Commission for
Communications Regulation

Response to Consultation & Decision

Response to Consultation and Final Decision

Amendments to the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines

Document No: **Decision No:**	**11/22** **D02/11**
Date:	**22 March, 2011**

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 *Fax* +353 1 804 9680 *Email* info@comreg.ie *Web* www.comreg.ie

Contents

1 Executive Summary

1.1 ComReg is responsible for the regulation of the electronic communications sector in Ireland. Part of ComReg's statutory functions under the Communications Regulation Act[1] ("the Act") and a number of statutory instruments, is the regulation of the market for the wholesale terminating segments of leased lines.

1.2 The term "leased lines" refers to fixed, permanent telecommunications connections providing symmetric capacity between two points. A leased line is permanent, in that capacity is available between the two fixed points. A wholesale leased line may be used as an input to the provision of a retail leased line, or may be used as an input to provide other retail services, such as fixed and mobile voice services, or Virtual Private Networks ("VPNs"). A wholesale leased line may also be used by an operator seeking to extend parts of its network without there being a direct corresponding retail service.

1.3 In ComReg Document No. 08/103 (Decision No. D06/08[2]) Eircom Limited ("Eircom") was designated as having significant market power ("SMP") in the market for wholesale terminating segments of leased lines. The market for wholesale terminating segments of leased lines consists of wholesale leased lines ("WLLs"), Private Partial Circuits ("PPCs") and Ethernet technology. As a result of the designation of SMP on Eircom, a number of obligations were imposed on Eircom including access, non-discrimination, transparency, price control and cost accounting as well as the obligation of accounting separation.

1.4 On 10 September 2010, ComReg published Consultation Document No. 10/70[3] which included a draft decision regarding proposed amendments to the existing transparency and access obligations in the market for wholesale terminating segments of leased lines.

1.5 The Consultation also included proposals on costing methodologies and pricing principles relating to the price control obligation in the market for wholesale terminating segments of leased lines. ComReg intends to separately publish a response to consultation with a further consultation and a draft decision on the principles and prices relating to the price control obligation, shortly.

- **Amendment to the transparency obligation**:

1.6 This decision now sets out that Eircom shall not be required to publish pricing information for WLL circuits of greater than 10 Mb/s generally. This also applies to WLLs (less than 155 Mb/s) between the urban centres listed in the Appendix to ComReg Decision No D06/08 as amended.

[1] S.I. No. 22 of 2007.

[2] ComReg Document No. 08/103 (ComReg Decision No. D06/08): Decision Notice and Decision Instrument: Market Analysis – Leased Line Market Review; dated 22 December 2008.

[3] ComReg Document No. 10/70: Further specification of the price control obligation, the transparency obligation and the access obligation in relation to the market for wholesale terminating segments of leased lines; dated 10 September 2010 (Hereinafter referred to as "ComReg Document No. 10/70").

1.7 The number of WLL circuits greater than 10 Mb/s is less than 5% of total WLL circuits and is considered to be immaterial in the overall context of the market. In addition, the amendment to the transparency obligation does not affect the equivalent high speed PPC wholesale interconnection based product, where the number of PPC circuits is more significant.

1.8 The bandwidth limit of 10 Mb/s was set to future proof any technological changes. Currently, the vast majority of WLL services, availed of by Other Authorised Operators ("OAOs"), have a bandwidth of up to and including 2 Mb/s. However, due to changes in the nature of demand, in particular the general tendency towards increased bandwidth services, operators, in time, may typically consume up to and including 10 Mb WLLs. ComReg believes that this bandwidth limit is appropriate, however, ComReg may revise the upper limit if such products become significant in the market in the future, as failing to do so could have a negative impact on competition.

1.9 ComReg is of the view that Eircom should continue to provide all pricing information for WLLs above 10Mb/s on an application basis from OAOs and to provide detailed billing information to OAOs for all WLLs in the market for wholesale terminating segments of leased lines.

- **Amendment to the access obligation**:

1.10 This decision now sets out that Eircom shall amend the frequency of billing offered by it to OAOs from a quarterly basis to a monthly basis, one month in advance of the provision of services in the market for wholesale terminating segments of leased lines. In line with this decision, Eircom shall continue to offer 30 days credit terms. In the interests of proportionality and reasonableness, these new terms will be effective from the next billing cycle, no later than twelve months from the date of this decision so that Eircom has a reasonable period of time to implement the changes to its systems and so that the changes are not overly disruptive to its own business planning.

1.11 ComReg believes that a change in the billing terms at a wholesale level allows OAOs the opportunity to replicate these payment terms at a retail level. This enables OAOs to offer more favourable terms to its retail customers should they decide to do so. The change in billing frequency could also improve end user companies' cashflows and limit their requirement for overdraft facilities, which in the current economic climate is critical to small and medium sized businesses that rely on data services over leased lines.

1.12 On 25 January 2011, ComReg notified the European Commission of the draft measures relating to the proposed amendments to the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines. A "No Comments" letter was received on 25 February 2011.

1.13 ComReg believes that this decision on the transparency obligation for the publication of prices for WLL circuits above 10 Mb/s and the frequency of billing for the provision of leased line services in the wholesale market is a necessary amendment to previously imposed remedies on Eircom. The amendments to these obligations will ensure that regulation keeps pace with an evolving marketplace. These changes will benefit Eircom, OAOs and consumers in the medium to long term.

2 Introduction

Overview

2.1 In ComReg Document No. 10/70 ComReg published a consultation and draft decision on the proposed amendments to the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines.

2.2 The consultation also included proposals regarding the costing methodologies and pricing principles relating to the price control obligation in the market for wholesale terminating segments of leased lines. ComReg intends to separately publish a response to consultation with a further consultation and a draft decision on the principles and prices relating to the price control obligation, shortly.

2.3 On 25 January 2011 ComReg notified the European Commission of the draft measures regarding the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines. Following receipt of a "No Comments" letter from the European Commission and the submission of a number of responses to the consultation, this decision now sets out the Response to Consultation Document No. 10/70 and a final decision regarding the amendments to the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines.

Regulatory Background

2.4 In December 2008, Eircom was designated with SMP in the market for wholesale terminating segments of leased lines (ComReg Decision No. D6/08). This market is listed as one of the 7 recommended relevant markets by the European Union.

2.5 The market for wholesale terminating segment of leased lines consists of wholesale leased lines ("WLLs"), private partial circuits ("PPCs") and Ethernet technology. WLLs involve purchasing a full end-to-end leased line from Eircom, while the use of PPCs allows an OAO to combine elements of their own network infrastructure with parts of Eircom's network. Ethernet technology facilitates the delivery of larger leased line circuits i.e. above 10 Mb/s and up to 1,000 Mb/s, at lower costs than legacy technologies.

2.6 As a result of the designation of SMP on Eircom in the market for wholesale terminating segments of leased lines, a number of obligations were imposed on Eircom which included the obligation of access, transparency, non-discrimination, price control and cost accounting as well as the obligation of accounting separation.

2.7 In ComReg Decision No D06/08, ComReg also set out that the market for the minimum set of retail leased lines (bandwidths up to and including 2 Mb/s) and the market for wholesale trunk segments of leased lines were sufficiently competitive and therefore not subject to regulation. ComReg also determined that certain routes between defined urban centres of 155 Mb/s (also referred to as STM 1) and above were also competitive. ComReg specified that everything outside of the trunk market is considered to be part of the market for wholesale terminating segments of leased lines, including the main points of handover. Those circuits which facilitate routes which run between urban centres and which are of a capacity less than 155 Mb/s also fall into this market.

Purpose of this decision

2.8 The purpose of this decision is as follows:

- To amend the existing transparency obligation regarding the publication of prices for WLLs above 10 Mb/s.
- To amend the existing access obligation with particular regard to the condition of fairness, reasonableness and timeliness relating to the frequency of Eircom's billing process.

2.9 A number of responses were received from operators relating to the proposed amendments to the transparency obligation and the access obligation. The respondents were as follows:

- Eircom Ltd. ("Eircom")
- BT Communications Ireland Ltd. ("BT")
- Alternative operators in the Communications Market ("ALTO")
- Magnet Networks Ltd. ("Magnet")
- e-net.

Structure of this document

2.10 **Section 3** sets out ComReg's conclusions regarding the level of transparency for WLL prices greater than 10 Mb/s.

2.11 **Section 4** sets out ComReg's conclusions regarding the frequency of billing offered by Eircom to OAOs.

2.12 **Section 5** sets out the Decision Instrument and Direction regarding the transparency obligation and the access obligation in the market for wholesale terminating segments of leased lines.

2.13 **Section 6** sets out the regulatory impact assessment ("RIA").

3 Amendment to the transparency obligation

Consultation Proposal

3.1 In ComReg Document No. 10/70, ComReg consulted publicly on the proposed amendment to the transparency obligation specifically in relation to Eircom's WLLs above 10 Mb/s generally and also, specifically, between the 16 urban centres as listed in ComReg Decision No D02/10[4].

3.2 In ComReg Decision No D06/08, a transparency obligation was imposed on Eircom in the market for wholesale terminating segments of leased lines. The obligation was imposed pursuant to Regulation 10 of the Access Regulations and as set out in section 9 of the Decision Instrument in ComReg Decision No D06/08.

3.3 The main purpose of the consultation was to consider how the transparency obligation should be applied in relation to regulated prices for WLL circuits. This was specific to the requirement imposed on Eircom to publish pricing for WLLs greater than 10Mb/s both generally and those (greater than 10Mb/s) which are routed between the 16 urban centres.

3.4 In ComReg Document No. 10/70 ComReg was of the preliminary view that Eircom should not be obliged to publish pricing information for WLLs of bandwidth greater than 10Mb/s.

3.5 In addition, ComReg believed that there was no reason for any differentiation of publication of WLL pricing information on the basis of geographical location or routing of individual circuits. Therefore, it was proposed that there would be no variation regarding the transparency obligation for WLLs (below 155 Mb/s) between the urban centres listed in the Appendix to ComReg Decision No. D06/08 as amended, with the exception of WLLs above 10 Mb/s.

3.6 It was understood that speeds above 10Mb/s could also be achieved, and ComReg would consider revising the upper limit if such products became significant in the market. ComReg also stated that it may revise this upper limit as appropriate, in line with future characteristics of such a product.

3.7 ComReg was also of the preliminary view that Eircom should continue to provide all pricing information for WLLs above 10Mb/s on an application basis by OAOs and to provide detailed billing information to OAOs for all WLLs in the market.

Consultation Question

Q. 20 Do you consider that the application of the transparency obligation in relation to the publication of Wholesale Leased Lines pricing information for circuits of bandwidth greater than 10Mb/s in general, should be adjusted so that Eircom should not be obliged to publish the pricing information for these WLLs? Please provide reasons for your response.

Q. 21 Do you consider that the application of the transparency obligation in relation to the publication of Wholesale Leased Lines pricing information for

[4] ComReg Document No 10/12, Decision No D02/10 on Leased lines Markets: Urban centres – Response to Consultation 09/86 and Final Decision; dated 15 February 2010.

circuits of less than STM 1 between the "urban centres", should not be adjusted so that Eircom should be obliged to publish the pricing information for these WLLs (insofar as these WLLs are of a bandwidth of less than and equal to 10Mb/s)? Please provide reasons for your response.

Views of Respondents

3.8 Five respondents provided their views in relation to Question 20 and Question 21.

3.9 With regard to Question 20, e-net agreed with ComReg's proposal as set out above. ALTO, BT and Magnet believed that Eircom should be obliged to publish all pricing information relating to WLLs given that Eircom are subject to the transparency obligation imposed on it.

3.10 In addition, ALTO and BT stated that they see little point in ComReg mandating processes to establish the value of WLL prices as prescribed in the earlier part of the consultation only for those prices not to be published.

3.11 Eircom did not agree that it should be required to publish the prices of WLLs above 2 Mb/s including WLLs of 10 Mb/s. Eircom raised a number of points in this regard.

3.12 Eircom stated that ComReg did not set out valid reasons for its position and referred specifically to paragraph 7.14 of ComReg Document No. 10/70. Eircom claimed that ComReg found that the fact that pricing information for any WLL above 2 Mb/s was not available '*has not been a hindrance to industry in the day to day operations of the market*'.

3.13 In addition, Eircom believed that by extending the speed to 10 Mb/s that ComReg may be intending to impose a requirement on Eircom to offer Ethernet-based WLLs at these speeds. Eircom stated that it does not accept that ComReg can lawfully require it to provide Ethernet-based WLLs.

3.14 Eircom also claimed that the publication of the prices for WLLs may dampen competition contrary to the interests of end-users. Eircom believed that the publication of such prices for WLLs will serve to exclude Eircom from the retail market, as its competitors will easily be able to undercut Eircom's published rates. Eircom also stated that the absence of a publication obligation will allow Eircom to tune offers to the local cost characteristics and to the degree of infrastructure competition. In this context, Eircom believed that it is particularly important that it is not required to publish the price for 10 Mb/s WLLs.

3.15 Eircom believed that the trend in the leased line market is towards higher bandwidths, especially for customers in urban areas where larger firms are located. Eircom claimed that Local Area Networks ("LANs") largely operate at 10 Mb/s and therefore that volumes of leased lines at 10 Mb/s are expected to grow at a greater pace than above 10 Mb/s. Eircom stated that requiring it to publish 10 Mb/s WLLs would effectively reduce the level of competition in this area. Eircom proposed that the remedy of transparency should therefore apply at 2 Mb/s or below, but not at 10 Mb/s or above.

3.16 With regard to Question 21, e-net agreed that there was no reason to differentiate the application of the transparency obligation to WLLs on the basis of geographical location or on routing. While Magnet, BT and ALTO believed that the existing rules, whereby Eircom should be obliged to publish all pricing information relating to WLLs, should continue BT and ALTO believed that the bandwidth limit should be extended from 10 Mb/s to 20 Mb/s.

3.17 Alternatively, Eircom stated that it offers WLLs at speeds of 2 Mb/s and at 34 Mb/s and at no speeds between these and has no intention of extending the WLL portfolio to provide services between these speeds. Eircom added that it will continue to publish the prices for WLLs up to and including 2 Mb/s in the form of the current leased line price list and this price list does not distinguish between services offered between and outside urban centres. Eircom therefore believed that the issue raised in this question does not arise.

ComReg's Position

3.18 This section sets out the main points raised by respondents and ComReg's position in that regard.

3.19 ComReg remains of the view that Eircom should not be required to publish pricing information for WLLs greater than 10Mb/s both generally and those (greater than 10Mb/s) which are routed between the 16 urban centres.

3.20 The number of WLL circuits greater than 10 Mb/s is less than 5% of total WLL circuits and is considered immaterial in the overall context of the market for wholesale terminating segments of leased lines. The amendment to the transparency obligation for WLLs does not affect the equivalent high speed PPC wholesale interconnect based product, where the number of PPC circuits are more significant. Therefore, ComReg is of the view that the amendment to the transparency obligation will not affect the overall market.

3.21 ComReg also believes that there is no reason for any differentiation of publication of pricing information for WLL circuits on the basis of geographical location or routing of individual circuits. Therefore, this decision does not provide any variation to the transparency obligation for WLLs (below 155 Mb/s) between the urban centres listed in the Appendix to ComReg Decision No D06/08 as amended, with the exception of WLLs above 10 Mb/s.

3.22 While a number of the OAOs believed that the obligation of transparency should continue to apply to Eircom in its entirety regardless of bandwidths, no reasons were put forward by the OAOs in this regard. ComReg believes that given that operators can obtain the pricing information from Eircom for any WLL circuit on an application basis, that this should not prove to be a significant issue for OAOs.

3.23 In response to BT and ALTO's point regarding the prices for WLL circuits that are not published, ComReg would like to clarify that it will have access to all the relevant pricing information as part of the cost modelling exercise. ComReg will therefore be in a position to monitor Eircom's compliance with its price control obligations.

3.24 Eircom claimed that ComReg did not set out valid reasons for its position and referred specifically to paragraph 7.14 of ComReg Document No. 10/70. In order to clarify the point made by ComReg, Paragraph 7.14 in ComReg Document No. 10/70 set out that:

'*Pricing information for any WLL above 2 Mb/s i.e. other than the minimum set, and more specifically 34 Mb/s, 45 Mb/s, 155 Mb/s (STM-1) circuits or greater, was not published either as retail pricing in the Telecommunications scheme, or, more recently, as part of the wholesale pricing published within the Network Price List. This situation, in the opinion of ComReg, has not been a hindrance to industry or in the day to day operation of this part of the market*.'

3.25 ComReg believes that it is clear that paragraph 7.14 refers only to the WLL circuits currently available above 2 Mb/s i.e. 34 Mb/s, 45 Mb/s, 155 Mb/s (STM-1) circuits or greater and is therefore not making reference to the bandwidth space between 2 Mb/s and 10 Mb/s where, currently, no WLL services are being offered. ComReg believes that its proposal to specify the publication requirement for WLL prices up to and including 10 Mb/s is entirely reasonable as the objective is to future proof any technological changes. Currently, the vast majority of WLL services, availed of by OAOs, have a bandwidth of up to and including 2 Mb/s. However, due to changes in the nature of demand, in particular the general tendency towards increased bandwidth services, operators, in time, may typically consume up to and including 10 Mb/s WLLs, where this is available. ComReg believes that this bandwidth limit is appropriate but ComReg may revise the upper limit if such products become significant in the market for wholesale terminating segments of leased lines in the future.

3.26 With regard to Eircom's point on mandating Ethernet based WLLs between 2 Mb/s and 10 Mb/s, ComReg would like to clarify that it is not currently mandating any such offering. However, should an operator make a reasonable request or raise a dispute to ComReg in this regard that ComReg would be required to consider any request on its merits.

3.27 Eircom also raised a point regarding the potential impact of the publication of prices between 2 Mb/s and up to and including 10 Mb/s on competition and on the interests of end-users. ComReg would like to point out that Eircom will be required to continue to provide detailed site specific pricing information for WLL circuits of any bandwidth should an operator request it. Therefore, for example, an OAO could obtain pricing information for WLLs in a bid situation, if it so wished.

3.28 In addition, ComReg disagrees with Eircom's point that the majority of LANs operate at 10 Mb/s. In fact, ComReg is of the view that the vast majority of LANs now operate at 100 Mb/s or 1,000 Mb/s. ComReg is of the view that Eircom appears to confuse LAN and WAN (Wide Area Network – often a leased line) speeds.

3.29 While Eircom raised a number of points regarding its concerns with the publication of prices for WLL circuits above 2 Mb/s and up to and including 10 Mb/s, which are set out above, it subsequently stated in its response to Question 21 that it has no intention of providing any services in the space between 2 Mb/s and up to and including 10 Mb/s. ComReg therefore concludes that publication of prices for WLL circuits between 2 Mb/s and 10 Mb/s is currently not an issue for Eircom. However, as stated earlier the bandwidth limit is set at 10 Mb/s to future proof any technological changes.

3.30 BT and ALTO believed that the 10 Mb bandwidth limit set out in the consultation should be extended to 20 Mb/s. However, ComReg believes that the bandwidth limit of 10 Mb/s is currently sufficient to future proof technological changes. As stated in ComReg Document No. 10/70 ComReg may consider revising the upper limit if such products became significant in the market in the future. ComReg also stated that it may revise this upper limit as appropriate, in line with future characteristics of such a product.

3.31 ComReg concludes that Eircom should not be required to publish WLL pricing information above 10 Mb/s. However, ComReg believes that Eircom should continue to provide all pricing information for WLLs above 10Mb/s on an application basis from operators and to provide detailed billing information to OAOs for all WLLs.

3.32 The Decision Instrument set out in Section 5 takes account of the measures discussed above and accordingly amends the Transparency obligation as set out in the Decision Instrument in ComReg Decision No. D06/08.

4 Amendment to the access obligation

Consultation Proposal

4.1 In ComReg Document No. 10/70 ComReg consulted publicly on a proposal to amend the frequency of billing offered by Eircom to OAOs for the provision of leased lines services.

4.2 As already detailed above, Eircom was designated with SMP in the market for wholesale terminating segment of leased lines and an obligation to provide access was imposed on Eircom. Section 7 of the Decision Instrument contained in D06/08 sets out that the access obligation shall, pursuant to Regulation 13(3) of the Access Regulations, be subject to conditions dealing with fairness, reasonableness and timeliness. The requirement to offer terms that are fair and reasonable is imposed as part of a broader condition to provide access to, and use of, specific network elements and associated facilities[5].

4.3 As set out in ComReg Document No. 10/70, Eircom currently bills OAOs three months in advance with 30 days credit terms. While the OAOs have requested Eircom to alter these terms, this request has been rejected by Eircom for a number of reasons. While ComReg acknowledged in the consultation that it would be preferable if the billing terms were resolved commercially, in the absence of such consensus regulatory intervention was necessary.

4.4 As set out in ComReg Document No 10/70, OAOs believe that advance payments of three months in advance are equivalent to OAOs being required to provide a funding facility to Eircom. In addition, OAOs must provide funding for their own working capital at the commercial cost of that working capital. On the other hand Eircom claimed that the change in payment terms would result in an increase in the prices for the wholesale leased line services to reflect the higher transaction and financing costs incurred at a wholesale level.

4.5 In the consultation ComReg set out that it did not believe that Eircom's current billing terms of invoicing three months in advance, with 30 days credit terms was fair and reasonable. Therefore, ComReg proposed that the billing terms should be amended from three months in advance to billing monthly in advance and to continue with 30 days credit terms.

4.6 ComReg was also of the view that consideration should be given to the timing of any changes to the billing terms. The options for the timing of any changes were as follows:

- The new terms should be effective from the next billing cycle, from the date of the decision.

- The new terms should be effective from the next billing cycle, six months from the date of the decision.

[5] See, for example, Article 12 of the Access Directive, in the post-amble to Article 12(1)(i): "National regulatory authorities may attach to those [access] obligations conditions covering fairness, reasonableness and timeliness."

- The new terms should be effective from the next billing cycle, twelve months from the date of the decision.

4.7 ComReg believed that these new billing terms should be effective from the next billing cycle, twelve months from any decision so that Eircom has a reasonable period of time to implement the changes to its systems and so that the changes are not overly disruptive to Eircom's business. In addition, ComReg believed that allowing Eircom an implementation period of twelve months from the date of any decision was proportionate and reasonable.

4.8 While ComReg believed that changing the frequency of billing from three months in advance to monthly in advance may have some associated transaction costs, ComReg was of the preliminary view that these costs should not be significant. However, ComReg welcomed industry views in this regard.

4.9 ComReg also noted that a similar issue was brought to Ofcom's attention in the UK, between BT Wholesale and THUS Communications. A determination[6] was issued by Ofcom where it concluded that BT Wholesale's payment terms of three months in advance for leased lines was not fair nor reasonable, and required BT Wholesale to offer THUS the option of billing monthly in advance, with 30 days credit.

Consultation Question

Q.22 Do you agree that a billing period of one month in advance with 30 days credit are reasonable payment terms from Eircom to other operators for the provision of wholesale leased line products i.e. WLLs, PPCs and NGN Ethernet leased lines, within the market for wholesale terminating segment of leased lines? Please provide reasons for your response.

Q.23 Do you agree that in the interests of proportionality and reasonableness Eircom's new billing terms should be effective from the next billing cycle twelve months from the date of the decision? Please provide reasons for your response.

Views of Respondents

4.10 Four respondents provided their views in relation to question 22 and 23.

4.11 With regard to question 22, e-net, Magnet and ALTO agreed that the billing period should be changed to billing operators one month in advance with 30 days credit terms, while Eircom strongly disagreed.

4.12 e-net noted in its response that given that Eircom's credit terms mirror those offered by BT in the UK and the fact that Ofcom recently compelled BT to alter its policy that it makes sense for ComReg to oblige Eircom to move away from such credit terms also.

[6] Determination of a dispute between THUS and BT about payment terms for PPCs, IECs and IBCs http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_916/thusbt.pdf

4.13 Magnet networks stated that it felt that the proposed change to billing would make budgeting easier.

4.14 ALTO noted that a number of operators requested this change from Eircom within the industry forum and Eircom firmly rejected the proposal. ALTO believed that it did not foresee Eircom offering the change voluntarily and it agreed and welcomed the proposal set out by ComReg.

4.15 On the other hand, Eircom believed that the finding by ComReg that Eircom's current terms of payment are not fair and reasonable is based on an assessment of facts which are inaccurate and wrong.

4.16 Eircom believed that heavy reliance was placed by ComReg on the findings of Ofcom in the UK and while these principles may be used by ComReg this does not mean that the findings of Ofcom can be readily transposed in Ireland. In this regard Eircom stated that there appears to be crucial differences between the Irish and British situation. The differences as noted by Eircom between the Ofcom case and the current case in Ireland relate to whether the payment terms affect competition and whether existing payment terms had been taken into account in arriving at cost-oriented prices. Eircom believed that the main difference between the case in UK and in Ireland is that Eircom's wholesale payment terms for leased lines in Ireland is mirrored at a retail level whereas this was not the case for BT in the UK.

4.17 Eircom also noted in its response that its costs underpinning its PPC and NGN Ethernet prices reflect the impact on working capital costs of revenue being charged quarterly in advance. Eircom believes that a consequence of this is that any change in current payment terms would inevitably lead to increased product prices.

4.18 Eircom also claimed that ComReg's RIA is flawed and wrong. In particular, Eircom claims that ComReg appears to believe that the measure could free some capital that OAOs could invest as well as allowing OAOs to offer their customers better payment terms. Eircom believes that this is not logical and that the likely outcome would be that one operator will offer monthly billing to end users, and all will be forced to follow. While Eircom believes that this may be a significant benefit for end users but it will not encourage investment by OAOs, and will reduce Eircom's ability to invest. Unless the benefits to end users outweigh the damage caused by reduced investment, the existence of any impact on the Irish economy is unclear according to Eircom.

4.19 With regard to question 23, e-net agreed with the twelve month time frame from the date of the decision so as to allow Eircom to implement the billing changes to its systems. ALTO believed that if the changes to billing did not take place from the time of finalisation of the decision instrument or in Magnet's view from the next quarter, then retrospective payments should be considered on the part of Eircom. ALTO also raised an issue regarding the urgent need to revise the process for leased line and network elements cessation processes. It believed that the process needs to be shortened to align with customer expectations and that ComReg should bring Ireland in line with other countries e.g. UK, France and other EU countries where target times for ceasing order are about 7 days in duration.

4.20 Eircom in its response believed that no change to payment terms was warranted. However, it also added that if ComReg decided to proceed with its proposal then a significant period of time of at least twelve months would be required for the transition to new payment terms. In addition, Eircom also stated that the current prices for PPC and Ethernet access products would have to be reviewed given the change to the billing process.

ComReg's Position

4.21 This section sets out the main points raised by respondents and ComReg's position in that regard.

4.22 Currently, Eircom bills OAOs three months in advance of the quarterly period of the service provided with 30 days credit. The concerns raised by OAOs have been that they are paying for provision of services several months before these services are actually provided to them. ComReg believes that this may have a more significant impact on the cashflows of the small and medium sized OAOs, compared with the impact on Eircom's cashflow. As a result of the impact on OAOs, under the current billing terms, OAOs may be forced to transfer the burden of the current billing terms onto retail businesses/customers throughout the country.

4.23 ComReg is therefore of the view that Eircom's billing terms should be amended from a quarterly basis to a monthly basis, one month in advance of provision of the service with the credit terms remaining at 30 days. In addition, ComReg is also of the view that these new billing terms should be effective from the next billing cycle, no later than twelve months from any decision so that Eircom has a reasonable period of time to implement the changes to its systems.

4.24 While the majority of respondents agreed with ComReg's proposal to change the billing terms to monthly in advance with 30 days credit, Eircom disagreed for a number of reasons.

4.25 Eircom raised the point that ComReg placed heavy reliance on the outcome of the Ofcom case in the UK. ComReg would like to clarify that while it gave due consideration to the determination of Ofcom in a case between BT and THUS with similarities to the case in Ireland, ComReg's proposal is based on the specifics of the issue brought to its attention by OAOs in Ireland.

4.26 In addition, Eircom also raised the point that a change in the billing frequency from three months in advance to monthly in advance would inevitably lead to increased product prices. ComReg has a number of points to make in relation to Eircom's position.

4.27 ComReg does not believe that a change in the billing terms from quarterly to monthly and from three months in advance to one month in advance should have a material impact on the overall working capital of Eircom's business based on the detailed cost modelling that has taken place to date in relation to Eircom's core model and associated pricing. In addition, while there will be additional billing costs ComReg believes that these costs will not be material. Given that carrier administration and billing costs have always been in the past allocated across both retail and wholesale product volumes, any increases in billing costs as a result of this decision will not have a material impact on unit costs. ComReg also believes that in line with the principle of efficiency that it would expect that the billing process would be an automated process and therefore any changes in frequency should not have any material impact on overall billing costs. However, any minor adjustments will be reflected, where relevant, in finalising the overall leased lines cost modelling and any revised prices as a result, in the coming months.

4.28 Eircom also believed that the change in the billing terms would not encourage investment by OAOs and would reduce Eircom's ability to invest. ComReg believes that the change in billing terms is a working capital management issue and should not affect Eircom's ability to invest. While Eircom are currently investing in next generation technology OAOs are also required to invest in their network where they are using part of their own network for provision of a service (e.g. PPCs) to their customers. ComReg is of the opinion that the current working capital requirements and billing terms of quarterly in advance may place a more significant burden on OAOs business in terms of additional borrowing costs and a squeeze on the capital available to them in order to grow their businesses.

4.29 While ComReg is of the view that the change in billing frequency is a working capital management issue, ComReg believes that it is also worth highlighting that a large part of Eircom's revenue for the provision of leased lines services in the market for wholesale terminating segments of leased lines are received from Eircom Retail. Therefore, ComReg believes that the revenues received from OAOs should not have a material impact on the level of capital available to Eircom for investment in its own network.

4.30 In its comments on the RIA, Eircom also raised the point regarding the benefit of the change in billing terms to end-users. ComReg believes that a change in the billing terms at a wholesale level gives OAOs the opportunity to replicate those payment terms at a retail level. This enables OAOs to offer more favourable terms to its retail customers should they decide to do so. The change in payment terms could also improve end user companies' cashflows and limit their requirement for overdraft facilities, which in the current economic climate is critical to small and medium sized businesses that rely on data services over leased lines. These benefits are further highlighted in the RIA in section 6.

4.31 ComReg believes that it is also worth noting that Eircom offers billing terms of monthly in advance for some of its other wholesale services. For example, local loop unbundling ("LLU") is monthly in advance with 30 days to pay and Wholesale Line Rental ("WLR") is also generally based on monthly in advance with 30 days to pay. Furthermore, and as already set out in ComReg Document No. 10/70, a number of operators around Europe offer terms of monthly in advance and in some cases more favourable terms for the provision of leased line services.

4.32 A number of respondents disagreed with ComReg's proposal that the revised billing terms should be implemented twelve months from the date of ComReg's final Decision and some suggested that if this was the case that Eircom should make retrospective payments to operators. ComReg is of the view that these measures are sufficient going forward and that it would not be appropriate to apply retrospective payments. ComReg believes that it is necessary, reasonable and proportionate to allow Eircom a period of no more than twelve months from the date of the decision to make the appropriate changes to its systems. This should also ensure that the changes to the billing terms are not disruptive to Eircom's business.

4.33 ALTO also raised the point that there is an urgent need to revise the process for leased lines and network elements cessation processes. However, this issue is not relevant to the current consultation and should be addressed separately as part of the relevant industry forum.

4.34 The Decision Instrument set out in Section 5 takes account of the measures discussed above and accordingly amends the Access obligation as set out in the Decision Instrument in ComReg Decision No. D06/08.

5 Decision Instrument

Please note that this Decision Instrument only deals with the access and transparency obligation regarding ComReg Decision No. D06/08.

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to the market for wholesale terminating segments of leased lines defined in the document entitled Market Analysis: Leased Lines Markets in ComReg Decision No D06/08[7] and as identified in the European Commission's Recommendation[8] and is made by the Commission for Communications Regulation ("ComReg"):

i. Pursuant to Regulations 9, 10, 13 and 17 of the Access Regulations[9];

ii. Having had regard to sections 10 and 12 of the Communications Regulations Act, 2002;

iii. Having taken account, of its functions under Regulation 6(1) of Access Regulations;

iv. Pursuant to the market definition, market analysis and reasoning conducted by ComReg in Market Analysis: Leased Lines Markets in ComReg Decision No D06/08 ("D06/08"), and the analysis and reasoning set out in Market Analysis: Leased Lines Markets Review of Urban Centres, Response to Consultation and Final Decision, ComReg Document No. 12/10, ComReg Decision No D02/10[10] and the reasoning and individual decisions set out previously in these documents, each of which form part of and shall where necessary, be construed with this Decision Instrument;

v. Having consulted pursuant to Regulation 19 of the Framework Regulations and having taken account of the submissions received in relation to ComReg Document No. 10/70;

vi. Having had regard to the analysis and reasoning set out in ComReg Document No. 10/70 which shall, where necessary, be construed together with this Direction;

[7] ComReg Document No 08/103 (ComReg Decision No D06/08) Market Analysis: Leased Lines Markets Review, Response to Consultation on draft Decision Instrument, Final Decision Notice and Decision Instrument; dated 22 December 2008.

[8] European 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 – OJ L 344/65.

[9] S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 ("Access Regulations") 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.

[10] ComReg Document No 10/12, Decision No D02/10 on Leased lines Markets: Urban centres – Response to Consultation 09/86 and Final Decision; dated 15 February 2010.

vii. Having had regard to the provisions of and the individual decision in the Response to Consultation and Decision in ComReg Document No. 11/22 (Decision No. D02/11) which shall where necessary be construed as forming part of this Direction;

viii. Having notified the draft measure to the European Commission, further to Regulation 20 of the Framework Regulations[11] whereby the draft measure was also made accessible to national regulatory authorities in other EU Member States, and the European Commission having informed ComReg that it had examined the draft measure and that it had no comments in relation thereto and pursuant to Article 7(5) of the Framework Directive[12], ComReg could adopt the resulting draft measure;

ix. Having where appropriate complied with the Policy Directions made by the Minister further to section 13 of the Communications Regulation Act 2002[13].

2 SCOPE AND APPLICATION

2.1 This Decision Instrument applies to Eircom Limited and its successors and assigns ("Eircom").

2.2 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.

3 OBLIGATION OF TRANSPARENCY

3.1 Eircom shall, no longer be obliged to publish prices for Wholesale Leased Lines of a bandwidth greater than 10 Mb/s.

3.2 Section 9.2 of the decision instrument contained in D06/08 is hereby amended by the substitution of the following wording for the wording therein contained:

"Section 9.2 Without prejudice to the generality of the obligation in section 9.1, pursuant to Regulation 10(2) of the Access Regulations, Eircom shall publish and keep updated a Reference Offer (RO) for the services and facilities referred to in sections 6 and 8. For the avoidance of doubt, this obligation also applies to any new product, service or associated facility in the Market. The RO shall be published 3 months from the effective date or at a later date if agreed with ComReg. The RO shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and the RO shall include:

[11] S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transpose 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.

[12] 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.

[13] Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

i. A description of the relevant offerings broken down into components; and

ii. A description of the associated terms and conditions, including prices, *other than prices for Wholesale Leased Lines of a bandwidth greater than 10Mb/s*."

4 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS

4.1 Section 7.1 of the Decision Instrument contained in D06/08, which provides the provision that the access obligations shall be subject to conditions dealing with fairness, reasonableness and timeliness pursuant to Regulation 13(3) of the Access Regulations, is hereby further specified in section 4.2 of this Decision Instrument.

4.2 Eircom's terms and conditions, in respect of the provision of leased lines, in the market for the wholesale terminating segments of leased lines, as defined in D06/08, shall be amended so that Eircom shall invoice other authorised operators on a monthly basis, one month in advance of provision of the service with the credit terms remaining at 30 days.

5 STATUTORY POWERS NOT AFFECTED

5.1 Nothing in this Decision Instrument 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 Decision Instrument) from time to time as the occasion requires.

6 EFFECTIVE DATE

6.1 This Decision Instrument shall be effective from the date of its publication and shall remain in force until further notice by ComReg.

6.2 Section 4 of this Decision Instrument shall be applied from the next billing cycle which occurs no later than twelve months from the effective date.

Alex Chisholm
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 22ND DAY OF MARCH 2011

6 Regulatory Impact Assessment

Introduction

6.1 A 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 regulatory options on different stakeholders.

6.2 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 Guidelines[14], issued by the Department of An Taoiseach in June 2009 under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002 requires ComReg to comply with Ministerial Policy Directions. Policy Direction 6 of February 2003[15] 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.

6.3 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. ComReg's ultimate aim in conducting a RIA is to ensure that all proposed measures are appropriate, proportionate and justified. 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.

6.4 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. However, ComReg has nonetheless decided to carry out a RIA in order to demonstrate that it has considered and evaluated the regulatory options available, with due regard to necessity, effectiveness, proportionality, transparency, accountability and consistency. However, ComReg will consider all respondents' views to this consultation and therefore in taking any decision ComReg will assess whether a further RIA should be conducted, though it is not mandatory for ComReg to do so.

6.5 In assessing the available regulatory options, ComReg's approach to the RIA follows the steps below:

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

[14] See "Revised RIA Guidelines How to Conduct a Regulatory Impact Analysis", June 2009. http://www.betterregulation.ie/eng/Developments_in_Better_Regulation_Policy/Revised_RIA_Guidelines.pdf

[15] Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

Step 3: determine the likely impacts on stakeholders

Step 4: assess the likely impacts and choose the best option.

Identify the regulatory objectives and describe the policy issues

6.6 ComReg considers that one of the main objectives, *inter alia*, is to foster competition in the telecommunications industry through appropriate and efficient infrastructure investment. In the context of this decision the main regulatory objectives are discussed under the following headings:

A. Transparency obligation; and
B. Access obligation.

A. Transparency obligation:

6.7 In ComReg Document No. 10/70 ComReg set out that the proposed modification to the publication of prices above 10 Mb/s for WLLs did not warrant a formal RIA. In ComReg Document No 07/56 ComReg specified that under normal circumstances a RIA will be conducted in the preparation of any ComReg document which proposes to impose a regulatory obligation, or amend an existing regulatory obligation to a significant degree, or which will otherwise significantly impact on the market or any stakeholder(s) or consumers. The decision on the transparency obligation is to remove and clarify the existing transparency obligation on Eircom relating to the publication of prices for WLL circuits above 10 Mb/s. ComReg is of the view that this amendment is not deemed significant in the context of the overall market and in fact only relates to a small number of WLL circuits (less than 5%) of total WLL circuits in the market. In addition, pricing information is supplied on a request basis and will continue to be. For these reasons, it was decided that a RIA was not required in this regard.

B. Access obligation:

6.8 The key regulatory objective in relation to Eircom's billing process is to ensure it is compliant with Regulation 13(3) of the Access Regulations, in relation to the conditions dealing with fairness, reasonableness and timeliness. Eircom currently bill OAOs quarterly in advance with 30 days credit. While the OAOs have requested Eircom to alter its terms, this request has been rejected by Eircom for a number of reasons. In this consultation process ComReg has explored the options available and has now determined the most reasonable and appropriate option going forward.

Identify and describe the regulatory options

6.9 In ComReg Document No. 10/70 ComReg set out that there were two relevant options to consider in terms of the most appropriate billing process going forward.

- **Option 1**: The billing process should remain at quarterly in advance with 30 days credit terms; or
- **Option 2**: The billing process should be changed to monthly in advance with 30 days credit terms.

6.10 Option 1 would mean that the status quo remains in place and Eircom would continue to bill the OAOs quarterly in advance (with 30 days credit terms).

6.11 Option 2 would mean that Eircom would change the frequency of its billing to monthly in advance (with 30 days credit terms).

6.12 This option would mean that Eircom would bill OAOs on a monthly basis, one month in advance of provision of the service with the credit terms remaining at 30 days. The new terms will be effective from the next billing cycle, no later than twelve months from any decision so that Eircom would have a reasonable period of time to implement the changes to its systems and so that the changes are not overly disruptive to Eircom's business. ComReg is of the view that the twelve month period for implementation is proportionate and reasonable.

Determine the likely impacts on stakeholders

6.13 The likely impact on stakeholders is discussed below:

Option 1 – Continue with the current billing process of three months in advance with 30 days credit terms		
(a) Impact on incumbent	**(b) Impact on OAOs**	**(c) Impact on consumer**
(i)No change to the status quo.	(i) OAOs continue to be billed three months in advance for the quarterly period of service, with 30 days to pay. (ii) The current working capital requirements may place a significant burden on OAOs business in terms of additional borrowing costs. (iii) The current requirement may also impact on capital available to invest in growing OAOs businesses.	(i) Small and medium businesses may continue to be constrained by quarterly in advance billing terms which may put a strain on their business cashflows and the requirement for overdraft facilities. (ii) There may be less possibility of OAOs offering more favourable terms to its retail customers.
Option 2 – Change the billing frequency to monthly in advance with 30 days credit terms		
(a) Impact on incumbent	**(b) Impact on OAOs**	**(c) Impact on consumer**
(i) No material impact on working capital of Eircom's business. However, any minor adjustment will be reflected where relevant in	(i)Allows OAOs to fund their own working capital requirements. (ii) Allows OAOs to use available capital to invest	(i) Gives OAOs the opportunity to change billing terms for retail customers. (ii) Gives OAOs the

finalising the overall leased lines cost modelling and any revised prices as a result in the coming months. (ii) Little, if any, impact on transactions/billing costs. However, any minor adjustment will be reflected where relevant in finalising the overall leased lines cost modelling and any revised prices as a result in the coming months. (iii) No impact on Eircom's ability to invest in infrastructure. Eircom still receive the same levels of cash but the timing will change. (iv) Eircom are allowed a period of no later than 12 months from the effective date of this decision to implement the amended billing terms. This should ensure that the changes are not disruptive to its business.	in their own network. (iii) This could reduce the requirement for overdraft facilities.	opportunity to offer more favourable terms to its retail customers. (iii) This could improve company cashflows and limit the requirement for overdraft facilities.

6.14 This decision now sets out that Eircom shall change the billing terms from a quarterly basis to a monthly basis, one month in advance of the provision of the service with 30 days credit. The new billing terms shall be implemented from the next billing cycle no later than twelve months from the date of the decision. ComReg believes that this should allow Eircom sufficient time to change its billing system and also it should ensure that the changes were not overly disruptive to Eircom's business.

6.15 ComReg believes that the process of this review has been *transparent*. A consultation process was undertaken where a number of respondents provided their views regarding the amendments. In addition, ComReg notified the European Commission of its draft measures regarding the amendments to the transparency obligation and the access obligation. On 25 February 2011, a "No Comments" letter was received from the European Commission. ComReg remains of the view that the billing terms should be amended from quarterly to monthly and from three months in advance to one month in advance while the credit terms remain at 30 days.

6.16 ComReg considers that the review of the billing terms was *necessary* given that the issue could not be resolved commercially between the operators. Regulatory intervention was necessary in order to assess and resolve the issue. In addition, ComReg is of the view that the current working capital requirements may place a more significant burden on OAOs business in terms of additional borrowing costs and a squeeze on the capital available to them. The new measure will ensure that OAOs are offered fair and reasonable billing terms.

6.17 ComReg considers that it has been *accountable* in its review of the billing terms offered by Eircom. One of the issues raised by Eircom relates to the impact the change may have on its working capital. ComReg does not believe that a change in the billing terms from quarterly to monthly and from three months in advance to one month in advance should have a material impact on the overall working capital of Eircom's business based on the detailed cost modelling that has taken place to date in relation to Eircom's core model and associated pricing. ComReg has also noted that there should be little, if any, impact on the transaction/billing costs. However, any minor adjustments will be reflected, where relevant, in finalising the overall leased lines cost modelling and any revised prices as a result, in the coming months.

6.18 ComReg disagrees with Eircom that the change would reduce Eircom's ability to invest. ComReg believes that the change in billing terms is a working capital management issue and should not affect Eircom's ability to invest. In essence, Eircom are still receiving the same level of cash from operators but as a result of this decision the timing will change. In addition, a large portion of revenue received by Eircom for the provision of leased line services in the market for wholesale terminating segments of leased lines is from Eircom Retail. Therefore, ComReg is of the view that the revenues from OAOs would not have a material impact on the level of capital available to Eircom for investment in its network.

6.19 ComReg believes that the review of the billing terms at a wholesale level gives OAOs the opportunity of a positive and *effective* impact at a retail level. ComReg believes that a change in the billing terms at a wholesale level gives OAOs the opportunity to replicate those payment terms at a retail level. This enables OAOs to offer more favourable terms to its retail customers should they decide to do so. The change in billing terms could also improve end user companies' cashflows and limit their requirement for overdraft facilities, which in the current economic climate is critical to small and medium sized businesses that rely on data services on leased lines.

6.20 ComReg believes that the revised billing terms are *consistent* with billing terms offered in relation to other wholesale products and also with the billing terms of other European incumbents. The billing terms offered by Eircom for some of its other wholesale services are offered on a monthly in advance basis e.g. LLU is monthly in advance with 30 days to pay and WLR is generally monthly in advance with 30 days to pay. Likewise and as already set out in ComReg Document No. 10/70 a number of operators around Europe offer billing terms of monthly in advance and in some cases more favourable billing terms for the provision of leased line services. ComReg also note the Ofcom determination in a similar case in the UK between BT and THUS Communications.

6.21 ComReg believes that the change in billing terms is *proportionate*. The new billing terms will be implemented from the next billing cycle no later than twelve months from the date of the decision. ComReg believes that this allows Eircom a sufficient period of time to amend its systems. It also ensures that the change to the billing terms is not overly disruptive to its business.