondents, ComReg is of the view that an IMP is contrary to the principles set out in paragraph 2.2 of Consultation Document No. 08/105.

3.121 Since all respondents but Eircom seem to agree with ComReg's preliminary opinion, in the remainder of this section ComReg sets out its reasons why it disagrees with Eircom's position.

3.122 The reasons why the IMP charge should be removed are consistent with ComReg's statutory objectives under section 12 of the Act (as noted by ComReg in paragraph 2.2 of Consultation Document No. 08/105).

(1) Promote competition:

Removing the IMP charge promotes competition as there is no premium to be paid by OAOs to move from Eircom's WBA product (Bitstream), that is paired with Eircom's retail broadband products and therefore the characteristic of the Bitstream product are set by Eircom, to infrastructure based competition through Eircom's local loop product(s) (LLU). Eircom's competitive position is also maintained as ComReg believes that any costs associated with providing migration are already covered in Eircom's other wholesale charges (i.e. LLU charges as per Eircom's Access Reference Offer price list, ComReg believes that the cost, if any, of the implicit option is already in Eircom's Bitstream price). Removing the IMP charge removes a barrier for OAOs to build their own LLU infrastructure and means that build or buy decisions are not affected by this switching barrier. Therefore, competition is promoted as OAOs, who have significant capital to spend, can decide whether they want to compete based on Eircom's WBA product (Bitstream) or based on infrastructure based competition (LLU).

(2) Promote the interests of users within the community:

OAOs claim that the current IMP charge is making it difficult and unattractive for OAOs to migrate their customers from Eircom's Bitstream products to Eircom's LLU products. OAOs also claim that this barrier hinders the interests of users within the community. Accepting these claims, ComReg believes that removing this barrier by removing the IMP charge will promote the interests of users within the community. ComReg does not believe that removing the IMP charge should increase the current Bitstream prices and that therefore the interests of Bitstream users are protected.

(3) Ensure that there is no distortion or restriction of competition:

Based on the claims of OAOs, ComReg believes that the current IMP charge restricts OAOs from competing, based on infrastructure based competition (LLU), as the customer payback and up-front cost of migrating customers is quite significant. OAOs have claimed that the IMP charge is unjustified, excessive and deters migration between Eircom's wholesale access products where there is no change in the customer/operator broadband relationship. OAOs claim that the current IMP charge therefore acts as a significant obstacle to OAOs enhancing their service offering to their existing customers on the basis of LLU wholesale inputs, to the detriment of competition. ComReg therefore believes that removing the IMP charge will ensure there is no distortion or restriction of competition.

(4) Encouraging efficient investment in infrastructure and promoting competition:

The current IMP charge has been a consistent complaint from OAOs in LLU related consultations over the past year. ComReg believes that the current IMP charge impedes OAOs investing significant capital in their own infrastructure and then switching to LLU products and moving up the ladder of investment to provide independence from the dominant operator. ComReg thus believes that removing the IMP charge will encourage efficient investment in infrastructure and will promote competition. As a result, ComReg believes that this investment in infrastructure will allow OAOs to offer product and price differentiation to consumers as OAOs will not be using Eircom's WBA product (Bitstream) which is paired with an Eircom retail broadband product.

(5) Encouraging access to the internet at a reasonable cost to end-users:

ComReg believes that the current IMP charge forces higher costs on OAOs that may force OAOs to pass these costs onto end-users through higher retail charges to allow a reasonable return on their investment. ComReg does not believe that removing the IMP charge will require Eircom to raise its Bitstream prices and therefore, end-users should not see an increased cost of the broadband provided by Bitstream. ComReg therefore believes that removing the IMP charge will encourage access to the internet at a reasonable cost to end-users. Increased competition through the successful take up of LLU will increase access speeds, quality and price to end-users.

Conclusion: ComReg concludes that the IMP charge is contrary to ComReg's statutory objectives under section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007.

What IMP charge is appropriate and when should this premium be paid?

Consultation Question

Q.8. If you believe a premium should be charged for Intra Migration (for example from Bitstream to LLU), what premium would you believe is appropriate and when should this premium be paid by OAOs?

Views of Respondents

- 3.123 **Eircom** is of the view that the original Indecon report submitted by Eircom and published by ComReg as Document No. 08/105a sets out a considered view of the calculation for the appropriate level of premium. Eircom considers that paying at the time of migration is the most sensible option for maintaining Bitstream rental prices, and allowing uncertainty in the market to reveal the best timing of payment for the OAO, as the market develops.
- 3.124 **Smart Telecom** believes that this premium should not be charged. In some instances, where it is known that a line already supports broadband, the connection charge for LLU or Bitstream should be lower as it is almost guaranteed that no additional engineering time will be needed for initial fault finding or complications that may arise.
- 3.125 **Vodafone** considers that an IMP set to reflect any incremental costs incurred by Eircom that is triggered by facilitating IMP requests, and that is not already recovered in other charges, would be consistent with the principles of cost causation.
- 3.126 **Magnet** believes that LLU operators are already penalised when unbundling an exchange. Costs to unbundle include backhaul and licence cost, Eircom project manager, cost of fault repairs, line rental etc. Therefore they believe that no IMP should apply as this already exists within the licence fee.
- 3.127 **BT** does not believe a premium should be charged and that it should be set to zero.

ComReg's Position and Conclusion

- 3.128 Having considered the views of respondents, ComReg's opinion as expressed in the Consultation Document No.08/105, remains unaltered: namely that no premium should be charged for Intra Migration at the point of Intra Migration. All respondents, except Eircom, seem to agree with ComReg's preliminary opinion. ComReg has already set out why it does not believe that Eircom's/Indecon's view of the IMP charge is appropriate in its reply to questions 3 and 4.
- 3.129 In relation to Vodafone's comment, ComReg considers that any incremental costs associated with the facilitation of Intra Migration requests (e.g. order handling) may be recovered by Eircom through the connection fees for the LLU service that the OAOs migrate their customers to; this position is supported by Eircom in its response and Eircom agrees that there are no other costs for consideration.

Conclusion: ComReg concludes that no premium should be charged for Intra Migration at the point of Intra Migration.

Further views on the IMP charge and the theory of option values?

Consultation Questions

Q.9. Do you have any further views on the theory of option value that has not been considered by ComReg when setting regulated wholesale prices?

Q.10. Do you have any further views on the IMP methodology as set out in Eircom's report published as 08/105a, other than that set out by ComReg in this consultation?

Views of Respondents

3.130 **Smart Telecom, Vodafone and Magnet** expressed no further views.

3.131 **Eircom** is of the view that ComReg has not considered the possibility that a put option can exist alongside a call option nor has ComReg produced any evidence that two options cannot co-exist. Eircom refers ComReg to pages 7-10 of the Indecon's Response to Consultation document where this is discussed in detail⁴⁴. In that document, Indecon International Economic Consultants summarise ComReg's arguments in three main points, which they proceed to criticise:

1. OAOs possess a "call option to invest" therefore, they "cannot" have a "put option".
2. There is "no option value at all if asset lives and WACC are set correctly".
3. Eircom is "free to set" Bitstream prices at whatever level they like, and therefore should not under-recover its sunk costs; in the event of such under-recovery, Eircom should simply raise the price of Bitstream.

3.132 Eircom notes that its views remain those as set out in Indecon's report published by ComReg as Document No. 08/105a.

3.133 **BT** is of the view that there are good grounds for setting a zero migration charge – and that, if it has not already done so, Eircom should simply adjust its Bitstream price to reflect the likely utilisation rate for its Bitstream assets. BT believes that the reason for a zero migration charge is that there is some tendency for OAOs to defer the timing and reduce the level of LLU investment because of the value of 'waiting to invest'. BT considers that a positive migration charge clearly exacerbates this tendency. The extent to which the Eircom Bitstream price needs to be adjusted for expected utilisation rate is an important issue. BT believes that in this particular instance, LLU migration will have little effect on Eircom's utilisation rates as Eircom should find it comparatively easy to 'back fill' the capacity created with new customers. BT believes that the development of alternative competitive offerings based on LLU is highly likely to stimulate overall market demand and benefit Eircom itself.

⁴⁴ See ComReg Document No. 09/77s to be published within 10 working days of this document.

- 3.134 BT believes that Indecon rightly characterises the Bitstream contract the OAO enters into as having the characteristics of a put option. However, BT believes that the OAO in no way ‘owns’ the assets – it merely obtains the right to use them for as long as it continues to pay the Bitstream price. BT believes that if the Bitstream price broadly recovers investment costs for average asset utilisation, there is clearly no basis for an IMP charge. BT believes that the Indecon analysis does not establish that it is better to set a lower Bitstream price than that discussed above, with subsequent cost recovery through a migration charge – because Indecon does not analyse what the optimal price structure should look like. BT acknowledges that such an analysis is likely to be both conceptually and theoretically demanding. BT provides a sketch of how the pricing problem might be addressed. BT believes that at the time Eircom is required to invest in Bitstream assets, following a request from an OAO for such a service, it already knows that the contract it is entering into can be terminated on request by the OAO when it subsequently chooses to migrate to LLU.
- 3.135 BT notes that Eircom sets a Bitstream price for access to the Bitstream service and the varying ‘migration charge’ when the OAO switches to LLU. Given the choices made by Eircom, the OAO then chooses the timing of its investment in LLU. BT believes, for the OAO, there is an option value associated with ‘waiting to invest’. That is, BT believes that the OAO will only choose to invest at a point in time when the Net Present Value (“NPV”) for the switch to LLU is sufficiently positive (a point where the Internal Rate of Return (“IRR”) of the investment is sufficiently large – that is, an IRR value above, and possibly significantly above, the OAO’s cost of capital). BT believes that the rationale for waiting to invest is that there is inter-temporal uncertainty as regards the costs of finance and the operating profits it can earn by shifting to LLU.
- 3.136 In its submission, BT considers the simple case where the incremental profit to be had from shifting to LLU is constant and fixed forever. The OAO will still only invest if the IRR for this project is sufficiently above the current cost of finance, if the NPV is sufficiently positive. The reason is that if the NPV is small, it can pay to wait until the financing costs are lower. BT believes that the optimisation problem is one of choosing to set a Bitstream price and a migration charge, given that it is known that both of these will have an influence on the decision of the OAO to invest in LLU. The optimisation should take account of the expected down time of the Bitstream assets, post migration. The optimisation should also take account of the constraint that Eircom should earn a reasonable expected return on its Bitstream assets. BT believes that the likely solution is unlikely to involve a positive migration charge.
- 3.137 To sum up, BT believes that the Indecon analysis does not consider at all the impact that pricing choices (including migration charges or subsidies) will have on the migration timing decision for OAOs. When these are taken into account, it seems likely that the optimal migration charge will not be significantly positive – and it has to be acknowledged that it might be negative. As a compromise and in the absence of formal analysis, BT is of the view that it is reasonable to agree with ComReg’s conclusion that the migration charge be set at zero. Any adjustment to pricing required to cover impacts on Bitstream asset utilisation rates can be done within the Bitstream price.

ComReg's Position and Conclusion

- 3.138 As regards Eircom's criticism of ComReg's preliminary position that OAOs possess a call option to invest and that they therefore cannot simultaneously possess a put option, ComReg notes that Eircom has selectively quoted from its preliminary position, which in fact was that there cannot be a put option "at the time of Intra Migration"⁴⁵. ComReg's position is that the implicit option is already granted at the time of taking the Bitstream service. As noted earlier in this document, ComReg, from a theoretical point of view, agrees with Eircom that the two types of options can co-exist: however ComReg considers that regardless how the option to migrate is formulated (put, call, or a combination of the two), the option premium should be paid up-front, when the option is taken out and held and not when it is exercised at the point of Intra Migration. Levying a migration premium increases the strike price, which is not appropriate.
- 3.139 Eircom's criticism of the comment attributed to ComReg that there "is no option at all if asset lives and weighted average cost of capital ("WACC") are set correctly"⁴⁶, is unfounded since Eircom replaced ComReg's "may" with "is" in the quotation it relied upon⁴⁷. As noted by ComReg in Consultation Document No. 08/105, this is beyond the scope of the present consultation.
- 3.140 ComReg has clearly set out its position in relation to Eircom's criticism of ComReg's position that current Bitstream prices under the Retail minus WBA price control already cover any possible cost due to stranded assets earlier in this section.
- 3.141 BT's comments provide broad support for ComReg's position. Removing the migration premium would still allow Eircom to recover any cost of providing cancellation and migration options to OAOs through rental charges, as Eircom's retail price can be set to include the costs of providing a similar cancellation option to its own retail customers (competition permitting), if any is required. ComReg considers that BT is correct in identifying an element of choice as to whether the costs of under-utilised assets, that result from migration by OAOs, are recovered as a migration charge or from on-going charges. BT also supports ComReg's conclusion that recovering such costs through a migration premium would significantly depress investment by OAOs and have an adverse effect on competition. ComReg agrees with BT that analysis of an optimal pricing structure between Bitstream and an IMP charge that takes account of competitive benefits is very difficult and unlikely to produce robust results given the numerous assumptions that would be needed. In principle, that exercise could produce a negative or a positive migration premium and there is no presumption that the optimal migration premium is positive. Under these circumstances, and given that Eircom's wholesale price should in any case allow recovery of the costs of providing the similar cancellation option given to its retail customers (even where the charge for IMP is set to zero), ComReg considers that the IMP charge should be removed.
- 3.142 In relation to BT's comments that the development of alternative competitive offerings based on LLU is highly likely to stimulate overall market demand and

⁴⁵ Page 2 of Consultation Document No. 08/105.

⁴⁶ Page 7 of Indecon's response of February 2009 – will be published as Document No. 09/77s within 10 working days of this document.

⁴⁷ See Paragraph 4.23 of Consultation Document No. 08/105.

benefit Eircom itself, ComReg agrees with this position. On the assumption that the example is transposable to Ireland, ComReg in Decision D04/09 has noted that increased LLU competition increased the number of lines in France.⁴⁸

Are there any similar option value charging mechanism in other European states?

Consultation Question

Q.11. Do you have any experience of, or know of, any similar charging mechanism using an option value in other European member states?

Views of Respondents

- 3.143 **Smart Telecom** and **Magnet** are not aware of any similar option value charging mechanisms in other EU member states. **Vodafone** did not respond to this question.
- 3.144 **Eircom** states that in general migration charges exist in the UK. Eircom states that the European Regulators Group (“ERG”) has recognised that migration charges might be optimal and suggests that they are reasonable. Eircom states that there are various international examples of access pricing whereby OAOs pay a migration charge to the wholesaler for the service of disconnecting the equipment from one network and connecting it to another. Eircom notes one proposal made by a UK industry group to the UK NRA for Telecoms, Ofcom. Eircom also notes a BT Nordic response to the Swedish NRA for Post and Telecoms (PTS). Eircom also refers to examples outside other European member states (Texas and New Zealand).
- 3.145 **BT** is not aware of any other Member State National Regulatory Authority (“NRA”) incorporating an option value explicitly into regulatory WACC or charges. BT notes that some allowance for utilisation risks have on occasion been made by Ofcom, which were to compensate for generic risks of under-utilisation of sunk assets that would arise in a competitive marketplace.

ComReg’s Position and Conclusion

- 3.146 ComReg notes that in order to draw comparisons between different EU Member States, the applicable regulatory regime should be considered in its entirety, including all of its components. The presence or absence of a migration premium does not, viewed in isolation, indicate the “correctness” or otherwise of any given regulatory regime.
- 3.147 ComReg observes that the quote attributed by Eircom to the ERG was incomplete and did not reflect the full meaning of what was intended. Eircom states in its response⁴⁹ that the “ERG states ‘charges for migration should be reasonable and not deter acquisition of existing customers’”. Eircom did not complete the citation, which ends with the words “or climbing of the ladder of investment”. ComReg, in its proposal to remove the IMP charge, is cognisant that the decision should not deter OAOs from making infrastructure investment, for example, moving from Bitstream to LLU.

⁴⁸ See Annex D (Graph 7) of ComReg Document No. 09/66 (Decision No. D04/09).

⁴⁹ At p.12 of Eircom’s response to Consultation Document No. 08/105.

- 3.148 ComReg notes that a more recent document from Ofcom than the one quoted by Eircom, is Ofcom's document on 'Broadband Migrations: Enabling Customer Choice' published on 13 December 2006 in which it states, in relation to customer broadband migrations, that any cost associated with migrations "can legitimately be recovered over the period of the contract, but to impose it at the point of migration would represent, in Ofcom's view, an impediment to smooth migrations."⁵⁰ This view seems to be consistent with ComReg's view on migrations from one Eircom wholesale service to another.
- 3.149 ComReg considers that the BT Nordic document in response to PTS's Bitstream consultation appears to concern migrations between Bitstream products and that when there is a migration from IP Bitstream to the cheaper ATM Bitstream, that the charge for this lower ATM Bitstream product should be applied retrospectively from the date of first taking the IP Bitstream product. ComReg notes that the example countries given by BT Nordic also include Ireland which Eircom left out in its response.
- 3.150 The other two examples provided by Eircom are outside the scope of the consultation question as they relate to countries outside the EU but would not in any event alter ComReg's decision and reasoning as set out in this document.
- 3.151 Separately, ComReg has also surveyed other European NRA's and no such premium charge as set by Eircom above the standard LLU connection charges, currently exists among the NRAs surveyed for an operator to migrate its retail customers from Bitstream to LLU.

Are there any other costs for consideration in the IMP charge?

Consultation Question

Q.12. Do you agree or disagree that there are no other costs for consideration in the IMP?

Views of Respondents

- 3.152 Three respondents agree and two respondents disagree.
- 3.153 **Eircom** believes that there are no other costs other than the value of the American Put Option. Eircom considers this to be the case because the connection fees for the LLU services immediately recover the costs incurred by Eircom in delivering the connection service.
- 3.154 **Smart Telecom** knows of no other costs that need to be considered.
- 3.155 **Vodafone** considers that it is possible that there are incremental costs associated with the facilitation of Intra Migration requests that may not be recovered in other charges.
- 3.156 **Magnet** disagrees and believes that there is an issue with the relative charging of Inter versus Intra Migrations. The charge for Inter Migration is €66 and Magnet believes that any excess in the charge for Inter Migration should also be reduced.

⁵⁰ At Page 31

3.157 **BT** agrees that there are no other costs for consideration in the IMP.

ComReg's Position and Conclusion

3.158 Based on the views of respondents, ComReg remains of the view that there are no other costs for consideration in the IMP charge.

3.159 In relation to Vodafone's comment, ComReg considers that any incremental costs associated with the facilitation of Intra Migration requests (e.g. order handling) may be recovered by Eircom through the connection fees for the LLU service that the OAOs migrate their customers to; Eircom's response supports this position and Eircom agrees that there are no other costs for consideration.

3.160 In relation to Magnet's comment that any excess in the charge for Inter Migration should also be reduced, ComReg notes that Inter Migration is outside the scope of this consultation as Inter Migration is migration between operators (e.g., Smart to Magnet). The pricing for Inter Migrations will be examined on a case by case basis, where a competition complaint is raised, for example, a complaint that the price of the Inter Migration acts as a switching barrier which could distort competition.

Conclusion: ComReg concludes that there are no other costs for consideration in the IMP charge.

Should the IMP charge be removed?

Consultation Question

Q.13. Do you agree or disagree with ComReg's proposed pricing for the IMP being set at €0(NIL)?

Views of Respondents

3.161 Three respondents agree and one respondent disagrees.

3.162 **Eircom** strongly disagrees for the following reasons:

- (1) There is a real option granted to the OAO on connection to a Bitstream service for the subsequent seamless migration to one of a range of LLU services;
- (2) This option is an American Put Option – and the presence or absence of a separate call option related to an OAO investment in LLU is of no relevance to the pricing of IMP. There is nothing to prevent two options existing in parallel;
- (3) The option granted to the OAO on Bitstream connection – and exercised at migration – is the option to put the Bitstream investment back to Eircom;
- (4) Eircom disagrees that the value of any option to migrate is already recovered from Bitstream revenues as the Bitstream revenues have not recovered the costs of the network investment and the Retail minus control precludes Eircom from raising Bitstream prices in the presence of increasingly competitive retail broadband markets.

- 3.163 **BT, Smart Telecom and Magnet** agree. Magnet states its belief that Eircom has recovered all its costs as it is not taking any risks, since the expense of LLU and unbundling exchanges ensures that Eircom recovers any sunk cost.

ComReg's Position and Conclusion

- 3.164 Based on the views of respondents, ComReg remains of the view that the IMP charge should be removed as it is not justified.
- 3.165 For replies to the points raised by Eircom, see ComReg's positions and conclusions to questions 3 and 4 of this document.

Conclusion: ComReg concludes that the IMP charge should be removed.
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Is the draft text of the proposed decision instrument from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed?

Consultation Question

Q.14. Do respondents believe that the draft text of the proposed decision instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed?

Views of Respondents

- 3.166 **Eircom** states that the decision does not identify the legal obligation that requires Eircom to offer Intra Migrations at €0. Such migrations were not offered before September 2007 and then were offered at the cost oriented price of €47 – based on the analysis of the option value, and on the basis of prices set for related Bitstream and LLU services. Eircom believes that ComReg has not explained why a cost component previously allowed should now be disallowed and has established no basis for obliging Eircom to continue to offer the service at a price below the level of the value of the new option granted. Eircom believes that ComReg has no legal basis to set the price to €0 as proposed in the draft direction. Eircom considers that ComReg would only have a reasonable basis to review the level of the price were it to examine the cost basis for the current price. That is, Eircom believes that if ComReg reviews the parameters in the calculation of the put option value it will establish the correct cost basis for the IMP.
- 3.167 **BT** recommends that to avoid any confusion that it should be specified in the instrument that the IMP shall be set to zero on the effective date of the decision notice.
- 3.168 **Vodafone, Smart Telecom and Magnet** agree with the draft text of the proposed decision instrument.

ComReg's Position and Conclusion

- 3.169 In response to Eircom's point in relation to a cost component that was previously charged that is now proposed to be amended, ComReg refers to Information Notice

07/25 'Status Update on Local Loop Unbundling – Issue 8' of 3 May 2007 which clearly stated on page 7 that the charge for migration would be reviewed by ComReg after one year.

- 3.170 ComReg remains of the view that the obligations imposed on Eircom in the SMP Decision include obligations in relation to Migrations since Migrations are an associated facility. The migration process is essential for OAOs to seamlessly move their retail customers from Bitstream to LLU without affecting the retail customer's service.
- 3.171 ComReg has reviewed the submission put forward by Eircom to justify the IMP charge and remains of the view that the IMP charge should be removed for the reasons set out in this document.
- 3.172 Finally, having considered BT's recommendation, the decision now notes that the IMP charge will be removed from the effective date of the decision instrument but will apply as soon as possible to all bills issued by Eircom 28 days after the effective date (this respects Eircom's or any OAO's statutory right to appeal this decision within 28 days of the decision being made).
- 3.173 The legal basis for the Decision at Annex B is set out in Annex A.

ANNEX A: Legal Basis

A1. As noted in Consultation Document No. 08/105, ComReg is of the view that the obligations imposed on Eircom in the Designation of Significant Market Power and the Decision on Obligations – Decision Notice D08/04 ‘Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops’ (“the SMP Decision”) include obligations in relation to migrations. In particular, section 9 of the SMP Decision states:

“Eircom shall have an obligation to offer cost orientated prices for LLU services, collocation, and associated facilities on the basis of forward looking long run incremental costs (FL-LRIC) as provided for by Regulated 14 of the Access Regulations.”

A2. As noted in Consultation Document No. 08/105, it is ComReg’s position that migration is contemplated by and encompassed in the SMP Decision, in particular at section 4.2 of the SMP Decision which states:

“...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;

VII. Technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services related to LLU; and

VIII. Operational support systems or, similar software systems necessary to ensure fair competition in the provision of LLU services.”

A3. Migrations are an associated facility because they allow an OAO to move from Eircom’s re-sale services (e.g. Bitstream) to Eircom’s LLU products. Migrations are essential to OAOs, without which OAOs would not be in a position to avail of LLU without significant disruption to their existing consumer broadband service provided by Bitstream.

A4. The legal basis for the imposition of a price is pursuant to Regulations 14 and 17 of the Access Regulations and is laid out below:

Price control and cost accounting obligations

Regulation 14 (1):

The Regulator may in accordance with Regulation 9 impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection, access or both such interconnection and access in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze to the detriment of end-users.

Directions

Regulation 17 (1):

The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an undertaking to do or refrain from doing anything which the Regulator specifies in the direction.

ANNEX B: Decision

STATUTORY AND LEGAL POWERS

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

- i. Pursuant to Regulations 9, 14 and 17 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003¹;
- ii. Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom Limited contained in Decision No. 08/04² which found Eircom Limited to have SMP under the provisions of Regulations 25, 26 and 27 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003³;
- iii. Having, where appropriate, complied with Policy Directions made by the Minister⁴;
- iv. Having taken account of the submissions received in relation to Document No 08/105⁵;
- v. Having had regard to the analysis and reasoning set out in Document No. 08/105 which shall, where necessary, be construed together with this Direction;
- vi. Having regard to the provisions of and the individual decisions in the Response to Consultation and Decision in Document No. 09/77 (Decision No. D05/09) which shall where necessary be construed as forming part of this Direction;
- vii. Having notified the draft measure to the European Commission, further to Regulation 20 of the Framework Regulations whereby it was also made accessible to national regulatory authorities in other EU Member States, and the European

¹ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

² Designation of Significant Market Power and Decision on Obligations – *Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops*, Document No. 04/70, dated 15 June 2004

³ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007)

⁴ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004

⁵ Consultation and Draft Decision *Intra Migration Premium Consultation and draft decision*, Document No. 08/105, dated 23 December 2008

Commission having informed the Commission for Communications Regulation that it had examined the draft measure and that it had no comments in relation thereto and that pursuant to Article 7 of the Framework Directive⁶, the Commission for Communications Regulation could adopt the resulting draft measure and;

- viii. Having regard to its functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007⁷.

2 DEFINITIONS AND INTERPRETATION

2.1 In this Direction:

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

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

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

“Intra Operator Migration” means the facility that allows services eligible for migration on an end user line to be substituted with the same operator and in particular migration from Bitstream to local loop unbundling with the same operator. For the avoidance of doubt, intra operator migration does not involve a change in the customer/operator broadband relationship. The current list of requested migrations that are classified as “intra” include:

1. Bitstream to Line Share;
2. Public Switched Telephone Network (‘PSTN’) with Bitstream to combined geographic number portability and full unbundled local path including full unbundled local metallic path (‘GLUMP’);
3. PSTN with Bitstream to full unbundled local path including full unbundled local metallic path (‘ULMP’);
4. Single Billing – Wholesale Line Rental (‘SB-WLR’) with Bitstream to GLUMP or to ULMP;

⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33).

⁷ No. 22 of 2007.

5. SB-WLR with Line Share to GLUMP or ULMP;
6. SB-WLR to GLUMP or ULMP;
7. Return paths to wholesale operators or Eircom for all of the above.

“Intra Operator Migration Premium” means the once off charge currently set at €47 in paragraph 4.1d of the document described as “Migration Services Terms and Conditions v2.1” dated 30 November 2007 on www.eircomwholesale.ie, and as may from time to time be amended;

“SMP Decision” means ComReg Decision No. 08/04⁸ which found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations.

3 SCOPE AND APPLICATION

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

4 PRICE CONTROL

- 4.1 The SMP Decision imposed *inter alia ex ante* regulatory obligations pursuant to Regulation 14 of the Access Regulations. The obligations imposed on Eircom under Regulation 14 of the Access Regulations include obligations relating to price control and cost orientation of prices.
- 4.2 Under Regulation 17 of the Access Regulations, ComReg may issue directions to Eircom to do or refrain from doing anything which ComReg specifies in the direction, for the purpose of further specifying requirements to be complied with by Eircom relating to its obligations under the Access Regulations.
- 4.3 This Direction is issued pursuant to Regulation 17 of the Access Regulations, for the purpose of further specifying requirements to be complied with by Eircom relating to obligations imposed on Eircom, under Regulation 14 of the Access Regulations and Section 9 of the SMP Decision.
- 4.4 Eircom is hereby directed to remove the Intra Operator Migration Premium.
- 4.5 Section 4.4 shall apply, as soon as possible, to all bills issued by Eircom 28 days after the effective date.

⁸ Designation of Significant Market Power and Decision on Obligations – *Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops*, Doc. No. 04/70, dated 15 June 2004.

5 MAINTENANCE OF OBLIGATIONS

- 5.1 Unless expressly stated otherwise in this Direction, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the effective date of this Direction, are continued in force by this Decision and Eircom shall comply with same.
- 5.2 If any section, clause or provision or portion thereof contained in this Direction is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Direction and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Direction, and shall not in any way affect the validity or enforcement of this Direction.

6 STATUTORY POWERS NOT AFFECTED

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

7 EFFECTIVE DATE

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

**MIKE BYRNE
COMMISSIONER
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 6 DAY OF OCTOBER 2009**

ANNEX C: Regulatory Impact Assessment

- C1. Regulatory Impact Assessment ('RIA') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy, and analyses the impact of regulation options on different stakeholders.
- C2. ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines¹, adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003 requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- C3. In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA ComReg takes into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact, ComReg may carry out a lighter RIA in respect of those decisions.
- C4. ComReg wishes to point out that since it is not imposing a new regulatory obligation on an undertaking, it is not mandatory for it to conduct a RIA. In the instant case, it has decided to do so in order to demonstrate that it considered and evaluated the alternative options available, with due regard to necessity, effectiveness, proportionality, transparency, accountability and consistency.
- C5. In determining the impacts of the various regulatory options, current best practice appears to recognise that full cost benefit analysis arises only where it would be proportionate or, in exceptional cases, where robust, detailed and independently verifiable data is available. Such a comprehensive review will be undertaken when necessary.
- C6. The purpose of the consultation was to determine whether the Intra Migration Premium ("IMP") charge on top of the LLU connection charge as set out below is appropriate:

¹ See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, www.betterregulation.ie

Table 1: Detail of existing and proposed connection charge

	Existing LLU Connection Charge - €	Proposed LLU Connection Charge - €
Standard ULMP Connection Fee ²	45.00	45.00
GLUMP Surcharge Connection Fee	3.50	3.50
Total GLUMP Connection Fee	48.50	48.50
IMP Charge	47.00	0.00
Total GLUMP and IMP charge	95.50	48.50

Identify and Describe the Regulatory Options

C7. The regulatory option that emerges from the consultation process is whether or not to remove the premium for Intra Migration. There is no other regulatory option, the IMP charge is either justified or not.

C8. The current IMP charge is €47 and was set in May 2007, with the process launched in September 2007. ComReg Information Notice 07/25 of May 2007 noted that the charge for migration would be reviewed after one year. Therefore on 29 August 2008, ComReg directed Eircom to demonstrate with supporting workings/model that the charge for migration was cost orientated. Eircom responded on 26 September 2008 with a submission it claimed justified the current IMP charge and proposed a slightly increased premium charge.

C9. Eircom justify the current IMP charge based on the modelling of an “American Put Option”. Eircom claims that this is the type of option that an access seeker avails of when choosing to migrate from Bitstream to LLU. The “American Put Option” was priced using the “*Black Scholes formula*”, modified with an early exercise premium. Further detail of Eircom’s proposal, which was prepared by Indecon International Economic Consultants, can be found in the non-confidential report published by ComReg as Document No. 08/105a.

C10. Following a review of Eircom’s submission and of the responses to consultation and taking into consideration the views of the European Commission, ComReg’s position remains that removing the IMP charge is appropriate and justified for the following reasons:

1. The Decision ensures compliance with the cost orientation obligation imposed on Eircom as SMP operator³;

² As per Access Reference Offer price list, this is subject to a 5% discount when 50,000 orders are achieved and a further 5% discount when 100,000 orders are achieved.

³ Section 9 of the SMP Decision.

2. An OAO is not granted a real option (at least not one of any significance⁴) at the point it migrates from a Bitstream service to an unbundled loop;
3. The Bitstream service bought by an OAO contains an implicit option to cancel the service (after the minimum contractual term) or to switch to a different wholesale service.⁵ This implicit option is granted to the OAO at the point that the Bitstream service is first purchased;
4. This implicit option cost (if any exists) has already been paid by the OAO when granted as part of the rental price of the Bitstream service;

Furthermore, even if the efficiently incurred costs of providing the implicit option were material, the current wholesale Bitstream rental charge should in any case lead to recovery of these costs even without any premium for Intra Migration being levied. Therefore, the IMP charge would lead to an over-recovery of cost. One of the reasons for this is that Eircom already provides an implicit cancellation option to its own retail customer that is comparable to the implicit cancellation or switching option provided to an OAO. The cost to Eircom of providing this implicit option to its own retail customers can be recovered through the retail Broadband rental charge which Eircom itself sets; when determining this rental charge, Eircom presumably takes account of the fact that no cancellation charge is levied if a retail customer terminates its service (after the minimum contractual period). The wholesale Bitstream charge is regulated on a Retail minus basis by subtracting retail costs from the retail price. Therefore, the wholesale Bitstream price already includes compensation to Eircom for the cost of providing a cancellation option on the basis of a zero retail cancellation charge. To set a premium for Intra Migration on top of this would lead to Eircom over-recovering its costs. The table below shows that Eircom has set the minimum terms and connection/disconnection charges at similar levels for its wholesale and retail customers but there is no corresponding version of the migration premium for its retail customers.

⁴ At the time of migration, there are other options gained by the OAO, such as the option to switch back from an LLU-based wholesale service to a Bitstream service. However, such an option is not likely to be exercised and in any case does not require Eircom to make any new investment. Therefore, any such options gained as a result of migration are immaterial to the decision being made in relation to the IMP charge.

⁵ In effect, when the OAO takes a Bitstream service, it is granted a put option that allows it to stop taking the service (subject to contractual restrictions such as minimum term) and a call option to allow it to take a different wholesale service. These are exercised simultaneously if an OAO switches from a Bitstream to an LLU-based service, with the IMP charge being the total exercise price for the OAO.

Table 2: Detail of charges for Eircom’s retail and wholesale customers

	Eircom retail customer	Eircom wholesale customers (OAOs)
Connection charge	€24.68	€30 per port
Minimum contract period	6 months	6 months
Cancellation Charge	€0 (may be charges if do not meet minimum contract term)	€60 (when without minimum term)
Migration Premium	€0	€47

5. There are competition reasons why the IMP charge should be removed consistent with ComReg’s statutory objectives under Section 12 of the Act:

a. Promote competition:

Removing the IMP charge promotes competition as there would be no premium to be paid by OAOs to move from Eircom’s Wholesale Broadband Access (“WBA”) product (Bitstream) to infrastructure based competition through Eircom’s local loop product(s) (LLU). Eircom’s competitive position is also maintained as ComReg believes that any efficiently incurred costs associated with providing migration are already covered in Eircom’s other wholesale charges (i.e. LLU charges as per Eircom’s Access Reference Offer price list, ComReg believes that the cost, if any, of the implicit option is already in Eircom’s Bitstream price). Removing the IMP charge removes a barrier for OAOs to build their own LLU infrastructure and means that build or buy decisions are not affected by this switching barrier. Therefore, competition is promoted as OAOs, who have significant capital to spend, can decide whether they want to compete, based on Eircom’s WBA product (Bitstream) or based on infrastructure based competition (LLU).

b. Promote the interests of users within the community:

Consumers have a clear interest in competition on price, quality and innovation. ComReg believes that infrastructure based competition (LLU) delivers on all these fronts as with LLU, OAOs should be in a position to offer more innovative broadband products at possibly lower retail prices.

OAOs claim that the current IMP charge is making it difficult and unattractive for OAOs to migrate their customers from Eircom’s Bitstream products to Eircom’s LLU products. OAOs also claim that this barrier hinders the interests of users within the community. Accepting these claims, ComReg believes that removing this barrier, by removing the IMP charge, will promote the interests of users within the community. ComReg does not believe that removing the IMP charge should increase the current Bitstream prices and that therefore the interests of Bitstream users are protected.

c. Ensure that there is no distortion or restriction of competition:

Based on the claims of OAOs, ComReg believes that the current IMP charge restricts OAOs from competing based on infrastructure based competition (LLU) as the customer payback and up-front cost of migrating customers is quite significant. OAOs have claimed that the IMP charge is unjustified and deters migration between Eircom's wholesale access products where there is no change in the customer/operator broadband relationship. OAOs claim that the current IMP charge therefore acts as a significant obstacle to OAOs enhancing their service offering to their existing customers on the basis of LLU wholesale inputs, to the detriment of competition. ComReg therefore believes that removing the IMP charge will ensure there is no distortion or restriction of competition.

d. Encouraging efficient investment in infrastructure and promoting competition:

The current IMP charge has been a consistent complaint from OAOs in LLU related consultations over the past year. Based on the claims made by OAOs, ComReg believes that the current IMP charge impedes OAOs investing significant capital in their own infrastructure and then switching to LLU products and moving up the ladder of investment to provide independence from the dominant operator. ComReg thus believes that removing the IMP charge will encourage efficient investment in infrastructure and will promote competition. As a result, ComReg believes that this investment in infrastructure will allow OAOs to offer product and price differentiation to consumers as OAOs will not be using Eircom's WBA product (Bitstream) which is paired with an Eircom retail broadband product.

e. Encouraging access to the internet at a reasonable cost to end-users:

ComReg believes that the current IMP charge forces higher costs on OAOs that could lead to these costs being passed on to end-users through higher retail charges. ComReg does not believe that removing the IMP charge will require Eircom to raise its Bitstream prices and therefore, end-users should not see an increased cost of the broadband provided by Bitstream. ComReg therefore believes that removing the IMP charge will encourage access to the internet at a reasonable cost to end-users. ComReg believes that increased competition through the successful take up of LLU will offer end-users more differentiated broadband product, with increased access speeds, quality and possibly lower prices to end-users as OAOs will not be using Eircom's Bitstream product. Eircom's Bitstream product is paired with Eircom's retail product and therefore the characteristics of the Bitstream product are set by Eircom.

6. In relation to the parameters of Eircom's calculation, these will be considered in the proposed revised WBA price control to ensure that any new WBA price control continues to compensate Eircom for any possible efficiently incurred cost incurred, if any, due to migration from Bitstream to LLU based products. If there is a move to a cost plus WBA price control (from the current Retail minus), the cost of the implicit option, if any, will be considered in the cost plus Bitstream rentals set under any revised WBA price control. However, based on the current pricing mechanism in place to date, that is, Retail minus price control, ComReg believes that Eircom fully recovers any such costs for

providing the Bitstream service from its wholesale Bitstream charges. Any further work by ComReg on a cost based Bitstream price control will ensure that wholesale Bitstream prices set going forward will continue to be appropriate and will not negatively impact on the incentives of Eircom or OAOs to invest efficiently in new network technology.

C11. Regulation 14(2) of the Access Regulations⁶ states that when imposing an obligation in accordance with Regulation 14(1) of the Access Regulations in relation to price control and cost orientation of prices, ComReg shall take into account any investment made by the operator, and allow the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved. In relation to the IMP charge, the underlying investment made by Eircom is in Bitstream. In relation to the actual physical costs in respect of carrying out the migrations for OAOs, these are recovered by Eircom through other wholesale prices – please see Table 2 above. Based on the above, ComReg believes that the proposed Decision meets the objectives of Regulation 14(3) of the Access Regulations, that is, it serves to promote efficiency and sustainable competition and to maximise consumer benefit.

C12. Based on the above, ComReg believes removing the IMP charge is appropriate and justified. Based on the above and the analysis as set out in this document, the regulatory option was whether the current IMP charge is justified or not. ComReg believes that the current IMP charge is not justified; therefore based on the analysis conducted by ComReg, ComReg believes that consideration of a revised IMP charge or say a glide path from the current IMP charge to zero would not be appropriate.

Impact on Stakeholders

C13. In determining the impact on stakeholders, ComReg considered the following:

Option – Maintaining the IMP charge at €47 / above €47 as per Eircom’s submission		
Impact on incumbent	Impact on OAOs	Impact on consumer
Incumbent receives premium from OAOs which migrate customers from one wholesale service to another where there is no change in the customer/operator broadband relationship. Eircom maintain that the premium charge for Intra Migration is justified by an American Put Option	Maintaining the IMP charge at the current level does not encourage OAOs to migrate their customers to LLU infrastructure as OAOs claim the charge is unjustified and results in a long customer payback period. If an average customer lifetime is 42 months, the current IMP charge adds €1.12 a month	OAOs claim that customers remaining on the Bitstream service results in OAOs being unable to fully compete with a differentiated retail product based on price and technical characteristics. For example the roll out of high speed broadband by BT Ireland is an example of

⁶ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I. No. 305 of 2003 as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

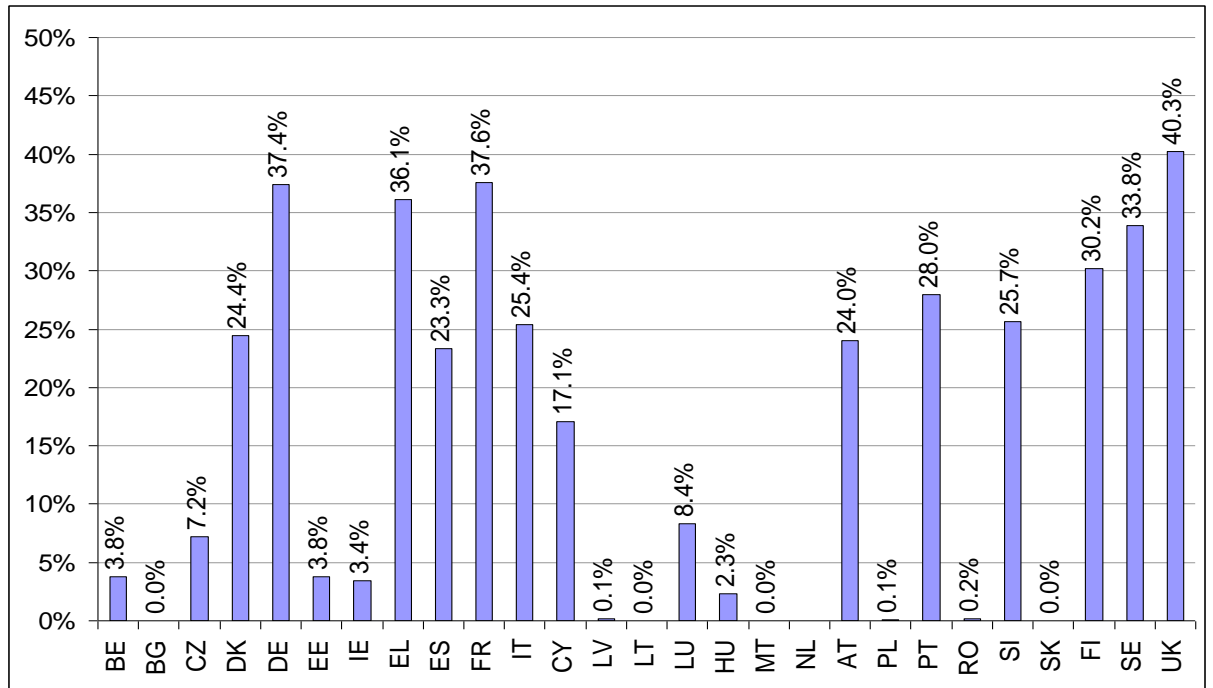
<p>granted at time of taking Bitstream service and paid when exercised.</p> <p>ComReg considers that an implicit option to migrate is paid on taking the Bitstream service. Eircom could be over compensated where an OAO is willing to pay this unjustified migration charge. For example a migration of 50,000 customers would lead to income of nearly €2.4m for Eircom.</p>	<p>to the cost to an OAO for servicing that customer on LLU. Also if an OAO had say 50,000 customers ready to migrate, the total cost to do this under the current IMP charge would be just under €2.4 million – a significant upfront cost to be paid. Therefore, the current IMP charge does not provide appropriate build/buy incentives for OAOs. The current charge can also give rise to significant uncertainty in the investment community as the incumbent is setting an exit charge which does not appear to have a sound basis except to act as a barrier to investment.</p>	<p>how competition can lead to improved product offerings. Given the current Government initiatives to promote Ireland as a competitive economy, such improved product offerings as a result of competition between operators are essential to foster development in line with business expectations and international comparison.</p> <p>To the reduced extent the unbundling may take place where this charge still applies, it is likely that this cost will be passed onto consumers through higher retail prices from the OAO.</p>
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Option – Removing the IMP charge		
Impact on incumbent	Impact on OAOs	Impact on consumer
<p>Removing the IMP charge will conform to the cost orientation principle.</p> <p>It is believed that the current Retail minus Bitstream prices includes the cost of an implicit option to migrate, if such a cost exists. It is also noted that in some cases the current Bitstream price is below the maximum Bitstream price allowed under the D01/06 price control⁷ and therefore Eircom has the flexibility to raise relevant Bitstream prices if it so wishes although ComReg does not</p>	<p>Removing the IMP charge will likely encourage migration from Bitstream to LLU – Ireland has a very low take-up of LLU, especially relative to the rest of Europe (see graphs 1 - 3 below) – this will result in more infrastructure based competition as opposed to competition constrained to wholesale products offered by Eircom (i.e., Bitstream) and may bring LLU competition in Ireland closer to the European norm.</p> <p>Will result in incentives to OAOs to increase their LLU footprint to an increasing</p>	<p>ComReg firmly believes that effective infrastructure based competition benefits consumers in the long term overall.</p> <p>If OAOs migrate to LLU as a result of the removal of the migration premium on the LLU platform OAOs are likely to be in a position to offer more innovative and possibly cheaper retail products to the benefit of retail consumers.</p> <p>This decision should result in increased level of competition at the retail</p>

⁷ Decision Notice 'Retail minus wholesale price control for the WBA market' dated 13 January 2006

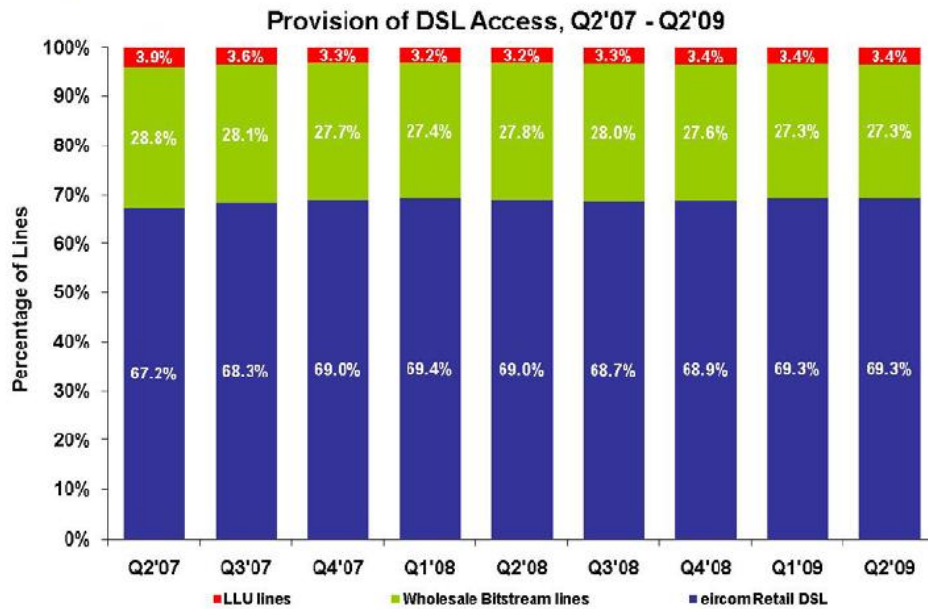
<p>consider this to be necessary.</p>	<p>number of exchanges and will not discourage them from investing in alternative infrastructure where a charge does exist.</p> <p>Supported by the EU Commissioner for Information Society and Media who said. "...Broadband competition in Ireland is currently being held-up by the high access prices Eircom charges its competitors and the Irish regulator is now making very important efforts to foster competition by promoting direct investment in broadband infrastructure." Supported by the EU Competition Commissioner who said: "ComReg's proposal is good news for competition and consumers. Alternative operators will have to pay considerably less for access to Eircom's broadband network. They will thus be in a position to make more attractive retail offers and consumers will get a better choice."</p>	<p>level as OAOs move to LLU infrastructure. Evidence from other EU states shows that LLU can be a key driver of competition.</p> <p>In the event that Eircom chose to increase retail prices in the future, ComReg believes that increased competition from all platforms will ensure consumers will continue to have sufficient choice of lower prices in the market where they wish to move provider. Such a move would also increase the incentives for OAOs to invest further in LLU.</p> <p>The general proposals on LLU pricing has been supported by the EU Commissioner for Information Society and Media who said "...fully support ComReg's proposal, as I am convinced that truly cost-oriented prices will be of great benefit to consumers.... This move will allow for greater flexibility and innovation in the provision of broadband internet services and ultimately lead to wider choice and lower prices for consumers "</p>
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Graph 1: DSL lines offered on the basis of unbundled local loops as a percentage of all DSL lines



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

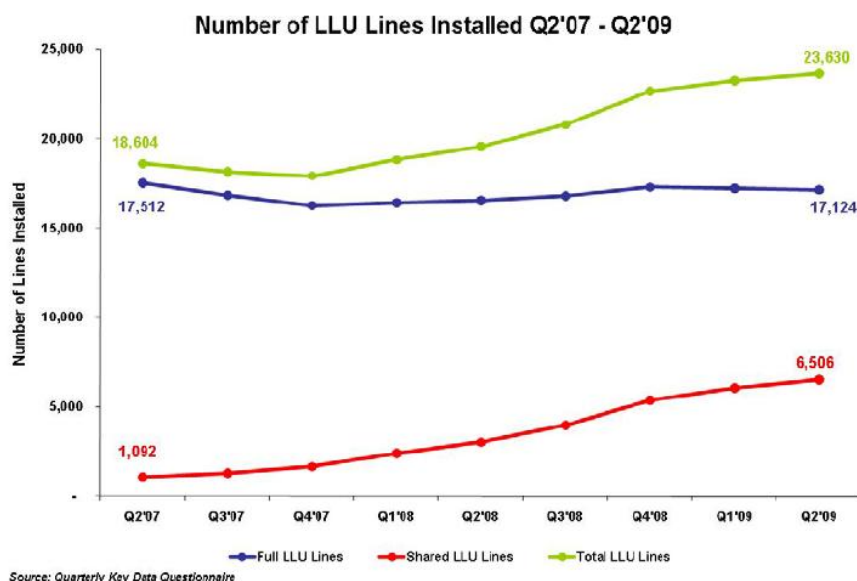
Graph 2: Provision of DSL Access



Source: Quarterly Key Data Questionnaire

Source: ComReg Quarterly Data report (ComReg Document No. 09/71) p.28

Graph 3: Number of Local Loops Unbundled



Source: ComReg Quarterly Data report (ComReg Document No. 09/71) p.29

ComReg's conclusion

C14. As ComReg is not imposing a new regulatory obligation on an undertaking, it is not mandatory for it to provide a RIA. However, it has decided to do so in order to consider and evaluate the alternative options available and to inform the decision making process.

C15. ComReg is of the view that the preferred approach, that is removing the IMP charge, is for the reasons set out in this response to consultation is justified and is a more appropriate approach than the current position and should encourage OAOs to migrate from Bitstream to LLU. It is therefore consistent with ComReg's objective to encourage infrastructure based competition and its statutory objectives under section 12 of the Act.

C16. ComReg is of the view that the preferred approach meets the six principles of "Better Regulation" as follows:

- i. ComReg has clearly outlined why it is **necessary** to undertake this review. ComReg considers that the current IMP charge is not justified which is a breach of Eircom's cost orientation obligation under the SMP decision. OAOs have noted that it is excessive, unjustified and limits their development of infrastructure based competition. ComReg is aware that there are existing and new players in the broadband market who wish to invest significant capital in LLU, such OAOs rely on cost oriented prices from the incumbent as they are essential in ensuring that appropriate build or buy decisions are made. The Irish broadband market is moving fast and regulatory inefficiency could negatively impact on the roll out of key

infrastructure in Ireland. The European Commission has commented negatively on the current progress of competition in Ireland and in particular the high access prices being charged by Eircom, it is important that ComReg ensures Ireland keeps pace with its European peers to ensure Ireland can compete for medium to large business investment;

- ii. ComReg considers that it has been **effective** in its review in that it will ensure Eircom's compliance with its cost orientation obligation. ComReg also considers it has been effective in addressing an anomaly that is acting as a constraint to the growth of innovative and differentiated consumer broadband offerings that OAOs may provide using LLU;
- iii. ComReg considers that it has been **proportionate** in its review. It has not imposed any new obligations upon Eircom. Further, ComReg believes that Eircom already recovers any cost incurred in providing migrations in its current Bitstream and other LLU charges;
- iv. ComReg considers its approach offers complete **transparency** in reaching the conclusion that the IMP charge should be removed. ComReg in its Document No. 07/25⁸ noted that the current IMP charge would be revised after one year. ComReg has published a public consultation and has reviewed all of the responses to the consultation before making a final decision. ComReg has also pre-notified the European Commission of its proposal;
- v. ComReg considers that it has been **accountable** in its review and that it has provided all of the detail, reasoning and information necessary to demonstrate how it reached the conclusion that the IMP charge should be removed. ComReg believes that its decision is consistent with its statutory objectives under section 12 of the Act;
- vi. ComReg considers that it has been **consistent** in its review and that it has fully considered all available data, submissions and responses to consultation. ComReg considers that its decision that the IMP charge should be removed, based on Eircom's cost orientation obligation, is consistent with both its previous decisions and its statutory objectives under section 12 of the Act. If the current IMP charge was not removed, it would be inconsistent with the cost orientation obligation set on Eircom as the SMP operator.

⁸ Information Notice 'Status Update on Local Loop Unbundling - Issue 8' dated 3 May 2007

Annex D: Updated competition assessment in the market for wholesale unbundled access

The existing SMP designation and decision on obligations

D1. A Decision Notice on Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops was published on 15 June 2004¹ (“the WUA Decision”). The notified Wholesale Unbundled Access (“WUA”) market included the following products:

- Fully unbundled local metallic path (“ULMP”).
- Shared loops (line sharing).
- Fully unbundled sub-loops.
- Shared sub-loops.
- Co-location.
- Associated facilities.

D2. WUA and Wholesale Broadband Access (“WBA”) were considered to fall within distinct product markets, due to differences in functionality and pricing. ComReg considered that access via alternative technologies such as cable and fixed wireless access (“FWA”) were excluded from the WUA market on the grounds that they would be unlikely to pose a competitive constraint in the WUA market within the period of the review. Accordingly, ComReg formed the view that there was a distinct relevant market in Ireland for WUA (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.

D3. Having regard to the market definition and the associated SMP analysis carried out at that time, ComReg considered that Eircom had 100% share of the WUA market, and that this was unlikely to change over the lifetime of the review. The threat of competitive constraint posed by potential competition and countervailing power over the review period was considered to be low, due to high barriers to entry and expansion in the WUA market.

D4. On that basis, Eircom was designated with Significant Market Power (“SMP”). ComReg imposed a number of obligations upon Eircom in relation to the provision of WUA. One such obligation imposed on Eircom was that of price control and cost orientation. Since the publication of the WUA Decision in June 2004, ComReg has been involved in the implementation of those obligations.²

Proposed removal of the Intra Migration Premium charge

D5. The WUA Decision set out the principles to guide the implementation by ComReg of a detailed price control methodology. ComReg notes that the proposal to remove the Intra Migration Premium (“IMP”) charge does not constitute a change to the cost orientation obligation in the WUA Decision. Rather, the proposed change relates only

¹ Designation of SMP and Decision on Obligations- Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and sub-loops. ComReg Decision D08/04, dated 15 June 2004.

² For example, on line share ComReg 04/111 and ComReg 05/22; and Consultation on the Rental price for Shared Access to the Unbundled Local Loop (ComReg Document No. 08/23).

to the implementation of the existing cost orientation obligation established by ComReg in the WUA Decision. The proposed change therefore does not require amendment of the actual cost orientation obligation established in the WUA Decision.

D6. The proposed removal of the IMP charge is intended to better effect ComReg's regulatory objectives, which include the promotion of competition, by ensuring that there is no distortion or restriction of competition in the market and by encouraging efficient investment in infrastructure. The proposal is consistent with, and falls within, the scope of the existing obligation of cost orientation.

Analysis of Wholesale Physical Network Infrastructure Access Market

D7. ComReg is in the process of conducting a full analysis of the Wholesale Physical Network Infrastructure Access ("WPNIA") market. This market was introduced by the European Commission in December 2007³ as an updated and technology-neutral version of the WUA market. The updated WPNIA market is technology neutral, and is not limited to metallic loops and sub loops (as was the case in the previous WUA market). Therefore, the WUA market, defined in the WUA Decision, is contained within the broader WPNIA market. Accordingly, the final WPNIA market analysis decision will ultimately supersede the WUA decision which remains in force.

D8. On 23 December 2008 ComReg published its Response to Consultation and Draft Decision for the WPNIA market analysis⁴ (the "Response and Draft Decision document 08/104").

D9. ComReg was of the preliminary view that Eircom has SMP on the expanded WPNIA market, with a market share at or approaching 100%. Metallic loops still account for all but a very small number of access paths that fall within the WPNIA market. It is therefore reasonable to assume that, in the context of the existing WUA Decision that is solely based on metallic loops, Eircom continues to have a market share at or close to 100%.

D10. ComReg's preliminary view as set out in the Response and Draft Decision document 08/104 is that the barriers to entry and expansion within the WPNIA market remain high, due to the high cost and lengthy timeframe associated with building a fixed broadband network. As a result, the competitive threat posed by potential competition remains limited. ComReg's preliminary view is that countervailing power in the WPNIA market also remains limited for the reasons set out in the Response and Draft Decision document 08/104.

D11. ComReg's preliminary conclusion is that Eircom has SMP in the WPNIA market.

³ EU Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁴ Market Review: Wholesale physical network infrastructure access (Market 4). Response to ComReg Document 08/41 and Draft Decision (http://www.comreg.ie/_fileupload/publications/ComReg08104.pdf)

D12. ComReg notified the European Commission of the proposed SMP designation in accordance with Regulation 20 of the Framework Regulations. In its response letter to ComReg, the European Commission approved ComReg's proposal in the Response and Draft Decision document 08/104 to designate Eircom with SMP in the WPNIA market, thereby forgoing the right to veto ComReg's draft decision. The European Commission invited ComReg to reconsider its treatment of fibre in defining the product market, but noted specifically that its invitation did not affect the regulatory outcome with respect to the SMP designation.

D13. In view of its analysis of the WPNIA market, ComReg considers that:

- Countervailing power in the existing WUA market remains limited;
- Barriers to entry and expansion within the WUA market remain high;
- The threat posed by actual and potential competition remains limited;
- Eircom has a market share at or close to 100% in the existing WUA market; and
- Competition problems would be likely to occur in the WUA market in the absence of effective remedial obligations.

D14. Based on the up-to-date analysis conducted by ComReg on the WPNIA market and having regard to the subsequent approval of that preliminary view by the European Commission, ComReg is of the view that conditions of competition are unchanged in the WUA market and that Eircom's existing SMP designation in the WUA market as set out in the WUA Decision is an appropriate instrument on which to remove the IMP charge.

Conclusion

D15. This annex note assesses whether the competitive conditions that are present within the WUA market justify the continued imposition of a cost orientation obligation on Eircom.

D16. ComReg considers that the competitive conditions in the WUA market, as observed by ComReg and described in the WUA Decision, remain present at this time. As such, the decision to remove the IMP charge remains equally valid. ComReg therefore considers that the continued imposition of the cost orientation obligation is consistent with ComReg's objectives as set out in the Access Regulations and that the cost orientation obligation remains in place until such time as it is removed.