



Commission for
Communications Regulation

Response to Consultation on Draft Decision on Obligations

Market Analysis – Wholesale Broadband Access

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1 Introduction

- 1.1 The new EU communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in *the Framework Regulations*.¹ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive. Where a market is defined as suitable for ex-ante regulation, ComReg is obliged under the *Framework Regulations* to impose such specific regulatory obligations as it considers appropriate on undertakings with significant market power.²
- 1.2 In accordance with this process, ComReg issued Document 04/25 ‘Market Review – Wholesale Broadband Access’ which reached the preliminary conclusions that a market for wholesale broadband access should be defined; that this market should be national in scope; and that eircom should be designated as having Significant Market Power in that market. This document was issued for national consultation.
- 1.3 The response to consultation was set out in Document 04/83 ‘Market Review – Wholesale Broadband Access’. In this ComReg confirmed its findings, and also set out the views of the Competition Authority of Ireland concurring with its conclusions. As required ComReg made the draft measure available to the European Commission and other NRAs. On 25th August 2004, the European Commission responded accepting ComReg’s findings and advising ComReg that it may adopt the draft measure.
- 1.4 In document 04/83, ComReg designated eircom with SMP in the market for wholesale broadband access.
- 1.5 As stated previously, where a market is defined as suitable for ex-ante regulation, ComReg is obliged under the *Framework Regulations* to impose such specific regulatory obligations as it considers appropriate on undertakings with significant market power. In Document 04/83 ComReg set out a Draft Decision (at Annex F) which proposed to impose on eircom obligations listed in Regulation 10 to 14 of the Access Regulations. These include transparency, non discrimination, accounting separation, access to and use of specific network facilities, and price control and cost accounting obligations. ComReg also conducted a Regulatory Impact Assessment to demonstrate that these obligations were based on the nature of the problem identified, were proportionate and justified in light of the objectives of Section 12 of the Communications Regulation Act 2002.
- 1.6 In Document 04/83, ComReg consulted upon its Draft Decision and asked if respondents believed that the draft text of the proposed decision was from a legal,

¹ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes 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.

² Regulation 27 (4) states ‘Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with Significant Market Power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate’

technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed.

- 1.7 Two responses were received in response to the consultation on the Draft Decision. These were from

- 1.7.1 *Eircom*

- 1.7.2 *Esat BT*

- 1.8 ComReg would like to thank the respondents for their submissions and has taken them into account when arriving at its conclusions
- 1.9 In this document ComReg sets out its Response to Consultation to the Draft Decision. It also finalises the Decision in relation to regulatory obligations to be imposed further to the SMP designation. The Final Decision is set out as an Annex to this document and the obligations therein are binding on the designated SMP operator, eircom, from the date of publication.

2 Decision Notice Issues

ComReg's proposed remedies

- 2.1 The Draft Decision set out at Annex F to Document 04/83 proposed to impose the following obligations on eircom:
- *Access to, and use, of specific network facilities*
 - *Non discrimination*
 - *Transparency*
 - *Accounting Separation*
 - *Price Control and Cost Accounting Systems*
- 2.2 In Document 04/83, ComReg consulted upon its Draft Decision and asked if respondents believed that the draft text of the proposed decision was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed.
- 2.3 Two responses were received in response to the consultation on the Draft Decision. These were from:
- *Eircom*
 - *Esat BT*

Views of Respondents

- 2.4 One respondent welcomes the text of the draft direction proposed by ComReg and states that the direction is clear and provides the correct remedies in order to ensure that there is fair competition in the broadband space. This respondent states that it is imperative to the development of the broadband market that a level playing field is created. This respondent marks the following areas as fundamental to the success of a competitive broadband space: bitstream Service Level Agreements; level of prices; treatment of eircom retail DSL and DSL related offers; and treatment by eircom wholesale of its downstream retail arm.
- 2.5 The same respondent agrees that the direction is clear and thorough, but to avoid misinterpretation of the language used and to ensure that the obligations serve the intended purpose, ComReg should reserve the right to alter/amend the direction in the future.
- 2.6 Another respondent states that it does not agree that ComReg has the power to intervene in the market. This respondent states that there is no legal basis for treating bitstream as a relevant market in Ireland. Furthermore, this respondent states that obligations can only be imposed if the market is not effectively competitive; that emerging markets should not be regulated; that obligations should be based on the nature of the problem identified, proportionate and justified.

- 2.7 This respondent alleges that ComReg does not understand the market and refers to investment by cable operators and the Government/Local Authority funded Metropolitan Area Networks (MANs). This respondent also alleges that allegations of discriminatory behaviour by eircom are false.
- 2.8 This respondent also alleges that the consultation procedure followed by ComReg is unsatisfactory.

ComReg's position

- 2.9 ComReg notes the position set out by one respondent that ComReg should reserve the right to clarify directions as appropriate. Having identified a particular remedy as appropriate ComReg's interventions will be within the scope of that regulation and will be proportionate and justified. ComReg may issue directions subject to Regulation 17 of the *Access Regulations* should a need for clarification arise.
- 2.10 Many of the comments made by one of the respondents are outside the scope of the consultation on the Draft Decision, and should more properly have been made in response to the consultation on market definition and analysis. Indeed in Document 04/83 ComReg set out its position in relation to a number of these issues. However for the avoidance of doubt ComReg once again is setting out its position.
- 2.11 ComReg has conducted its analysis as it is required to do pursuant to Regulation 27 of the Framework Regulations and has designated eircom with SMP.
- 2.12 In Document 04/25 ComReg consulted on the relevant market and set out arguments as to the correct market definition. Market analysis showed the market not to be effectively competitive. . Where a market has been defined and SMP designated, ComReg is obliged to impose appropriate obligations.
- 2.13 Given the concrete examples of competition problems provided by OAOs in 04/83, ComReg considers that competition problems have been identified arising from eircom's dominance and that competition law is considered to be insufficient to deal with the problems identified by market players. ComReg notes that emerging markets should not be regulated. However the regulation proposed by ComReg guards against any possible foreclosure as a result of eircom's dominance in the access network and does not represent regulation of any emerging market.
- 2.14 By conducting a Regulatory Impact Assessment, ComReg considers that the proposed obligations are based on the nature of the problem identified, are proportionate and justified in light of the objectives of the Communications Regulation Act 2002. ComReg also notes the support expressed by other authorised operators (OAOs) in response to this and previous consultations for the intended measures.
- 2.15 In relation to the procedural comments, ComReg also wishes to point out that national respondents were, in fact, given two opportunities to comment on the proposed remedies. In Document 04/25 ComReg conducted a national consultation process on market definition and analysis which also gave respondents an opportunity to comment on proposed remedies. Document 04/83 was both a response to consultation on market definition and analysis and a further consultation on the detail of the proposed remedies in the Draft Decision. This was also made accessible to other NRAs and the European Commission for their comments. Therefore all national respondents have had two opportunities to comment on the proposed market remedies.

It should also be noted that in their comments the European Commission has accepted the approach adopted by ComReg.

- 2.16 In relation to Government initiatives including MANs, ComReg wishes to reiterate that these do not relate to the local access market and as such are more properly categorised in the market for Wholesale Trunk Segments (see ComReg document 04/59) and have been taken into account in that market review.

Access to, and use of, specific network facilities

Draft Decision proposals

- 2.17 In the Draft Decision, ComReg proposed that the following obligations be imposed on eircom

- *eircom shall have an obligation to meet reasonable requests for access to, and use of, wholesale bitstream access products, features or additional associated facilities by undertakings requesting access or use of such wholesale bitstream access products, features or additional associated facilities, as provided for by Regulation 13 of the Access Regulations. Without limiting the generality of Regulation 13 of the Access Regulations and this section, eircom shall:-*

I. Negotiate in good faith with undertakings, requesting access.

II. Give third parties access to specified network elements, facilities or both such elements and facilities.

III. Not withdraw access to certain facilities already granted without the prior approval of ComReg.

IV. Grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services.

V. Provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.

- *It shall be a condition of the obligations contained [in section 5.1] that eircom conclude legally binding Service Level Agreements ('SLAs') with Other Authorised Operators ('OAOs') in respect of all products and all process points.*

Views of Respondents

- 2.18 One respondent agrees with ComReg's proposals.
- 2.19 Another correspondent does not agree that the conditions for imposing an access obligation has been met as there is no evidence to support the assumption that eircom has displayed anti-competitive motives or behaviours and therefore this respondent strongly refutes the need for the specific obligations under Regulation 13.
- 2.20 This respondent continues that the specific obligation to negotiate in good faith with undertakings requesting access is not needed as eircom in its dealings with all customers (retail and wholesale) acts in a professional and commercial manner.

- 2.21 This respondent also states that the obligation to give third parties access to specified network elements, facilities or both such elements and facilities is not needed. This is because eircom wholesale is in constant dialogue with its customers to develop and bring products to market and it is eircom's commercial practice to assess the market demand of service providers and to develop commercial wholesale products that allow for product differentiation and innovation whilst offering these products on a non discriminatory basis to all market participants.
- 2.22 In respect of the proposed obligation stating that eircom should not withdraw access to certain facilities already granted without the prior approval of ComReg, this respondent alleges this to form a new and unnecessary remedy to be imposed on eircom. Whilst recognising that under the legislation ComReg has the power to impose this remedy, this respondent believes it is unnecessary, onerous and not in the interest of industry or consumers. It is unnecessary as a) eircom has never unilaterally withdrawn access to facilities for third parties once granted; and b) eircom needs to be able to develop the access and core network to maintain the network integrity. It is regarded as onerous because eircom also needs to retain the flexibility to discuss access with third parties when it is re-designing its network architecture and redeploying network infrastructure. Without this flexibility eircom may be forced to maintain facilities which could be withdrawn and replaced elsewhere more efficiently. Some access facilities if not withdrawn could impede development completely. Any decision to continue could undermine the support systems and potentially delay or cancel development of services particularly on the edge of the network i.e. new housing and business development parks.
- 2.23 In relation to the obligations requiring open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services and the requirement to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services, this respondent refutes these. It states that eircom have made all necessary information and technical interfaces available to OAOs to support the bitstream products in this market. The ability to order the Bitstream Service and to submit a fault report is provided through a "gateway" system, which also provides order and fault status updates. In addition eircom have provided on-line access to the Line Prequalification Database, which has been recently upgraded to include prequalification details on non-working lines (Soft Dial Tone and In-Situ). Eircom believe that this approach is proven and has been accepted by the OAO community. There is no evidence provided in the market analysis or in the consultation report to suggest that any market failure has occurred in this area.
- 2.24 This respondent also refutes that eircom should conclude legally binding SLAs with OAOs in respect of all products and processes points as this is unreasonable. It states that a more acceptable approach might be to require that SLAs be introduced for relevant products and appropriate process points.

ComReg's position

- 2.25 In Document 04/83 OAOs provided evidence of the competition problems resulting from eircom's dominance in the wholesale broadband access market and proposed that an obligation of access should be imposed to remedy these competition problems. ComReg concluded an obligation of access to be necessary to ensure that OAOs are afforded the opportunity to compete in the retail market as eircom's downstream arm.

An obligation of access is the only obligation that allows OAOs to request wholesale inputs from eircom according to their specifications.

- 2.26 ComReg notes that one respondent does not agree that the conditions for imposing obligations have been met. ComReg does not accept this comment. As required by the legislation, ComReg has defined a market for wholesale broadband access; has analysed this market and designated eircom with SMP. ComReg has proposed obligations as required to remedy competition problems, as it is obliged to do. Therefore ComReg is satisfied that the conditions for imposing obligations have been met.
- 2.27 Therefore, ComReg maintains its position and intends to impose an obligation of access on eircom.
- 2.28 Turning to the detail, ComReg intends to maintain the obligation on eircom to negotiate in good faith. This is necessary to provide certainty to OAOs that their requests are treated in an equivalent manner to those of eircom's downstream arm. In the absence of this obligation, OAOs would not have this certainty and so competition problems relating to denial of access or discriminatory behaviour would arise. ComReg also wishes to reinforce its view as set out in Document 04/83 that it intends to monitor that OAOs are afforded equivalent access to eircom wholesale as eircom's downstream arms. ComReg does not consider this obligation to place an onerous burden on eircom as eircom state that this is their normal practice. ComReg does not intend to amend the wording in the Decision.
- 2.29 As stated previously an obligation of access is the only obligation which allows OAOs to specify products to their own requirements. ComReg welcomes the statement that eircom wholesale assesses the requirements of other operators when developing new bitstream products. However ComReg notes the competition problems raised by respondents alleging that their requirements for differentiated products have not been met. For retail consumers to benefit it is important for differentiated products to be developed. OAOs need the ability to specify product features so as to suit their networks and business plans and compete in an efficient manner. ComReg also wishes to reinforce its view as set out in Document 04/83 that it intends to monitor developments to ensure that OAOs are afforded equivalent access to eircom wholesale as eircom's downstream arms. ComReg does not intend to amend the wording in the Decision.
- 2.30 ComReg does not accept that the obligation stating that eircom should not withdraw access to certain facilities already granted is an entirely new obligation. This obligation was implicit in the ONP framework and is explicitly dealt with in the terms of reference offer documentation. ComReg considers it necessary so as to allow OAOs the certainty to compete in the retail market. OAOs have raised concerns that eircom may seek to withdraw facilities. By adding the proviso that eircom may withdraw access to facilities with the prior approval of ComReg, ComReg considers that the obligation not to be onerous. ComReg considers eircom to be overly concerned as to the burden of this obligation, and will discuss applications to withdraw facilities (should they arise) on a case by case basis. In any event ComReg wishes to point out that provisions of Regulation 13 (4) of the *Access Regulations* apply when gauging the reasonableness of requests. ComReg does not intend to amend the wording in the Decision

- 2.31 ComReg does not intend to withdraw the obligations requiring open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services or the requirement to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services. These obligations are necessary to ensure that OAOs are afforded the same opportunity as eircom's downstream arm in the retail market and have been the subject of industry concern leading to, for example, the Bitstream Port Transfer process. OAOs require these obligations so as to provide them with certainty as to compliance with non discrimination. ComReg does not intend to amend the wording in the Decision
- 2.32 ComReg intends to accept the proposed wording proposed by one respondent requiring eircom to conclude legally binding SLAs with OAOs in respect of relevant products and appropriate process points. ComReg considers the revised wording to provide greater clarity and to ensure that the most appropriate metrics are captured and reported upon, so as to enable meaningful SLAs to be put in place within a reasonable timeframe. It should be noted that ComReg, together with OAOs, will take an active role in concluding SLAs and defining the relevance of included products and the appropriateness of process points. Comreg has amended the wording in the text of the Decision attached as an Annex to this paper.

Non Discrimination

Draft Decision Proposals

- 2.33 In its draft decision, ComReg proposed that the following obligations be imposed on eircom:

- *eircom shall have an obligation of non-discrimination as provided for by Regulation 11 of the Access Regulations. Without limiting the generality of Regulation 11 and this section, eircom shall:-*

I. Provide a wholesale equivalent for retail offerings.

II. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners.

III. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to eircom's retail arm and associates.

IV. Conclude legally binding SLAs with OAOs in respect of all products and all points.

Views of Respondents

- 2.34 One respondent states that it remains concerned about issues of non discrimination and states that it is imperative to the development of the broadband market that a level playing field is created.

- 2.35 One respondent does not agree that the conditions for imposing the obligations have been met.
- 2.36 However if imposition of non discrimination was seen as a requirement it states that the proposed wording is unworkable. This respondent suggests that the following text would be required to create a workable situation (emphasis added to respondents' suggestions).

I. Provide **sufficient** wholesale products **to support the full range of** retail offerings.

II. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information, **subject to the limitations of Data Protection Legislation**, to others under the same conditions and of the same quality as *eircom* provides for its own services or those of its subsidiaries or partners

III. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are equivalent to those provided to *eircom*'s retail arm and associates.

IV. Conclude legally binding SLAs with OAOs in respect of **relevant** products and **appropriate** process points.

ComReg's position

- 2.37 In Document 04/83 OAOs provided evidence of the competition problems resulting from *eircom*'s dominance in the wholesale broadband access market and proposed that an obligation of non discrimination should be imposed to remedy these competition problems. ComReg concluded an obligation of non discrimination to be necessary to ensure that OAOs are afforded an equivalent opportunity to compete in the retail market as *eircom*'s downstream arm. An obligation of non discrimination is the only obligation which can ensure this.
- 2.38 ComReg notes the support from one respondent for its proposals. ComReg also notes that one respondent does not agree that the conditions for imposing obligations have been met. ComReg does not accept this comment. As required by the legislation, ComReg has defined a market for wholesale broadband access; has analysed this market and designated *eircom* with SMP. ComReg has proposed obligations as required to remedy competition problems, as it is obliged to do. Therefore ComReg is satisfied that the conditions for imposing obligations have been met.
- 2.39 Therefore, ComReg maintains its position and intends to impose an obligation of non discrimination on *eircom*.
- 2.40 Turning to the detail of the obligation, ComReg considers there to be merit in adopting one respondent's proposed wording requiring *eircom* to provide sufficient wholesale products to support the full range of retail offerings. This was ComReg's intent in the original wording but ComReg considers the revised wording to be more appropriate and clear. Comreg therefore has amended the wording in the text of the Decision attached as an Annex to this paper.

- 2.41 However in order to assist in implementation of this wording ComReg considers that an obligation of transparency is key. Sufficient notice should be provided to OAOs regarding the availability of new wholesale products in order to allow OAOs to compete with retail offerings. OAOs will need advance notification of new wholesale products so as to plan their retail offerings with the certainty afforded to eircom's retail arm.
- 2.42 ComReg does not accept the respondent's suggestion to add the reference to data protection 'legalisation' [sic] to the proposed obligation. ComReg notes that all obligations are subject to the governing laws of Ireland and it is unwarranted to emphasise one particular aspect above another. All operators and ComReg should be fully aware of their obligations under all governing legislation, including but not limited to data protection. ComReg has not therefore amended the text of the obligation.
- 2.43 ComReg intends to accept the proposed wording proposed by one respondent requiring eircom to conclude legally binding SLAs with OAOs in respect of relevant products and appropriate process points. As set out previously, ComReg considers the revised wording to provide greater clarity and to ensure that the most appropriate metrics are captured and reported upon, so as to enable meaningful SLAs to be put in place. However ComReg wishes to note that it expects that ComReg, together with OAOs, will take an active role in concluding SLAs and defining the relevance of included products and the appropriateness of process points. ComReg has amended the wording in the text of the Decision attached as an Annex to this paper.

Transparency

Draft Decision Proposals

- 2.44 In its draft Decision, ComReg proposed the following obligations should be imposed on eircom:

- *eircom shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations. Without limiting the generality of Regulation 10 of the Access Regulations and this section, eircom shall publish and keep updated a bitstream access reference offer ('BARO') that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. eircom shall ensure that the BARO includes a description of the relevant offerings broken down into components according to market needs; and a description of the associated terms and conditions, including prices.*
- *eircom shall publish, specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.*
- *eircom shall publish all SLAs concluded (and as from time to time amended) in accordance with section 5.1 and section 6.1 (iv) of this Decision.*

Views of Respondents

- 2.45 One respondent states that it does not agree that the conditions for imposing obligations of transparency have been met

2.46 This respondent continues that if transparency was seen as a requirement, the proposed wording set out in the Decision is unworkable and proposes adjustments to the text that it suggests are required to create a workable situation (emphasis added to show respondent's suggestions).

- *eircom* shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations. Without limiting the generality of Regulation 10 of the Access Regulations and this section, *eircom* shall publish and keep updated a bitstream access reference offer ('BARO') that is sufficiently unbundled, **where technically feasible and commercially viable**, to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. *eircom* shall ensure that the BARO includes a description of the relevant offerings broken down into relevant components; and a description of the associated terms and conditions, including prices.
- *eircom* shall publish, specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.
- *eircom* shall publish all SLAs concluded (and as from time to time amended) in accordance with section 5.1 and section 6.1 (iv) of this Decision.

ComReg's position

2.47 In Document 04/83 OAOs provided evidence of the competition problems resulting from *eircom*'s dominance in the wholesale broadband access market and proposed that an obligation of transparency should be imposed to remedy these competition problems. ComReg concluded an obligation of transparency to be necessary to ensure that OAOs are afforded the same opportunity to compete in the retail market as *eircom*'s downstream arm. An obligation of transparency is necessary to effect this and provide OAOs with sufficient information to develop and plan their market offerings.

2.48 ComReg notes that one respondent does not agree that the conditions for imposing obligations have been met. ComReg does not accept this comment. As required by the legislation, ComReg has defined a market for wholesale broadband access; has analysed this market and designated *eircom* with SMP. ComReg has proposed obligations as required to remedy competition problems, as it is obliged to do. Therefore ComReg is satisfied that the conditions for imposing obligations have been met.

2.49 Therefore, ComReg maintains its position and intends to impose an obligation of transparency on *eircom*.

2.50 ComReg does not accept one respondent's suggestion that the words 'where technically feasible and commercially viable' should be added to the obligation to publish a reference offer. Regulation 10 (2) of the *Access Regulations* is clear that a reference offer should be 'sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested'. The extra restrictions proposed by one respondent are not provided for under the legislation. In any event ComReg considers that Regulation 13 (4) which requires the assessment of access obligations against factors of, *inter alia*, technical and economic

viability and feasibility of provision, to be sufficient to assuage the concerns of the respondent. ComReg has not therefore amended the text of the obligation.

Accounting Separation

Draft Decision Proposals

2.51 In its draft Decision, ComReg proposed the following obligations should be imposed on eircom:

• *eircom shall have an obligation to keep separated accounts as provided for by Regulation 12 of the Access Regulations. All of the obligations in relation to accounting separation applying to eircom in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and eircom shall comply with those obligations, pending a decision to be made by ComReg following further consultation in relation to the implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations³ in force immediately prior to the effective date of this Decision, eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-*

- *D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators;*
- *D8/99 – Costing Methodology for use in Accounting Separation;*
- *D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators;*
- *D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators;*
- *D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00;*
- *D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net;*
- *D7/01- eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators; and*
- *D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by eircom.*

³ Including any obligations contained in various Decision Notices not relating exclusively to accounting separation, any obligations set out Decision Notices relating to the Reference Interconnect Offer (‘RIO’) and any detailed requirements and obligations set out in any correspondence between ComReg and *eircom*.

Views of Respondents

2.52 Neither respondent provided a submission commenting on this area.

ComReg's position

2.53 ComReg notes that respondents did not comment on this section. ComReg intends to maintain its proposals in respect of Accounting Separation obligations and maintains the text in the Decision.

2.54 ComReg notes that the European Commission have noted that a further consultation will be held on the detailed implementation of wholesale price control, accounting separation obligations and cost accounting obligations and that draft measures relating to these regulatory obligations are required to be notified under Article 7(3) of the Framework Directive.

Price Control

Draft Decision Proposals

2.55 In its draft Decision, ComReg proposed the following obligations should be imposed on eircom:

- *eircom shall, pursuant to Regulation 14 of the Access Regulations, have obligations relating to wholesale price control as determined from time to time by ComReg, following consultation, for the purposes of establishing the margin between wholesale and retail prices proposed to be offered by eircom, preventing the potential application by eircom of a price or margin squeeze and for the purpose of preventing eircom from sustaining prices at an excessively high level.*

Interim Price Controls

- *Pending a further decision by ComReg, to be made following further consultation in relation to the implementation of wholesale price controls referred to in section 9.1 and without limiting the generality of Regulation 14 of the Access Regulations and section 9.1, eircom shall:-*
 - *I. Pursuant to its obligations of non-discrimination referred to in section 6 and its obligations of transparency referred to in section 7, notify ComReg in writing of any proposed amendments to retail terms and conditions, including price, in respect of its existing and future Asymmetric Digital Subscriber Line ('ADSL') products. In this regard, eircom shall also notify ComReg in writing, for its prior approval, any proposed amendments to wholesale terms and conditions, including price, in respect of its existing and future bitstream products. ComReg shall as soon as is reasonably practicable, undertake and complete its assessment of eircom's proposed wholesale amendments and either approve such amendments or, pursuant to its powers under Regulations 10, 14 and 17 of the Access Regulations, direct that adjustments be made to such amendments, or the actual wholesale terms and conditions, including price, if no amendments have been proposed or notified to ComReg (which procedure for the purpose of this Decision shall be referred to as 'the Assessment Procedure').*

- II. Apply the retail minus controls to each of the connection and rental charges for each of the four eircom wholesale bitstream products, as set out in the Table⁴. The margin between the retail prices and the wholesale prices must be at least as big as the margin implied by the retail minus controls in the Table. ComReg may however, deviate from the formulae set out in the Table for the purpose of fulfilling its functions and objectives as set out in Regulation 6 of the Access Regulations and section 10 and section 12 of the Communications Regulation Act, 2002 and for the purpose of ensuring compliance with Regulation 14 of the Access Regulations.

Table – Interim Retail Minus Price Controls

Regulated Wholesale Product & Charge	Related Retail Product & Charge	Price Control*
<i>eircom Bitstream expand IP; connection</i>	<i>eircom broadband home starter; self-install connection</i>	<i>Retail minus 21.81 euros</i>
<i>eircom Bitstream expand IP; monthly rental</i>	<i>eircom broadband home starter; monthly rental</i>	<i>Retail minus 12.95 euros</i>
<i>eircom Bitstream Swift IP; connection</i>	<i>eircom broadband home plus/business starter; self-install connection</i>	<i>Retail minus 21.81 euros</i>
<i>eircom Bitstream Swift IP; monthly rental</i>	<i>eircom broadband home plus/business starter; monthly rental</i>	<i>Retail minus 18 euros</i>
<i>eircom Bitstream Express IP; connection</i>	<i>eircom broadband business plus; self-install connection</i>	<i>Retail minus 21.81 euros</i>
<i>eircom Bitstream Express IP; monthly rental</i>	<i>eircom broadband business plus; monthly rental</i>	<i>Retail minus 29.40 euros</i>
<i>eircom Bitstream Sonic IP; connection</i>	<i>eircom broadband business enhanced; self-install connection</i>	<i>Retail minus 21.81 euros</i>
<i>eircom Bitstream Sonic IP monthly rental</i>	<i>eircom broadband business enhanced monthly rental</i>	<i>Retail minus 54 euros</i>

*These price controls apply to prices exclusive of VAT.

Retail Discount Schemes

- III. Notify ComReg in writing of any proposed amendments to the eircom Bulk Connection Discount Scheme or of the proposed introduction of any new retail discount scheme. eircom may be required to make corresponding amendments to wholesale bitstream product prices, or other terms and conditions, if it makes any amendment to the eircom Bulk Connection Discount Scheme or, proposes to

⁴ Namely: 'eircom Bitstream Expand IP', 'eircom Bitstream Swift IP', 'eircom Bitstream Express IP' and 'eircom Bitstream Sonic IP' as described in eircom's ADSL Bitstream Service Product Description, Version 1, dated 31 March 2004.

introduce any new discount scheme. eircom shall notify ComReg in writing, for its prior approval, of any proposed corresponding amendments to wholesale bitstream product prices. The Assessment Procedure shall apply in respect of eircom's proposed wholesale amendments. In making its assessment, of what (if any) amendments are required to wholesale bitstream product prices and if demonstrated to ComReg's satisfaction, ComReg will take into account the extent of any objective justification for a discount scheme for example, the scheme characteristics implying cost savings relative to the standard product. Where an objective justification of this nature has not been demonstrated to ComReg's satisfaction, ComReg may require changes in wholesale prices that reflect the retail minus formulae set out in the Table and apply the approach applied to new promotion schemes as set out below.

IV. Retail Promotions

- *Notify ComReg in writing of any proposed amendments to a retail promotion (including a new retail promotion) that amends the self-install connection charges or monthly rental charges or, makes any other amendments to the characteristics of the relevant product. eircom shall also notify ComReg in writing, for its prior approval, of any corresponding proposed wholesale price amendments. The Assessment Procedure shall apply in respect of eircom's proposed wholesale amendments.*
- *Any promotion that only makes amendments to self-install connection charges or monthly rental charges will have the retail minus controls set out in the Table above applied to it. In order to allow further pricing flexibility for eircom promotions, ComReg will however allow eircom to distribute required monetary reductions in wholesale prices across the wholesale connection and rental charges as eircom sees fit⁵. ComReg may allow eircom to make equivalent reductions to other relevant wholesale charges, where it can be shown that it would not lead to a disadvantage to purchasers of bitstream products.*
- *Where promotions change product characteristics other than the connection or rental charges⁶, ComReg will amend the retail minus controls as set out in the Table in a manner that reflects the change in cost implied by the amendment in product characteristics. This approach is aimed at preventing eircom from squeezing margins by other means, for example, improving the retail product instead of reducing the price differential. This will allow eircom to improve the*

⁵ For example, if eircom wishes to introduce a retail promotion for its broadband home starter product, providing free connection and the first 2 months line rental for free, it could, for the same promotional period, set a wholesale connection charge of minus €21.81 and a monthly wholesale rental of minus €12.95 for the first two months, or it could set a wholesale connection charge of minus €47.71 (€21.81 + €12.95 + €12.95 = €47.71), equivalent to a reduction in the wholesale connection charge by the same monetary amount in total, with no change in the wholesale monthly rental charge. Other combinations would also be possible. ComReg would restrict the timing of any wholesale price reductions to be broadly similar to the timing of retail price reductions (for example, in this instance, ComReg would not accept a reduction in wholesale monthly rental prices for the last 2 months of the customer or port life).

⁶ This includes the bundling of other products and services.

retail product, but will require eircom to make corresponding improvements to the wholesale product, usually to the price⁷.

- *V. Not put in to effect, publish or cause to be published any associated amendments to retail prices and / or terms and conditions prior to publishing any amendments to wholesale prices. eircom shall not make such associated amendments to retail prices effective, prior to the amendments to the wholesale prices becoming effective.*
- *VI. Pursuant to its non-discrimination obligations referred to in section 6 and its transparency obligations referred to in section 7, publish the amendments to its wholesale prices (referred to in section 9) in the BARO no less than 15 working days prior to the date they are intended to become effective and specify the date on which they are intended to become effective.*
- *VII. With respect to the charges and products detailed in the Product Schedule below, notify ComReg in writing, for its approval, of any proposed amendments thereto. The Assessment Procedure shall apply with respect to such a notification. eircom shall not publish or cause to be published any increase in the prices (or any proposed amendments to the other terms and conditions) to the products detailed in the Product Schedule without first both notifying ComReg thereof and at the same time submitting to ComReg an appropriate cost based justification with respect to the proposed increases or amendments.*

Product Schedule

- The eircom Service Establishment Charge;
 - The eircom Cessation Charge;
 - The eircom Bitstream Connection Service VT Link Charge;
 - The eircom ATM Products⁸; and
 - eircom New Products / Charges.
- *VIII. Ensure that the eircom Bitstream Connection Service Access and Transport Link Charge ('ALT') is consistent with the equivalent wholesale leased line price.*

Views of Respondents

2.56 One respondent argued that ex ante price control is not appropriate in this market given its dynamic nature, and that competition law is sufficient. They also said that even if it were justified, a price control should not be imposed until the further consultation envisaged by ComReg was complete because the Directives do not allow the imposition of an interim measure in the manner proposed by ComReg.

⁷ For example, if as part of a promotion eircom wished to provide a freephone customer helpdesk number instead of a tariffed number, then ComReg would use an estimate of the net cost of making this change and require a corresponding downward adjustment to wholesale prices, allowing eircom flexibility as to which wholesale price(s) to reduce as above.

⁸ eircom Bitstream Swift and eircom Bitstream Express.

- 2.57 In one of the responses it was argued that the requirement to notify ComReg of retail changes and the accompanying process proposed by ComReg amounts to de facto retail regulation and that this would cause delays and prevent the operator from responding rapidly in a fast moving market. The other respondent expressed the view that the notification and publication process should ensure that competitors were not disadvantaged compared to the SMP operator.
- 2.58 One respondent argued that the obligation on the SMP operator to provide wholesale equivalents for retail offerings was too broad and contravened the objectives of the EU Framework because the remedy is neither included in Articles 9 to 13 of the Access Directive, nor have ComReg established the exceptional circumstances that ComReg believes justifies the imposition of this obligation. The other operator indicated a particular concern about issues relating to discrimination generally.
- 2.59 It was suggested in one of the responses that the draft Direction may prevent the SMP operator from introducing retail products that do not have a direct wholesale equivalent. An example was provided where an ISP might offer a usage based DSL product where usage parameters are measured at the ISP level not the network level. In this case a wholesale equivalent might not be feasible unless the ISP were to sell it as an end to end product.
- 2.60 One respondent argued that a margin test based on a product by product approach was incorrect unless each product was a separate market, and also that an ex post test would be more appropriate than an ex ante test. This respondent also argued that the amounts in the fixed monetary margins may be invalid both because the product set may change and because they are based on existing prices which were set on the basis of an incorrect regulatory approach.

ComReg's position

- 2.61 Ex ante versus ex post regulation was raised in two contexts in the consultation responses. First, it was raised in the sense of sector specific regulation versus competition law. As ComReg has found that one operator, eircom, has SMP in the market for wholesale broadband access then it is clear that sector specific regulation is appropriate. In fact, the legislation requires ComReg to impose sector specific regulation in this case.
- 2.62 Second, ex ante versus ex post regulation was raised in the sense of whether or not there should be any requirements that the SMP operator notify ComReg (and/or publish) proposed changes to prices before they become effective. Advance notification and/or publication allows ComReg and/or others some opportunity to object that proposed changes are not compliant with the regulatory obligations before any changes are applied to prices. In a rapidly developing market, where eircom has such a dominant position, ComReg believes that it is important to ensure that the risks of competing operators being subjected to the effects of discriminatory behaviour by the SMP operator, even for relatively short periods of time, is minimised. It is important that competing operators have an equal opportunity to compete for those customers who are new to broadband at a time when the market is developing rapidly, because it is likely to be much more difficult to overcome customer inertia and win these customers when they are already taking service from an established operator.

Advance notification and publication of prices during the interim price control period will contribute to limiting this risk.

- 2.63 ComReg believes that in current circumstances an ex post approach to enforcement that also protects competing operators from being subject to the effects of discriminatory behaviour, is likely to be more onerous than the proposed ex ante approach. Where margins are found to have been inadequate ex post then, in order to achieve the protection outlined above, some means of restoring competing operators to the position that they would have found themselves in the absence of the discriminatory bitstream pricing would need to be found. This would be difficult and complex, possibly involving judgements on factors such as how many customers each of the competing operators had lost to the SMP operator and how bitstream prices could be set in such a way as to allow competing operators the opportunity to win these or a similar number of customers back.
- 2.64 In the response to the previous consultation (ComReg Document 04/83) ComReg said that as part of the further consultation on the price control obligation, it would consider whether the market is then at the stage of development where the ex post application of the retail minus price control is sufficient to deal with the problem of potential price/margin squeeze. ComReg noted that if an ex post control were applied in future then this would result in ComReg investigating alleged breaches of the retail minus price control after the setting of retail and wholesale price by the SMP operator. A sufficiently transparent retail minus control mechanism would enable interested parties to monitor the SMP operator's compliance.
- 2.65 In ComReg's view, the legislation does allow ComReg to impose an interim measure in the manner proposed. The Access Regulations provide ComReg with the necessary powers to impose the interim price control obligations set out in draft decision paragraph 9.2. Regulation 9 of the Access Regulations provides it with the power to amend or withdraw such obligations, subject to the requirement that it notify the European Commission of such a decision, in accordance with Regulation 20 of the Framework Regulations.
- 2.66 One respondent suggested that, in line with regulation 9(5) of the Access Regulations, ComReg is required to obtain the permission of the European Commission in order to impose an obligation on the SMP operator to provide wholesale equivalents for retail offerings. ComReg does not share this view as this obligation clearly relates to non-discrimination and so the imposition of this obligation falls within the terms of Regulation 11 of the Access Regulations. As a result, the requirement to obtain such permission provided for in Regulation 9(5) of the Access Regulations does not apply. ComReg will interpret this requirement in the light of the requirements in Regulation 11(2) that the SMP operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and also provides services and information to others under the same conditions and of the same quality as the operators provides for its own services or those of its subsidiaries or partners.
- 2.67 In relation to whether the retail minus test should be applied product by product approach or across a portfolio of products, ComReg noted in Document 04/83 that it had chosen to apply the controls outlined in the Table in the draft Decision at the level of each connection and rental charge for each product during the interim period as this would provide for a greater degree of clarity and certainty than alternatives, which might include estimating average retail and wholesale revenues across a number of

prices for one product, or even across a portfolio of products. ComReg's current view is that in a developing market such as this, it may not be appropriate to apply retail minus test on a portfolio basis, ie one test across all products, because that could constrain existing or potential competing operators from offering a different range of products from the SMP operator. To date, not all operators providing retail DSL services have provided the same range of products as the SMP operator. ComReg will consult further on this issue in the further planned consultation paper, but will maintain the approach proposed in Document 04/83 in the meantime.

- 2.68 In implementing a more permanent measure in relation to price control, ComReg believes that the emphasis on retail minus may have to be reviewed in the event that it failed to achieve its objectives, or alternatively, if ComReg came to the view that wholesale prices were excessive and were unduly restricting competition. In these circumstances cost orientation on a forward looking efficient basis may be considered (subject to normal consultation procedures).
- 2.69 ComReg notes comments on the level of the fixed monetary amounts used in the interim retail minus price control. The fixed monetary amounts are based on current wholesale and retail prices – ComReg believes in this case that this is the most appropriate approach for an interim measure. As set out in ComReg Document 04/83, these amounts may not necessarily be applied in all circumstances, including where product specifications change.
- 2.70 ComReg's position in relation to the requirement to provide wholesale equivalents of retail products is discussed earlier in this document in the section on non-discrimination.
- 2.71 ComReg notes that the European Commission have noted that a further consultation will be held on the detailed implementation of wholesale price control, accounting separation obligations and cost accounting obligations and that draft measures relating to these regulatory obligations are required to be notified under Article 7(3) of the Framework Directive.

Cost Accounting

Draft Decision Proposals

2.72 In its draft Decision, ComReg proposed the following obligations should be imposed on eircom:

- *Eircom shall have obligations in relation to cost accounting as provided for by Regulation 14 of the Access Regulations. All of the obligations in relation to cost accounting applying to eircom which were in force immediately prior to the effective date of this Decision shall be maintained in their entirety and eircom shall comply with those obligations pending a decision to be made by ComReg following further consultation in relation to the implementation of accounting separation obligations and cost accounting obligations.*

Views of Respondents

2.73 One respondent did not agree that the conditions for imposing the obligations in respect of Cost Accounting Systems have been met.

ComReg's position

2.74 ComReg concluded that an obligation of cost accounting is necessary to support the accounting separation and price control obligations and is also required to support the non discrimination obligation.

2.75 ComReg notes that one respondent does not agree that the conditions for imposing obligations have been met. ComReg does not accept this comment. As required by the legislation, ComReg has defined a market for wholesale broadband access; has analysed this market and designated eircom with SMP. ComReg has proposed obligations as required to remedy competition problems, as it is obliged to do. Therefore ComReg is satisfied that the conditions for imposing obligations have been met.

2.76 Therefore, ComReg maintains its position and intends to impose an obligation of Cost Accounting Systems on eircom. ComReg intends to maintain its text in the Decision

2.77 ComReg notes that the European Commission have noted that a further consultation will be held on the detailed implementation of wholesale price control, accounting separation obligations and cost accounting obligations and that draft measures relating to these regulatory obligations are required to be notified under Article 7(3) of the Framework Directive.

DECISION

1 STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has taken account, its functions under Regulation 6 (1) of the Access Regulations,⁹ has (where appropriate) complied with the Policy Directions made by the Minister¹⁰ and has also taken the utmost account of the EU Commission's Recommendation¹¹ and the Guidelines¹². This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale broadband access for the purpose of delivering broadband to end users,¹³ as part of the consultation process arising from the ComReg document entitled *Market Analysis: Wholesale Broadband Access – Response to Consultation* (Document No. 04/83) dated 29 July 2004. Document No. 04/83 forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations¹⁴, Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations and having regard to sections 10 and 12 of the Communications Regulations Act, 2002.

2 MARKET DEFINITION

- 2.1 This Decision relates to the market for wholesale broadband access as identified in the EU Commission's Recommendation. The market in this Decision is defined as the market for wholesale broadband access as identified in the EU Commission's Recommendation.
- 2.2 The relevant geographic market for wholesale broadband access is defined as Ireland.

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

⁹ 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.

¹⁰ Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

¹¹ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

¹³ As referred to in the EU Commission's Recommendation.

¹⁴ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

3.1 *eircom* is designated as having SMP in market for wholesale broadband access in Ireland.

4 SMP OBLIGATIONS¹⁵

4.1 ComReg has decided to impose the *ex ante* SMP obligations set out in Regulations 10 – 14 inclusive of the Access Regulations. These SMP obligations are described further in the sections below.

5 ACCESS¹⁶ OBLIGATIONS

5.1 *eircom* shall have an obligation to meet reasonable requests for access to, and use of, wholesale bitstream access products, features or additional associated facilities by undertakings¹⁷ requesting access or use of such wholesale bitstream access products, features or additional associated facilities, as provided for by Regulation 13 of the Access Regulations. Without limiting the generality of Regulation 13 of the Access Regulations and this section, *eircom* shall:-

- I. Negotiate in good faith with undertakings, requesting access.
- II. Give third parties access to specified network elements, facilities or both such elements and facilities.
- III. Not withdraw access to certain facilities already granted without the prior approval of ComReg.
- IV. Grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services.
- V. Provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.

5.2 It shall be a condition of the obligations contained in section 5.1 that *eircom* concludes legally binding Service Level Agreements ('SLAs') with Other Authorised Operators ('OAOs') in respect of relevant products and appropriate process points.

¹⁵ ComReg is legally obliged to impose *ex ante* SMP obligations that are appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 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 in order to remedy SMP in the market on which *eircom* is designated as having same.

¹⁶ As defined in the Access Regulations.

¹⁷ The expressions 'associated facilities' and 'undertaking' shall have the same meaning as contained in Regulation 2 of S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes 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.

6 OBLIGATION OF NON-DISCRIMINATION

- 6.1 *eircom* shall have an obligation of non-discrimination as provided for by Regulation 11 of the Access Regulations. Without limiting the generality of Regulation 11 and this section, *eircom* shall:-
- I. Provide sufficient wholesale products to support the full range of *eircom* retail offerings.
 - II. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to undertakings under the same conditions and of the same quality as *eircom* provides for its own services or those of its subsidiaries or partners.
 - III. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are equivalent to those provided to *eircom*'s retail arm and *eircom*'s associates or subsidiaries.
 - IV. Conclude legally binding SLAs with OAOs in respect of relevant products and appropriate process points.

7 OBLIGATION OF TRANSPARENCY

- 7.1 *eircom* shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations. Without limiting the generality of Regulation 10 of the Access Regulations and this section, *eircom* shall publish and keep updated a bitstream access reference offer ('BARO') that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. *eircom* shall ensure that the BARO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.
- 7.2 *eircom* shall publish, specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.
- 7.3 *eircom* shall publish all SLAs concluded (and as from time to time amended) in accordance with section 5.1 and section 6.1 (iv) of this Decision.

8 ACCOUNTING SEPARATION

- 8.1 *eircom* shall have an obligation to keep separated accounts as provided for by Regulation 12 of the Access Regulations. All of the obligations in relation to accounting separation applying to *eircom* in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and *eircom* shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all

accounting separation obligations¹⁸ in force immediately prior to the effective date of this Decision, *eircom* shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and *eircom.net*.
- D7/01- *eircom's* Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by *eircom*.

9 PRICE CONTROL

9.1 *eircom* shall, pursuant to Regulation 14 of the Access Regulations, have obligations relating to wholesale price control as determined from time to time by ComReg (following consultation) for the following purposes:

- I. Establishing the margin between wholesale and retail prices proposed to be offered by *eircom*.
- II. Preventing the potential application by *eircom* of a price or margin squeeze.
- III. Preventing *eircom* from sustaining prices at an excessively high level.

Interim Price Controls

9.2 Pending a further decision by ComReg (to be made following further consultation) in relation to the details of and implementation of wholesale price controls referred

¹⁸ Including any obligations contained in various Decision Notices not relating exclusively to accounting separation, any obligations set out Decision Notices relating to the Reference Interconnect Offer ('RIO') and any detailed requirements and obligations set out in any correspondence between ODTR/ComReg and *eircom*.

to in section 9.1 and without limiting the generality of Regulation 14 of the Access Regulations and section 9.1, *eircom* shall:-

- I. Pursuant to its obligations of non-discrimination referred to in section 6 and its obligations of transparency referred to in section 7, notify ComReg in writing of any proposed amendments to retail terms and conditions, including price, in respect of its existing and future Asymmetric Digital Subscriber Line ('ADSL') products. In this regard, *eircom* shall also notify ComReg in writing, for its prior approval, of any proposed amendments to wholesale terms and conditions, including price, in respect of its existing and future bitstream products. ComReg shall as soon as is reasonably practicable, undertake and complete its assessment of *eircom*'s proposed wholesale amendments and either approve such amendments or, pursuant to its powers under Regulations 10, 14 and 17 of the Access Regulations, direct that adjustments be made to such amendments, or the actual wholesale terms and conditions, including price, if no amendments have been proposed or notified to ComReg. The procedure described in this section shall, for the purpose of this Decision, be referred to as 'the Assessment Procedure'.

- II. Apply the retail minus controls to each of the connection and rental charges for each of the four *eircom* wholesale bitstream products, as set out in the table below ('the Table').¹⁹ The margin between the retail prices and the wholesale prices shall be at least as great as the margin implied by the retail minus controls in the Table. ComReg may, for the purpose of ensuring the fulfilment of its functions and objectives in Regulation 6 of the Access Regulations and section 10 and section 12 of the Communications Regulation Act, 2002 and for the purpose of ensuring compliance with Regulation 14 of the Access Regulations, deviate from the formulae set out in the Table.

Table – Interim Retail Minus Price Controls

Regulated Wholesale Product & Charge	Related Retail Product & Charge	Price Control*
<i>eircom</i> Bitstream expand IP; connection	<i>eircom</i> broadband home starter; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream expand IP; monthly rental	<i>eircom</i> broadband home starter; monthly rental	Retail minus 12.95 euros
<i>eircom</i> Bitstream Swift IP; connection	<i>eircom</i> broadband home plus/business starter; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream Swift IP; monthly rental	<i>eircom</i> broadband home plus/business starter; monthly rental	Retail minus 18 euros
<i>eircom</i> Bitstream Express IP; connection	<i>eircom</i> broadband business plus; self-install connection	Retail minus 21.81 euros

¹⁹ Namely: '*eircom* Bitstream Expand IP', '*eircom* Bitstream Swift IP', '*eircom* Bitstream Express IP' and '*eircom* Bitstream Sonic IP' as described in *eircom*'s ADSL Bitstream Service Product Description, Version 1, dated 31 March 2004.

<i>eircom</i> Bitstream Express IP; monthly rental	<i>eircom</i> broadband business plus; monthly rental	Retail minus 29.40 euros
<i>eircom</i> Bitstream Sonic IP; connection	<i>eircom</i> broadband business enhanced; self-install connection	Retail minus 21.81 euros
<i>eircom</i> Bitstream Sonic IP monthly rental	<i>eircom</i> broadband business enhanced monthly rental	Retail minus 54 euros

*These price controls apply to prices exclusive of VAT.

Retail Discount Schemes

III. Notify ComReg in writing of any proposed amendments to the *eircom* Bulk Connection Discount Scheme or, of the proposed introduction of any new retail discount scheme. *eircom* may be required to make corresponding amendments to wholesale bitstream product prices, or other terms and conditions, if it makes any amendment to the *eircom* Bulk Connection Discount Scheme or, proposes to introduce any new discount scheme. *eircom* shall notify ComReg in writing, for its prior approval, of any proposed corresponding amendments to wholesale bitstream product prices. The Assessment Procedure shall apply in respect of *eircom*'s proposed wholesale amendments. In making its assessment, of what (if any) amendments are required to wholesale bitstream product prices and if demonstrated to ComReg's satisfaction, ComReg will take into account the extent of any objective justification for a discount scheme for example, the scheme characteristics implying cost savings relative to the standard product. Where an objective justification of this nature has not been demonstrated to ComReg's satisfaction, ComReg may require changes in wholesale prices that reflect the retail minus formulae set out in the Table and apply the approach applied to new promotion schemes as set out below.

IV. Retail Promotions

Notify ComReg in writing of any proposed amendments to a retail promotion (including a new retail promotion) that amends the self-install connection charges or monthly rental charges or, makes any other amendments to the characteristics of the relevant product. *eircom* shall also notify ComReg in writing, for its prior approval, of any corresponding proposed wholesale price amendments. The Assessment Procedure shall apply in respect of *eircom*'s proposed wholesale amendments. In addition, the following shall apply:-

- Any promotion that only makes amendments to self-install connection charges or monthly rental charges will have the retail minus controls set out in the Table applied to it. In order to allow further pricing flexibility in respect of *eircom* promotions, ComReg will however allow *eircom* to distribute required monetary reductions in wholesale prices across the wholesale connection and rental charges as *eircom* sees fit.²⁰ ComReg may allow *eircom* to

²⁰ For example, if *eircom* wishes to introduce a retail promotion for its broadband home starter product, providing free connection and the first 2 months line rental for free, it could, for the same promotional period, set a wholesale connection charge of minus €21.81 and a monthly wholesale rental of minus €12.95 for the first two

make equivalent reductions to other relevant wholesale charges, where it can be shown that it would not lead to a disadvantage to purchasers of bitstream products.

- Where promotions change product characteristics, other than the connection or rental charges,²¹ ComReg will amend the retail minus controls as set out in the Table in a manner that reflects the change in cost implied by the amendment in product characteristics.²²
- V. Not put in to effect, publish or cause to be published any associated amendments to retail prices and / or terms and conditions prior to publishing any amendments to wholesale prices. *eircom* shall not make such associated amendments to retail prices effective, prior to the amendments to the wholesale prices becoming effective.
- VI. Pursuant to its non-discrimination obligations referred to in section 6 and its transparency obligations referred to in section 7, publish the amendments to its wholesale prices (referred to in section 9) in the BARO no less than 15 working days prior to the date they are intended to become effective and specify the date on which they are intended to become effective.
- VII. With respect to the charges and products detailed in the Product Schedule below, notify ComReg in writing, for its approval, of any proposed amendments thereto. The Assessment Procedure shall apply with respect to such a notification. *eircom* shall not publish or cause to be published any increase in the prices (or any proposed amendments to the other terms and conditions) to the products detailed in the Product Schedule without first notifying ComReg thereof and at the same time, submitting to ComReg an appropriate cost based justification with respect to any such proposed increases or amendments.

Product Schedule

- The *eircom* Service Establishment Charge.

months, or it could set a wholesale connection charge of minus €47.71 ($€21.81 + €12.95 + €12.95 = €47.71$), equivalent to a reduction in the wholesale connection charge by the same monetary amount in total, with no change in the wholesale monthly rental charge. Other combinations would also be possible. ComReg would restrict the timing of any wholesale price reductions to be broadly similar to the timing of retail price reductions (for example, in this instance, ComReg would not accept a reduction in wholesale monthly rental prices for the last 2 months of the customer or port life).

²¹ This includes the bundling of other products and services.

²² This approach is aimed at preventing *eircom* from squeezing margins by other means, for example, improving the retail product instead of reducing the price differential. This will allow *eircom* to improve the retail product, but will require *eircom* to make corresponding improvements to the wholesale product, usually to the price. For example, if as part of a promotion *eircom* wished to provide a freephone customer helpdesk number instead of a tariffed number, then ComReg would use an estimate of the net cost of making this change and require a corresponding downward adjustment to wholesale prices, allowing *eircom* flexibility as to which wholesale price(s) to reduce.

- The *eircom* Cessation Charge.
- The *eircom* Bitstream Connection Service VT Link Charge.
- The *eircom* ATM Products.²³
- *eircom* New Products / Charges.

VIII. Ensure that the *eircom* Bitstream Connection Service Access and Transport Link Charge ('ALT') is consistent with the equivalent wholesale leased line price.

10 COST ACCOUNTING

10.1 *eircom* shall have obligations in relation to cost accounting as provided for by Regulation 14 of the Access Regulations. All of the obligations in relation to cost accounting applying to *eircom* which were in force immediately prior to the effective date of this Decision shall be maintained in their entirety and *eircom* shall comply with those obligations pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations.

11 EFFECTIVE DATE

11.1 This Decision shall be effective from the [●] day of [●] 2004 and until further notice by ComReg.

John Doherty
Chairperson
The Commission for Communications Regulation
The [●] day of [●] 2004

²³ *eircom* Bitstream Swift and *eircom* Bitstream Express.