



# **Response to Eircom's request for a derogation on launch date for Wholesale NGA Services**

## **Information Notice**

**Reference:** ComReg 13/23

**Date:** 08/03/2013

# 1 Introduction

1. ComReg published Decision D03/13<sup>1</sup> in respect of the regulation of Next Generation Access ("NGA") on 31 January 2013. In the decision ComReg mandated in Clause 8.8 of the associated Wholesale Broadband Access (WBA) decision, that Eircom could not launch Next Generation WBA services prior to 20 May 2013. The possibility of a derogation by ComReg following discussion with industry was provided for.
2. On 19 February 2013, Eircom wrote to ComReg to apply for approval to launch Wholesale Next Generation WBA services on 8 April 2013. The letter referenced a number of operators that Eircom claimed were supportive of this proposed new launch date.
3. The evidence from Eircom suggested that there was support from at least some of the industry for a derogation. In accordance with Clause 8.8 of D03/13, in order to ensure that all parties could express their opinion as part of a demonstrably impartial and transparent process, ComReg sought the views of industry and any other interested parties publicly. Accordingly, on 21 February 2013, ComReg issued an Information Note (ComReg Document 13/17) in which ComReg requested that submissions in respect of this matter be made by 1700 hrs on 28<sup>th</sup> February 2013.
4. Five operators responded to ComReg's Information Note. These were: Eircom, Vodafone, ALTO, Sky Ireland and BT Ireland.
5. ComReg sets out some of the main points raised by respondents below. Full texts of the non-confidential versions of the responses are published at Annex 1.

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<sup>1</sup> "Next Generation Access: Remedies for Next Generation Access Markets" published 31 January 2013.

## 2 Summary of Responses

6. Vodafone stated that, as ComReg had specified the launch date in Decision D03/13, affected parties (including Eircom) had already had an opportunity to challenge it. It observed that there was a material risk that incumbent first mover advantage would be crystallised if the derogation was granted. Vodafone further stated that it was unaware of anything that had changed since the Decision was published which would warrant an earlier launch date.
7. ALTO stated that it found it curious, if not exceptional, that any material information should come to light within 4 weeks of the publication of ComReg's Decision that would support Eircom's request for a derogation and stated that ComReg had not disclosed or published any such information. It said that the NGA document set is, as yet, unstable and cannot be relied upon for the purposes of a product launch; and that this strengthens the case against an earlier launch date.
8. Eircom, arguing in favour of its derogation request, stated that, in its view, it would be inappropriate and unreasonable that there be any further delay in making NGA products available when, it believed, Eircom had met all reasonable requirements to ensure that no operator is competitively disadvantaged in the downstream retail market. Eircom stated that all elements of the proposed product portfolio had been presented in detail to industry and that all operator feedback has been fully addressed. It stated that there had been sufficient time to allow the necessary developments to be completed efficiently and that there would be commercial implications for it if an earlier launch date is not facilitated.
9. Sky expressed concerns about the fitness for purpose of Eircom's wholesale NGA product. It said that the product was incomplete in its view, that there were deficiencies in scheduling the NGA trial, and that this meant that 8 April 2013, or even 20 May 2013 would be premature for NGA launch. Sky believed that if Eircom is permitted to launch in these circumstances, there is a real risk of serious harm being done to competition and to consumers.

10. BT considered that the number of issues currently outstanding prevent the advancement of the NGA launch date. It stated that Eircom's documentation and prices had changed substantively since 20 November 2012, (date of notification of the NGA product set) and that these and other changes had required modifications to their deployment plans and NGA business models. In BT's view, the NGA industry trial has been badly managed by Eircom, leaving insufficient time for adequate testing, discussion and resolution of issues and re-testing. It stated that aspects of Eircom's NGA pricing result in an unreasonable distortion to competition and that these issues remain largely unresolved despite repeated attempts to engage with Eircom. It also references price changes in respect of NGA which were announced in February 2013. BT believes that completing the necessary work before 20 May let alone 8 April is no longer possible.

### 3 ComReg's View

11. ComReg thanks respondents for their submissions.
12. In ComReg's notification to the European Commission of 16 November 2012 it stated "*For initial launch, Eircom shall make publicly available, in adequate detail, wholesale pricing and non price information at least six months prior to wholesale launch. (Retail launch may not take place in advance of wholesale launch). In the case of initial launch, if Eircom publishes this information before a Decision is made by ComReg consequent on this notification, the six months will be taken to elapse six months after the date Eircom makes the information publicly available*". As Eircom published information on 20 November, which ComReg still believes was materially adequate, it mandated 20 May 2013 (i.e. six months later) as the earliest date for launch, except in the case of a derogation.
13. ComReg notes that a six months notification requirement is set out by the European Commission ("EC") in its Recommendation on Next Generation Access<sup>2</sup>. Furthermore the EC made no comment on this aspect of ComReg's notification.
14. In setting out this requirement in its decision, ComReg was attempting to balance a number of considerations. On one hand it wanted to ensure that all operators had sufficient time to develop the necessary systems and processes and to plan their launch. As against that, it wanted to avoid unduly hampering Eircom or those other operators who might support an early launch. Further, we did not want to unnecessarily delay launch as this would result in delayed end user choice.
15. ComReg agrees with operators who point out that no material new information has come to light since 31 January 2013 (the date of Decision D03/13) which would suggest that there be a different balancing of those same considerations upon which D03/13 is based.
16. In respect of the publication of pricing information published in February 2013 ComReg takes this to refer to prices which are regulated under different markets for regulatory purposes or possibly (it is not clear from the responses) to services to which a price control does not apply. As such, these issues are not relevant to a consideration of the launch date of Next Generation WBA services.

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<sup>2</sup> Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA).

17. We note the concerns about various aspects of the current trial, and systems and process development. ComReg understands that, as planned, operators and Eircom are conducting a trial and that Eircom will address the issues that emerge in an appropriate manner.
18. It is reasonable that operators would have relied on a launch date occurring six months after the date of notification and planned accordingly. The requirement for advanced planning and resource allocation means that a late change, which has the effect of reducing the time available for pre-launch preparation, is very likely to negatively impact on operators leaving some at risk of being disadvantaged by such a change.
19. However it is also our view that of the material issues raised many are currently being addressed by Eircom through the forum process for completion prior to launch. The remainder are either already scheduled for development or are considered as candidate items for a work-plan post launch. In stating this we are cognisant of those operators who supported early launch and of Eircom's concerns about unnecessary delay and the benefits to end users of an alternative NGA platform. Nevertheless it is essential that launch takes place in a manner that is non-discriminatory and compliant with regulatory obligations generally. ComReg will monitor events between now and 20 May closely and reserves the right to intervene if appropriate.
20. In conclusion, ComReg does not consider that its decision in D03/13 that NGA launch may not take place earlier than 20 May 2013 should be varied.

# Annex: 1 Responses

**Non- confidential**



Response to consultation on amendment of earliest permitted launch date for eircom's wholesale NGA services.



## Introduction

Vodafone welcomes the opportunity to comment on the proposal that there be a modification to the recent regulatory obligation imposed by ComReg on eircom under ComReg Decision D03/13 not to launch Wholesale NGA services prior to 20 May 2013.

Vodafone believes that the earliest possible introduction of NGA services by eircom is an important and welcome development in Ireland's progression towards meeting the European Commission's Digital Agenda vision. Ideally this deployment would have occurred in line with the timelines which accompanied eircom's original announcement in 2011. Vodafone has proactively engaged in the entire debate with a view to the earliest readiness for possible launch. For a variety of reasons this did not come to pass.

In imposing the obligation set out in D03/13 ComReg identified a minimum advance notice period required by OAOs prior to the launch of NGA in order to prevent competition problems arising. ComReg also identified the start of that notice period. In order to meet a launch date of 8 April 2013 this six month notice period would have had to have commenced on 8 October 2012. This did not happen. ComReg has already determined that the notice period commenced on the publication by eircom of its wholesale NGA product offer on 20 November 2012.

However desirable an 8 April 2013 launch may be, the necessary pre-conditions to allow this simply have not been met.

What is now being consulted upon by ComReg is that ComReg revisits and modifies its original decision to specify a six month notice period and to now foreshorten it.

Vodafone is concerned about the regulatory process. Vodafone opposes any regulatory intervention by ComReg which would curtail the previously determined minimum notice period prior to eircom's launch of its regulated wholesale NGA product. Based on the commencement date of the notice period, triggered by eircom's publication of its product offering including preliminary pricing, this launch cannot occur any earlier than 20 May 2013. The reasoning for this position is set out below.

## Preliminary Issues

Unlike most other consultations and unusually, ComReg has not set out any preliminary view nor has it set out any analysis of the issues under consideration and it has not asked any specific questions.

Most notably ComReg has not set out the regulatory underpinning for any decision it might make. Therefore Vodafone has conducted its own analysis of the matter at hand to determine the nature of the question to be decided, the legal basis for any decision that ComReg might make, the extent of ComReg's powers to make the requested decision, the factors which ComReg is required to take into account in making its decision and the administrative process required to be followed.

All of these matters are fundamental to consideration of the issues and to the formulation of responses to the consultation. Should it transpire that ComReg has no powers to make the requested decision or that the required administrative process has an irreducible time which extends beyond 8 April 2013 then the consultation itself becomes moot. Even if this is not the case, respondents must know the factors which are required to be taken into account by ComReg in order to properly address these topics in their responses to this consultation.

## Nature of the requested Decision

As ComReg has pointed out in its Information Notice 13/17 central to this issue is a regulatory obligation imposed on eircom by ComReg Decision D03/13. This obligation provides that

*“For the avoidance of doubt Eircom’s provision of Next Generation WBA, which shall not occur before 20 May 2013, (except as otherwise agreed with ComReg following discussion with industry), shall inter alia be on a non-discriminatory and transparent basis pursuant to Section 8.1 and Section 9.1 of this Decision Instrument.”*

The net obligation under consideration here is a mandatory requirement set by Comreg that the initial offering of Wholesale NGA services by eircom shall not occur prior to 20 May 2013. You can only have one initial launch. If ComReg gives permission for a launch earlier than 20 May, however this permission is characterised, then this permission replaces the original obligation and sets a new “not before” date. In all practical respects the Decision that ComReg is asked to make by eircom is a Decision to amend the existing obligation imposing an effective six month notice period expiring on of 20 May 2013 and to foreshorten this previously determined period by substituting some other earliest permitted launch date.

The change sought and being consulted upon is not some editorial change, nor a mechanistic calculation of a new price based on a defined methodology nor is it a further specification of an obligation (the date in the obligation is incapable of further specification as it is explicit). The change requested is a substantive amendment of a discrete and well defined obligation.

The fact that ComReg has used the word “*derogation*” in connection with this request does not change the fundamental nature of the decision under consideration; the amendment of the existing obligation.

## Legal Basis for the requested Decision

The obligations contained in Clause 8.8 of Decision D03/13 relate to non-discrimination. ComReg sets out in Clause 8.1 of that Decision that the non-discrimination obligations are imposed as provided for by Regulation 10 of the Access Regulations.

ComReg’s legal basis for the imposition of these obligations derives from Regulation 8 of Access Regulations.

There is no provision within the Regulations for ComReg to vary an obligation which it has imposed, other than in accordance with the Regulations. The Regulations do not permit ComReg to confer on itself additional powers nor to circumvent its own statutory and regulatory obligations by way of adopting a measure purportedly to that effect.

Therefore the “*agreement of ComReg*” to amend an existing obligation must be given by ComReg in conformance with the Regulations and the legal basis for the amended obligation must be the same as the original obligation.

## Process to be adopted and factors to be taken into account

Given that the legal basis for the imposition of the obligation not to launch services before a specified date (even an amended date) derives from Regulation 8 of the Access Regulations the provisions of Regulation 8(6) apply to ComReg’s decision making as regards its imposition. These are as follows:

*“8(6) Any obligations imposed in accordance with this Regulation shall—  
(a) be based on the nature of the problem identified,  
(b) be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and  
(c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.”*

These therefore are the parameters that define both the process for deciding whether to amend the mandated “not before” date and the factors that ComReg must take into account in reaching its decision.

Even if Vodafone’s analysis is not correct then ComReg itself has set out the criteria which it would consider in deciding to allow a launch earlier than 20 May 2013. In the consultation analysis associated with D03/13<sup>1</sup> ComReg stated that “*where sufficient data is made available prior to notification, during the product development process, for example and where there is evidence that Eircom is fulfilling its non-discrimination obligations, ComReg may consider a partial derogation from the prior notification timelines to ComReg and industry*”.

## Information requested By ComReg

ComReg has suggested that respondents structure their inputs under the following headings:

### 1. Eircom’s engagement, to date, with Operators on NGA related issues.

In the initial stages of Industry discussions eircom proposed that the NGA development take place through a process that did not have direct ComReg involvement. Operators including Vodafone expressed a preference for a product development process that was in some way moderated by ComReg. This led into the establishment of the NGA Forum.

Vodafone was also conscious that bilateral discussions between itself and eircom would involve a discussion between two operators comprising the vast majority of DSL based WBA demand. To avoid any potential issues arising from this situation Vodafone’s engagement with eircom on NGA issues have been almost entirely via the NGA Forum process.

Vodafone’s engagement with eircom via the Forum was geared at ensuring that the content of the NGA product document set, at the date of its publication, was sufficient to allow OAOs commence their own development activity and the product itself was sufficiently fit for purpose to allow the wholesale NGA product be used as a retail product input.

By whatever process or level of engagement, on 20 November 2012 eircom published its Wholesale NGA offer. This reflected the activity in the Forum to that point in time

In response to an eircom request for operator indications of their realistic assessment of suitable launch dates,

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. The communication was copied to ComReg. This time estimate was based on a forward looking assessment of the planned forum activity and took account of the development effort and timelines on the Vodafone side after product information was sufficiently stable.

In addition Vodafone also wrote to ComReg on 26 October 2012 outlining its concerns regarding the NGA launch date and the provision of stable pricing.

ComReg has confirmed both in its adopted measure, in meetings with Industry and in correspondence with Industry that in its view this publication was sufficient in itself to trigger the start of an advance notice period prior to NGA product launch. The duration of this notice period was specified by ComReg to be six months. Given that at the date of adoption of D03/13 the commencement date was known, ComReg specified the end date in its Decision.

If affected parties (including eircom or others) felt that ComReg’s assessment of the notice period duration and its commencement date was flawed then it was open to them to challenge Decision D03/13 which incorporated both of these elements.

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<sup>1</sup> Paragraph 8.20



2. Operators planning and readiness for the launch of NGA services.



3. Impact on competition.

ComReg's own finding and as reflected in its decision is that a minimum of six months advance notification is required to other operators prior to initial NGA launch to ensure that the incumbent does not obtain a first mover advantage. This type of competition problem is explicitly recognised by BEREC<sup>1</sup> Therefore there is a material risk that acceding to eircom's request will crystallise this competition problem by favouring its retail arm to the detriment of competitors.



eircom's request in effect proposes that operators have only 28 calendar days' notice of the launch of a major new product portfolio. Typically such a launch requires the preparation of marketing material, the purchase of advertising and marketing outlets, staff training and systems testing. In the case of this product because of the non-ubiquitous nature of its geographic coverage geographically focussed sales channels must be engaged. All of these activities have finite lead times. While it is possible (but perhaps not easy) to defer or delay these activities it is much more difficult to bring them forward. The one constant throughout the two year NGA product development period has been the regulatory position that a six month lead time would apply. Repeated changes to project plans and launch dates have made this certainty all the more important as it allowed an adequate lead time for operational planning associated with such changes. The practical effect of what is now proposed is that eircom will inform operators on 10 March that the launch date is changing from 20 May to 8 April. That is, at the start of a 10 week period between 10 March and 20 May eircom will inform operators that the period has been shortened by 60%. Operators will be required to compress their pre-launch activities into less than half the time that would be otherwise available to them and which, based on the regulatory position throughout the product development process, they have come to rely on.



Vodafone suspects that this compression of activities is not feasible for most operators.



this can only be competitively distortive and directly cause the problem that the original date was designed to prevent.

In terms of the factors which ComReg itself has said it would take into account in formulating its decision, there has been no additional relevant activity since the adoption of D03/13 which was not already foreseen at the time of its adoption. The relevant information is in terms of either provision of information or strengthened non-discrimination compliance demonstrating that this has occurred to an extent which would counterbalance the competitive benefit that eircom would derive at the retail level from an advanced launch date.

In addition ComReg's original decision must implicitly take account of the fact that some operators would be in a position to make use of a Wholesale NGA input with a lead time shorter than six months and other operators would need a longer advance notice period. The six month period specified in the existing obligation therefore represents

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<sup>1</sup> BEREC Common Position on wholesale broadband access *SMP operators may deny access to key information relevant for alternative operators roll-out of NGA. A denial of access to information has a new dimension for NGA roll-out because we deal with access to "newly" rolled out networks instead of existing networks.*

the output of a balancing process. Having previously determined that six months advance notice is an equitable lead time across a pool of potential users of wholesale NGA services a foreshortening of this period can only be distortive when compared to the competitive protections that accrue from a six month notice period. Again there has been no activity since the adoption of D03/13, in terms of the factors that ComReg set out would inform its decision to amend the launch date, which would address the inter operator competitive distortions which would arise compared to the maintenance of the existing obligation.

#### 4. Impact on consumers

Most customers within the initial launch areas can already avail of retail services which would objectively be described as Next Generation, albeit these are mainly provided over the cable network of UPC. The benefit of eircom's NGA launch is therefore not to introduce retail NGA services but rather to introduce consumer choice in the purchase of these services.

If there was an adequate advance notice period, the early availability of this choice for consumers would in itself be desirable. However the foreshortening of the notice period in order to yield a marginally earlier availability would in itself cause consumer detriment which more than outweighs any potential benefit

The deployment of a fit for purpose a retail NGA proposition within six months of the availability of stable, product, process and pricing information for the wholesale product was always going to be challenging. This was recognised both in the EU Commission's NGA recommendation and ComReg's own decision D03/13 where minimum notice periods of six months have been endorsed. An early wholesale launch will therefore lead to a partial retail launch as some OAOs simply will not be able to meet the revised timeline. Customers who react to this partial launch in the period between 8 April and 20 May and purchase NGA services based on the eircom wholesale NGA input will find themselves committed to minimum term contracts. This is before they have had an opportunity to consider the full range of provider possibilities that would become available post 20 May.

There seems to be little incremental benefit in bringing the launch forward from May to April given that there has been a deficit in choice for a number of years and the partial retail launch that this would likely engender would result in customers being trapped in sub-optimal service contracts.

Eircom's original announcement of NGA deployment envisaged retail NGA availability by mid-2012<sup>1</sup>. The nature of the wholesale product development process and practical issues that have arisen during the Industry engagement process have meant that this availability has been substantially delayed. The availability of the NGA product is in fact delayed by some 12 months compared to the original timeline. In the context of the overall timeline there seems to be little material additional benefit that would accrue to customers if this date now moved from 20 May until 8 April.

ComReg in its document 13/11 recognised that there is finite probability that the trial being run by eircom will bring to the fore material issues, which in the normal course, would merit the **delay** of the launch.<sup>2</sup> the launch date now sought by eircom is the day after the trial finishes. There is no provision for the incorporation of learnings from the trial into the product processes or systems nor is there any possibility of the delay that ComReg had envisaged. This is because the product would already be launched and in the market. Consumers ordering the product in the period immediately following launch therefore face the real prospect that the service that they purchase will not give a good customer experience and may be subject to rework and high levels of customer disruption.

Issues which we expect to be exercised during the trial include:

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<sup>1</sup> Eircom press release July 2011

[http://pressroom.eircom.net/press\\_releases/article/eircom\\_Announces\\_Over\\_100M\\_Investment\\_in\\_Phase\\_1\\_of\\_Planned\\_Fibre\\_Rollout/](http://pressroom.eircom.net/press_releases/article/eircom_Announces_Over_100M_Investment_in_Phase_1_of_Planned_Fibre_Rollout/)

<sup>2</sup> Paragraph 8.21 of ComReg Document 13/11

- The fine detail of how the in-home installation process will work, timings, backouts, working hours etc. so that service interruption is minimised.
- Appointments system, including an exploration of its ability to deal with any “bow wave” effects from initial launch.

These have the potential to cause significant adverse customer experience if not implemented correctly.

The proposal now is that the commercial launch would dovetail with the trial with no opportunity to assess let alone remediate any issues that arise. Launch will happen even if the issues arising would in the normal course justify a launch date delay.

From a customer perspective the balance to be struck is whether it is better to have a partial choice of potentially sub-standard product offerings six weeks earlier than having a full range of fit for purpose offerings.

It is Vodafone’s view that the second is by far the preferable and is achieved by not amending the 20 May launch date. This view is further reinforced when one factors in the downstream consumer impacts of the completion effects described at Point 3.

## 5. Other relevant considerations

### ComReg’s Objectives

Regulation 16(2)(a) of the Framework Regulations provides that *“In pursuit of its objectives under paragraph (1) and under section 12 of the Act of 2002, the Regulator shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by, among other things— (a) promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods”*

ComReg has just concluded a lengthy Consultation process as regards the appropriate remedies to impose in respect of NGA. On foot of that consultation ComReg notified the European Commission of its view that a minimum six months advance notice was required by OAOs prior to the initial launch of wholesale NGA services and would adopt a final measure on that basis. ComReg adopted final measure which imposed a minimum period of six months between the publication by eircom of its wholesale product offering on 20 November 2012 and the launch of wholesale NGA services.

What is proposed now is that within weeks of formally adopting this measure ComReg and at this 11<sup>th</sup> hour in the process would change its position to one where it considered that a 4.5 month advance notice period was acceptable, a 25% reduction.

In order to meet the requirements of Regulation 16(2)(a) it is Vodafone’s view that ComReg would have to demonstrate some material and objective change in market conditions in the period since Decision D03/13 was adopted, which justified a change in the regulatory position previously adopted. If the market conditions now advanced to support a change to this date substantially predate then these adoption of D03/13 then these would already be factored into ComReg’s deliberations in imposing D03/13.

A change in ComReg’s position so soon after the decision was made would not conform to Regulation 16(2)(a) as it would involve ComReg adopting a different regulatory approach in order to reach a different decision based on substantially the same inputs.

### NGA Recommendation

Regulation 30(1) of the Framework Regulations provides as follows:

*“30. (1) The Regulator shall, in carrying out its tasks under the Specific Regulations, the Framework Directive and the Specific Directives, take the utmost account of any recommendations to which Article 19 of the Framework Directive refers.”*

ComReg has previously set out its view of how it must comply with the requirements of Regulation 30(1) where it stated that:

“While deviation from the Recommendation is allowed under Article 19 of the Framework Directive, any such deviation requires notice to the European Commission *“giving reasons for its position”*. In addition and in accordance with Regulation 30 of the Framework Regulations, in cases where it chooses not to follow a recommendation, ComReg must *“inform the Minister and the European Commission giving the reasons for its position”*.”

The European Commission has issued such a recommendation in respect of NGA<sup>1</sup>. This provides at Clause 32 that:

*“NRAs should oblige the SMP operator to make new wholesale broadband access products available in principle at least 6 months before the SMP operator or its retail subsidiary markets its own corresponding NGA retail services, unless there are other effective safeguards to guarantee non-discrimination.”*

The original decision would have incorporated all relevant market information available at the time of the decision, including the new obligations to be imposed by the decision itself and would have taken utmost account of the NGA recommendation in the formulation of the original decision to impose a date of 20 May 2013. To avoid a deviation from the Recommendation, which ComReg itself believes would trigger a requirement to *“inform the Minister and the European Commission giving the reasons for its position”*, ComReg would have to show that a decision allow any shorter period was based on evidence of *“other effective safeguards to guarantee non-discrimination”*.

In any assessment of whether to effectively mandate a notice period of shorter than six months, Vodafone notes that the consideration of non-discrimination issues conforms to the NGA Recommendation but consideration of any other factors would not. Vodafone also notes that this assessment would have been carried out at the time that the duration of the notice period was specified.

#### **Factors which ComReg has previously indicated will inform its decision**

In the consultation analysis associated with D03/13<sup>2</sup> ComReg stated that *“where sufficient data is made available prior to notification, during the product development process, for example and where there is evidence that Eircom is fulfilling its non-discrimination obligations, ComReg may consider a partial derogation from the prior notification timelines to ComReg and industry”*.

In formulating the provisions of Clause 8.8 of D03/13 ComReg has set out no other factors which would be relevant to a consideration of an amendment to the earliest launch date. If ComReg adopts the view that it does not have to follow the processes set out in Regulations 12 and 13 of the Framework regulations but can implement this change based on some self-defined process then it is, in any event, constrained to follow the process which it itself has set out.

At the time that D03/13 was adopted ComReg had full visibility of the provision of information to OAOs by eircom. With this knowledge ComReg imposed a date of 20 May 2013. The question then arises as to what different or accelerated provision of information has occurred after the adoption of the measure and which was not foreseen at the time of the adoption which would now justify its effective amendment? Vodafone can see none.

The question also arises in relation to non-discrimination as to what additional evidence has come to hand after the adoption of D03/13. The non-discrimination provisions which form part of D03/13 cannot be relied on to modify the Decision itself. These should have already been factored into the setting of the 20 May date.

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<sup>1</sup> Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (Text with EEA relevance) (2010/572/EU)

<sup>2</sup> Paragraph 8.20

Vodafone notes that in the period since the publication of eircom's Wholesale NGA product Documentation ComReg has issued a finding of non-compliance in respect of eircom's discharge of its non-discrimination obligations.

When one considers the factors which ComReg itself set out as being relevant to a consideration any request for an amendment of the earliest launch date it is Vodafone's view that no new evidence has been adduced against these factors which justify bringing the date forward.

#### **When was sufficient product information available to Operators?**

A key consideration in determining when any notice period might finish is defining when it commences. In this regard Vodafone repeatedly sought clarification from ComReg as to the conditions that would need to be met to trigger the commencement of the notice period.



It is clear that ComReg had formed firm and definite views on the adequacy of the information provided on 20 November when it reached its decision as set out in Clause 8.8 of D03/13. In reaching this position ComReg had full visibility of the wholesale NGA product development process and the information that was being provided to Operators as ComReg both Chaired and provided the Secretariat to the Industry NGA Forum. There is no new or additional information regarding the provision of information to OAOs in the period prior to 20 November which was not already available to ComReg as it considered the imposition of the 20 May date.

#### **Alternative Appeals Mechanism**

Eircom applied for the change to the launch date within the period during which it could also have made a statutory appeal of ComReg's decision to mandate the 20 May date. If ComReg revisits its decision to impose this date based on information that was available prior to the decision being taken then the consultation process that ComReg is currently engaged in effectively amounts to an alternative appeals mechanism for Clause 8.8 of D03/13. There is no statutory or regulatory basis for such an appeals mechanism.

This potential appeals mechanism has been created by ComReg in a way which is not transparent. The criteria for the creation of an alternative appeals mechanism are not known. The granting of such a mechanism is entirely within ComReg's gift and has not been made available to other operators when they have had remedies imposed under Regulation 10 of the Access Regulations. The "standard of review" is not defined for any such quasi-appeal process, nor are the detailed processes or legal basis.

If ComReg wishes to avoid the consultation becoming such an appeals mechanism it would appear to limit the scope of information that ComReg can properly take into account as the basis for a decision to modify the date. This limitation would narrow the scope to information that was not available prior to the adoption of D03/13. Even then the breadth of the question to be addressed by ComReg would appear to be limited as to whether any additional material justifies in itself the amendment of the advance notice period of six months. To do otherwise would be to revisit the original decision based on the original inputs.

#### **Proximity to the original Decision**

The return date for this consultation is only 4 weeks after ComReg adopted a measure following a consultation process spanning two years with a preliminary consultation issued by ComReg in May 2011<sup>1</sup>. At all material times prior to adopting D03/13 ComReg had visibility of the progress of the NGA wholesale product development process and had open to it the option of using its formal information gathering powers if it felt it needed further information prior to making its Decision.

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<sup>1</sup> ComReg Document 11/40



Should ComReg effectively amend the obligation so soon after imposing it, without a clear and substantive basis for making this change, this would raise serious concerns as to the adequacy of the original decision making process. If one portion of the original decision is infirm, what other elements are similarly tainted?

Allowing that the original decision was well made then Vodafone does not believe that any new information of sufficient weight to justify the requested change has been adduced.

**Basis for eircom's request.**

The non-confidential version of eircom's request for permission to launch earlier than 20 May 2013 does not advance any new substantive information as regards either the availability of information to OAOs or its compliance with its non-discrimination obligations. Even if it did advance this material, in order to justify the change sought the material would have to show that it addressed the competition issue that the original date was designed to address.

eircom's request contains a summary of the result of eircom's canvassing of operators. This is of limited probative value as there is no indication that the pool of respondents are those who will be likely to make use of NGA in the period between 8 April and 20 May nor is there any information as regards those who either did not express support for the proposal or who did not respond to eircom's request for support.

The request does not adduce any evidence of the type which ComReg had indicated would be relevant to a consideration of such a request nor does it demonstrate any deficiency in the original decision. Any arguments advanced do not engage with the purpose and analysis which underpin the original decision. Therefore the request as submitted does not provide any legitimate basis for ComReg to engage in a modification of the initial launch date.

**Weight to be ascribed to new information**

There has been no material change in market conditions since the adoption of D03/13. Rather eircom has simply canvassed and collated additional inputs on the original consultation question from those who were willing to react to eircom's advances in this regard. A critical examination of the weight that should be ascribed to these inputs is required. The authors of these additional inputs (those who provided expressions of support to eircom) may have made submissions on the issue during the Consultation process. Unless these new expressions of support contain some new substantive point then the substance of the issue had already been fully canvassed and considered by ComReg and a reconsideration of the same arguments (albeit in some cases made by different actors) should not yield a different result.

If they did not respond to the original Consultation process then they did not feel so strongly the matter to deem it worthwhile to make the representations on the issue directly to ComReg as part of the consultation process or before the Decision was made. Therefore it is appropriate that lower weight should be given to their late zeal for the matter.

In addition ComReg should take account of whether those expressing support are in a position to deliver such substantive market benefits from the advancement of the date that these would more than outweigh the procedural, competition and consumer welfare issues that Vodafone has identified earlier in this response.

## Summary

If ComReg was to accede to this request it would raise substantive procedural questions as to how a regulatory body, having adopted a formal decision, could effectively change its mind within some four to five weeks with little or no relevant new information to hand. This is especially in the context where the decision was made on foot of an overall public consultation process which had its genesis two years ago and was notified to the European Commission for review and approval as a draft measure prior to adoption.

A significant question mark exists as to the legal basis and framework under which ComReg is undertaking this consultation process. Even if one accepts ComReg's apparent position that it has some discretion to set up a process which would allow it to grant some form of derogation, then based on the factors which ComReg itself has set out as being those falling to be considered in the matter, there is no basis for advancing eircom's wholesale NGA launch date to 8 April 2013.

The competition effects of advancing the date are adverse, the consumer affect are adverse and it nullifies any prospect of taking experiences for the trial into account. Such a course simply cannot be justified.

Vodafone does not support the proposal to allow eircom's Wholesale NGA launch to take place prior to 20 May 2013.

Non-Confidential

Appendix 1



Non-confidential

Appendix 2



Non-confidential

# alto

alternative operators in the communications market

**Response to Consultation - Eircom's request for a derogation  
on launch date for Wholesale NGA Services  
Ref:13/17**

**Submission By ALTO**

**Date: February 28<sup>th</sup> 2013**

ALTO is pleased to respond to the above Consultation entitled - Eircom's request for a derogation on launch date for Wholesale NGA Services, Ref: 13/17.

## **Preliminary Comments**

ALTO welcomes this Consultation the aim of which is to determine the appropriateness whether or not ComReg should assent to the request by Eircom Limited for any derogation on the launch for Wholesale Next Generation Access – NGA, services.

ALTO considers this a critical consultation given that it triggers certain regulatory remedies that mandate Eircom to supply certain wholesale services and may act to modify the conditions in the communications market in Ireland to significant extent.

ComReg has itself stated that *“in relation to Wholesale NGA services, the initial Wholesale NGA product launch will require sufficient time for OAOs to prepare business cases. ComReg believes that at least six months notice in advance of a launch of wholesale services will be required for initial pricing and non-pricing information.”*

ALTO does not agree that the derogation request made by Eircom to ComReg is appropriate for a number of reasons, which are set out below.

## **Inadequate Reasons for Derogation**

ALTO notes that ComReg has not disclosed or published any meaningful information as to what determinants it considers necessary and appropriate to allow a derogation, save for limited references to compliance with non-discrimination obligations, mentioned very briefly at paragraph 8.20 of ComReg's own decision D03/13.

ALTO requests a full and detailed statement from ComReg, by way of information notice or otherwise, outlining of the elements to be considered in the issuing of, or deciding upon, such a derogation request.

Further, ALTO seeks information as to what precise information has now become available to ComReg in order for it to consider such a material change to the direction of the market.

ALTO further finds it curious, if not exceptional, that any such material information should come to light within 4 weeks of the publication of ComReg's Decision instrument D03/13.

### **Commercial Pressure**

ALTO comments that it is not enough that mere commercial pressure being exerted by Eircom wholesale on ComReg, be a valid reason for an independent regulatory authority, to grant a derogation for the launch of Wholesale NGA services in the circumstances.

ALTO is aware that Eircom Retail may be ready to deploy NGA services, which is irrelevant to the launch of the wider NGA suite of services to the market.

### **ComReg: OAO Business Cases**

ComReg has already decided at paragraph 8.20 of decision D03/13 that OAOs *“will require sufficient time to prepare business cases”* further, *“ComReg believes that at least six months notice in advance of a launch of wholesale services will be required for initial pricing and non-pricing information.”* That decision being a formal

ComReg decision given on the 31<sup>st</sup> of January 2013 and a decision upon which the market placed great store and trust.

ALTO states that ComReg should be extremely cautious in its evaluation of any modification to the above decided time scale.

ALTO notes that ComReg notified this to the European Commission Article 7 Task Force who later responded by letter stating to ComReg that: *“Obligation to make publicly available wholesale pricing and non-price information at least six months prior to the initial launch of the wholesale product (retail launch may not take place in advance of wholesale launch) and, post launch, to make available non-pricing information at least six months prior to an offer of next generation NPNIA and WBA.”*

The industry has taken the ComReg Decision as a formal and proper decision in all of the circumstances. Any derogation must be properly consulted upon, which full disclosure and principles of assessment outlined therein. By letter dated the 8<sup>th</sup> of February 2013, ALTO wrote to ComReg seeking clarification as to:

*“the precise: (1) process, (2) consultation and (3) transparency measures related to the matter outlined below, published at paragraph 8.7, page 356, of the above Response to Consultation and Decision Instrument:*

*“8.7 For the avoidance of doubt, Eircom’s provision of Next Generation WPNIA, which shall not occur before 20 May 2013, (except as otherwise agreed with ComReg following discussion with industry).” (Emphasis Added)*

*Further, ALTO seeks formal written clarification as to the precise: (1) process, (2) consultation and (3) transparency measures related to the*



*matter outlined below, published at paragraph 8.8, page 380, of the above Response to Consultation and Decision Instrument:*

*“8.8 For the avoidance of doubt Eircom’s provision of Next Generation WBA, which shall not occur before 20 May 2013, (except as otherwise agreed with ComReg following discussion with industry).” (Emphasis Added)”*

ALTO stated for the record, that any discussions in industry relating to an NGA trial, product development, service development or pricing, should not be relied upon for the purposes of agreement as to any future launch, provision of service dates, or the contraction of time relating to any notified dates presently.

ALTO members can only assume that these insertions in the Decision instruments are in fact the origins of the consultation that we now address.

### **Documentation Stability**

ALTO states that the NGA document set, detailing the very nature, operation, features and design of NGA products are as yet unstable.<sup>1</sup> The industry document set, dating back to November 2012, are as of the date of writing this submission out of date, or stale and cannot be properly suggested to be properly reliable for the purposes of a product launch. This is a significant matter to any OAO contemplating launching any product or service in the market.

ComReg knows this to be a correct point and further ComReg’s officials have firsthand knowledge of the detail and machinations of this particular point. It cannot be said that the industry document sets have the certainty and stability antecedents to base any meaningful products thereon.

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<sup>1</sup> In house wiring being one such example.

The following list is a non-exhaustive list of issues directly and materially effecting the industry and NGA document set that remain incomplete and as such unstable:

- Provisioning Issues
- Process issues
- IPM amendments
- Code of Practice
- Service Level Agreement – SLA

#### **Industry Developments: Incomplete and unstable**

ALTO states that its members are aware of and are addressing countless product and service developments that remain incomplete and unstable. That can hardly be said to permit ALTO to suggest to its membership that supporting any derogation can be a good or positive step for the market in all the circumstances.

ComReg has detailed and acute information as to the complexity of certain matters arising, and indeed the nature of the antecedent conditions required, to include stability and certainty prior the launching of any product or service.

#### **Testing: As yet incomplete**

ALTO states that NGA testing is incomplete, a matter that ComReg is acutely aware of. This situation would be entirely incongruent with the granting of any

derogation in the circumstances. Interoperability testing will undoubtedly result in issues requiring interoperability tests and fixes to be undertaken between the parties in the circumstances.

### **Testing: Period of 11<sup>th</sup> February 2013 – 8<sup>th</sup> April 2013**

ALTO submits that the testing period between the 11<sup>th</sup> of February and the 8<sup>th</sup> of April 2013 is far too short and a significantly shorter than the period contemplated and alluded to by ComReg in its decision instrument and in industry meetings.

It is a safe and clear conclusion to reach that even with the current date of the 20<sup>th</sup> of May 2013, for NGA launch, that this date may not be adequate to ensure that testing and interoperability is completed properly and adequately so.

By way of reference to the situation in the United Kingdom, where unlike Ireland, the incumbent is fully functionally separated, the pre-commercial launch, testing phase was for a period of nine calendar months. It is ALTO's submission that even with the testing period being that length, certain significant issues were suspended and dealt with after the expiry of the testing phase window.

The initial testing dates were supposed to commence on the 17<sup>th</sup> of December 2012, then this was put back to January 2013, and later then till the 11<sup>th</sup> of February 2013.

### **Phased Launch**

ALTO proposes, as it has in the past, a phased approach to products that may diametrically effect or shift the experience of the wholesale market, and wholesale

consumer. This would obviously involve an agreed second phase and series of upgrades on a case-by-case basis.

ComReg has not, as yet, considered the issue of a phased approach to launching NGA services.

ALTO remarks that instead of a commercially pressurised launch, ComReg must consider that the market might not be ready for a full NGA launch.

### **Consultation Sections:**

#### **Q. 1. Eircom's engagement, to date, with Operators on NGA related issues**

A. 1. ALTO agrees that Eircom has engaged positively and made positive efforts to ready NGA services for launch at an operational level. That said, a number of significant issues and gaps are present, many of which are present on the industry issues list and are underlying, either from the lack of meaningful testing on the NGA product suite, or a rush to hit certain dates.

ALTO remarks that there appears to be executive pressure being exerted by Eircom Wholesale that is not required, proper or reasonable in the circumstances.

The launch of robust industry NGA services should not be an exercise in budget justification, or internal KPI matrices.

It is ALTO's opinion that it is more important that Eircom Wholesale launches robust service offerings into the market, and leave aside extraneous, internal management and irrelevant issues.

#### **Q. 2. Operators planning and readiness for the launch of NGA services**

A. 2. ALTO submits that operators are not currently even likely to be ready for launch on the date decided upon and expressed by ComReg in Decision D03/13, that being the 20<sup>th</sup> of May 2013.

ALTO cannot comment on, and nor does it know about individual operator readiness. This is due to Article 101 legal restrictions, but both Eircom Wholesale and ComReg should be readily able to access such information from operators bilaterally.

ALTO remarks that had the industry NGA document set and trial dates been properly project planned and maintained (taking into account Christmas, etc.), matters might be somewhat different. As matters currently stand, the date of the 20<sup>th</sup> of May 2013 is seriously at risk. A number of serious and not inconsequential technical issues remain unresolved and unanswered and that will seriously impact this date.

ALTO is aware that certain members have different levels of work to do to be ready for any launch, whereas other members can simply use the Eircom UG, e.g., White label customers. There must not be disproportionate measurement allowed for those who claim they are ready and accept any derogation, versus those who are developing systems and services themselves.

ALTO submits that ComReg must consider the differences between the nature of the undertaking and the type of service being sought on a case-by-case basis. We suggest this, but do so stating for the record that we are unaware of ComReg's assessment criteria for any derogation in all the circumstances, which is a situation we find most unusual and unsatisfactory.

### **Q. 3. Impact on competition**

A. 3. ALTO suggests that any derogation will have an impact on the competitive dynamics in which ALTO members compete.

The difficulty ALTO has in assessing such dynamics is that we cannot discuss, and

nor do we know, the readiness and circumstances of individual undertakings.

ComReg must consider the most appropriate time for launch for all players in the market, including Eircom's own retail arm, which as the European Commission has directed, should launch at the same time as the rest of the market and with the same notice period.

#### **Q. 4. Impact on consumers**

A. 4. ALTO suggests that the comments made above, in particular relating to testing, stability, certainty and launch will have significant impacts on the consumer if industry/ComReg allows products to go to market that are untested, unstable and not fit for purpose.

ALTO cannot understate its own experience in dealing with offerings that simply do not work.

ComReg must ensure that adequate time and effort is allowed in order to make offerings stable, fit for purpose and fit for service. That is of course, over and above any issues relating to the business cases and readiness of any given undertaking.

#### **Q. 5 Other relevant considerations**

A. 5. ALTO submits that a serious consideration is the nature and status of the information passed to the European Commission and industry in the Article 7 Market Analysis process, versus what is now being requested and undertaken under the guises of a derogation request.

ALTO remarks that an operator other than Eircom Limited could as easily submit a request to elongate and concatenate the periods allowed to industry to implement and test matters.

ALTO queries whether the same impetus or priority would be shown to, or allowed to a non-incumbent making a derogation request.

ALTO is aware that this request was made last week, and with lightening speed, industry is expected to address its collective minds to a request and consultation that ultimately is detracting from the time industry has to expend on the 'real work' in this area.

## **Conclusion**

ALTO cannot agree that any derogation is the correct and proper course of action for ComReg to take at this time. The application for any derogation contracting the represented and proposed date should fail *in limine*, considering the issues raised herein, formal market expectations set by ComReg and other representations of fact made to the European institutions.

ALTO also has grave concerns about the procedures adopted in this particular consultation, stemming from Decision D03/13 which we understand was notified as part of the Article 7 notification procedure.

ALTO has had a very short time to construct a response to this consultation and further, ComReg must note that any decision can be susceptible to appeal or judicial review in the circumstances.

In terms of the law relating to consultation and adequacy of same, Auld LJ has described the requirements of adequate consultation in the following terms<sup>2</sup>:

*“[T]he classic statement of the basic requirements of consultation is that formulated by Mr Stephen Sedley QC, as he then was, in*

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<sup>2</sup> *R v London Borough of Barnet, ex p B* [1994] ELR 357

*argument, and adopted by Hodgson J in his judgment in R v Brent London Borough Council, ex p Gunning 919850 84 LGR 168, and approved by Webster J in R v Sutton London Borough Council, ex p Hamlet (unreported) namely ...: “**First** ... consultation must be at a time when proposals are still at a formative stage. **Secondly** ... the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. **Thirdly** ... adequate time must be given for consideration and response and finally, fourthly, the product of consultation must be conscientiously taken into account in finalising any ...proposals.”*

The process described above is one providing for the give and take of information and views between the relevant parties before a final proposal or decision is made. It is predicated on early disclosure of sufficient information facilitating an informed response to be made. Whether or not persons take the chance to be involved in a consultation is their choice. However, those affected should be given the chance in a meaningful way so that they may become involved.

The requirement for adequate consultation has been incorporated into Irish jurisprudence as a ground for judicial review. It may arise where there is a mandatory statutory requirement to consult and may then form part of a lack of procedural fairness ground for review, or indeed in the case of absence of any consultation where one is statutorily required, the procedural *ultra vires* ground for review.

A consultation and consequent decision must follow proper legal and administrative legal procedures, including consultation, in all the circumstances.<sup>3</sup>

Judicial review is the basic procedural mechanism by which the High Court

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<sup>3</sup> S.I. No. 333/2011 — European Communities (Electronic Communications Networks and Services)



scrutinises public bodies, including ComReg in the exercise of public law functions. The High Court may intervene to quash, prevent, require or declare as appropriate. Intervention takes place not because the court disagrees with a merits judgment, but rather so as to right a procedural issue.

In Ireland, standard judicial review procedure is set out in Order 84 of the Rules of the Superior Courts 1986 (as amended). Rule 18 identifies the main orders that may be sought:

1. *Certiorari* – whereby a decision of an inferior court or public body open to review may be quashed either in part or in full;
2. *Mandamus* – an order compelling a public person or body to perform a public duty;
3. Prohibition – an order restraining a public body from exceeding its powers, acting contrary to the rules of natural justice or restraining a public authority in the exercise of their judicial or quasi-judicial powers;
4. A declaration or injunction; and
5. *Quo warranto* – an order directing an enquiry into the authority by which a person purported to exercise public powers.

In relation to an application for an order of *certiorari*, the court may quash the decision of the public body concerned. Generally, in relation to judicial review concerning regulatory or administrative decisions, the court may remit the matter to the public body concerned with a direction to reconsider the decision and make a new decision in accordance with the findings of the court.

As stated by Charleton J in *Davy v Financial Services Ombudsman*:<sup>4</sup>

*'[i]t is not the function of the High Court, however, on judicial review of a decision to substitute its own view as to the merits of any*

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(Framework) Regulations 2011.

<sup>4</sup> [2008] IEHC 256

case.'

The High Court is not ever asked to substitute a merits judgment, rather there is some recognised vitiating flaw, for example: (i) an error of law; (ii) excess of jurisdiction or power; (iii) failure to ask the right questions; (iv) frustration of legislative purpose; (v) unjustified interference with European Convention on Human Rights; (vi) breach of EU Law; (vii) unreasonableness; (viii) error as to a precedent fact; (ix) error of established and relevant fact; (x) failure of inquiry; (xi) absence of evidence; (xii) substantially unfair outcome; (xiii) unjustified breach of a legitimate expectation; (xiv) unjustified inconsistency; (xv) bad faith; (xvi) improper motive; (xvii) unlawful abdication; (xviii) improper delegation; (xix) fettering of discretion; (xx) failure to consider a relevancy; (xxi) considering an irrelevancy; (xxii) manifestly disproportionate act; (xxiii) breach of express procedural duty; (xxiv) basic procedural unfairness; (xxv) real danger of bias; (xxvi) absence of adequate reasons; (xxvii) relevant external wrong.

ALTO requests that ComReg seriously consider the issues raised in this response and reject any derogation request for the contraction of NGA launch periods in the circumstances. It may be more appropriate for ComReg to in fact withdraw this consultation in its entirety and set out in detail, reasons for consulting on any measures that could be considered in the granting of any derogation.

As matters currently stand, industry is blissfully unaware of the criteria to be used in assessing such a request. Further, no proof or evidence of readiness and service proofing has been produced to underpin or support any claims for any derogation.

ALTO reserves its rights in respect of comments that may be required to be submitted later in respect of this particular issue.

**Exhibits to this letter:**

1. Letter from EU Commission Article 7 group to ComReg;
2. ALTO letter to ComReg, 8<sup>th</sup> of February 2013.

**ALTO**

**28<sup>th</sup> February 2013**

**eircom Ltd.**

**Response on behalf of eircom Group to  
ComReg Consultation 13/17:**

**eircom's request for a derogation on launch  
date for Wholesale NGA Services**

**28February 2013**

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**DOCUMENT CONTROL**

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## INTRODUCTION AND EXECUTIVE SUMMARY

This response to ComReg's consultation, Doc. No. 13/17, supplements the arguments set out in the eircom application of 19<sup>th</sup> February 2013 to launch wholesale NGA services on 8<sup>th</sup> April 2013. In that application, eircom set out the high level justification in support of its application as well as evidence of its discharge of the obligation to provide necessary information in a timely manner to all operators to ensure that no operator is disadvantaged in competing in the downstream retail market.

eircom is committed to launch NGA services in line with the Irish Government's commitment in the July 2012 National Broadband Plan, "*to delivering high speed broadband throughout Ireland as soon as possible*". To do so, eircom, solely among the telecommunications operators, is implementing a high-risk investment of over €400 million in NGA services based on Fibre to the Cabinet with a current target of reaching 1.2 million premises by December 2014. eircom's investment strategy was announced to industry in July 2011 and since then eircom has worked with industry in an entirely transparent manner to facilitate the launch of wholesale and retail services.

Under the regulatory framework, ComReg is obliged to encourage efficient investment. Subject to its regulatory obligations, eircom in turn is entitled to begin to remunerate its investment at the earliest opportunity. In this context, having regard to the added significance of this NGA investment in terms of the Government's economic recovery programme, it would be entirely inappropriate and unreasonable that eircom is delayed in making available NGA products in circumstances where eircom has met all reasonable requirements to ensure that no operator is disadvantaged in competing in the downstream retail market. That there can be no reasonable case that launch ought to be delayed is clearly apparent from the following, to which ComReg ought to give due regard:-

- From the beginning, eircom committed to develop the NGA services on an Equivalence of Inputs (EoI) basis and there has been no evidence or suggestion by industry that eircom has deviated from that principle during the intervening 18 month period since engagement with industry commenced.
- In view of eircom's strict adherence to the equal treatment of all operators, any assessment of whether service launch should proceed on 8th April should be based on whether a reasonably efficient retail operator has had sufficient opportunity to be

prepared to utilise the network rather than being based on the actual position of any particular operators. This assessment can only be based on objective criteria of whether operators had the required data to inform their own internal activity in a timely manner. eircom is entirely satisfied that this is the case and accordingly, eircom should be allowed to proceed to launch on 8th April. Indeed, eircom has support from a majority of operators for the launch of services on 8th April.

- In these circumstances, eircom should not be allowed to suffer the commercial damage that a delay would bring. It is evident from recent discussions that the opposition to the proposed launch date is centered on ✂. Each of them has a specific quantifiable commercial self-interest in delaying the development of NGA services. None of these operators agreed to participate in the original pilot of NGA services in 2011. Evidence from the market is that ✂.
- ✂

Finally, eircom notes that the subject matter of this consultation is whether the launch date for eircoms NGA wholesale services should be the 8<sup>th</sup> April. The industry has not been asked to comment on whether that date should be extended to a later period in 2013.

**eircom's engagement, to date, with Operators on NGA related issues.**

While the formal announcement of eircom's commercial NGA deployment was in July 2011, the planning of the NGA rollout began over 1 year earlier in June 2010 when eircom advised industry of its plans to conduct a significant Fibre to the Home pilot in Wexford and South Dublin covering 10,000 homes. This was augmented in October 2010 with the inclusion of an additional 8,000 homes to be served with Fibre to the Cabinet in South Dublin. eircom established the Fibre Industry Leadership Group (FILG) with the assistance of independent consultants Analysis Mason to fully involve all interested industry operators in this pilot. This FILG met regularly over the 15 month period prior to the launch of the NGA pilot in September 2011. The wholesale products offered by eircom during the pilot were essentially the same as those products currently being provided for the full commercial deployment. In fact, the initial proposals for the current Virtual Unbundled Access product came from BT as this product was not initially proposed for the pilot. In total, 5 operators finally participated in the pilot albeit that only two provided commercial services.

There was extensive learning from the fibre pilot which has been carried through into the product developments undertaken for the commercial launch. While the product specifications did not change, the manual processes which underpinned the pilot generated important learnings, which became vital inputs to the design of the systems and process for the full commercial launch. In particular, the knowledge gained from the pilot in relation to the delivery of NGA services in the home was particularly important in the design of the provisioning processes for the commercial launch. Approximately 200,000 customer connections were successfully completed during the pilot and the key learning from these installations was fully incorporated into the processes which have been developed for the full commercial launch. In particular, extensive systems development was undertaken to provide a significantly appointment scheduling capability to enable operators deliver NGA based services to customers with minimum customer disruption.

eircom announced its plans publically on 28<sup>th</sup> July 2011 for a commercial rollout of Fibre to the Cabinet in the Access Network to 1 million premises. In an industry meeting convened by eircom on 20 September 2011, and attended by more than 20 operators active in the Irish market, eircom informed industry that it intended to provide open access to the NGA network and to launch wholesale Virtual Unbundled Access and Bitstream products to enable operators bring ultra-high speed services to customers including TV and other entertainment



services. The NGA would be implemented as a core element of the Wholesale Reform Programme being undertaken by eircom to transform its relationship with its wholesale customers. Following this initial engagement, workshops were organised by eircom which provided industry members with detailed information on the various elements of the proposed development including:

- Product Specifications and Functionality,
- Pricing Structures and Principles
- Systems and Process interfaces

Following these workshops and detailed engagement with ComReg, it was agreed that the continued development of NGA products should be aligned with the established industry regimes in place for other regulated products. Therefore, ComReg announced the establishment of an NGA industry forum which met for the first time on 26 October 2011. This forum has met on either a weekly or fortnightly basis over the past 16 months with detailed engagement between the several operators regularly attending and senior product and programme management team representing eircom and ComReg. All elements of the proposed product portfolio have been presented in detail and all operator feedback has been fully addressed.

Over the engagement period, approximately 50 industry meetings and workshops have been held where eircom has engaged openly and intensively on every aspect of the planned NGA network and products. At an early stage of this engagement, a project plan, detailing all the key milestones associated with the introduction of NGA wholesale products was presented to industry. This project plan initially targeted a launch of NGA on 4<sup>th</sup> February 2013 but based on feedback presented by operators, this date was later modified to 8<sup>th</sup> April 2013. This planned launch date has been known to operators for several months.

All the required information relating to the product developments has been provided to operators in a timely manner. In particular the following elements were provided on:

- |                                   |               |
|-----------------------------------|---------------|
| • Detailed product descriptions   | December 2011 |
| • Process manuals                 | April 2012    |
| • Technical Specifications        | April 2012    |
| • Indicative Pricing              | July 2012     |
| • Detailed Systems specifications | May 2012      |

- Unified Gateway interface delivered August and December 2012
- Detailed phases of rollout published in:
  - Phase 1 20 September 2011,
  - Phase 2 7 March 2012,
  - Phase 3 19 September 2012,
  - Phase 4 17 October 2012,
  - Phase 5 28 November 2012

The engagement culminated with the formal publication of eircom's proposed Reference Offer on 19 November 2012. This publication was in complete alignment with the documentation which had been developed with industry over the preceding 12 months. Since this publication, eircom has continued to engage with industry on a constructive basis both through the forum and on a bi-lateral basis to ensure that each individual operator can be in a position to provide services on the NGA network following launch. In addition, eircom commenced a trial phase of the project on 11<sup>th</sup> February 2013 as planned in the overall project plan. The timing and duration of this trial had been flagged to industry for more than 6 months earlier and was never challenged as being inadequate. The purpose of the trial is to enable operators to test their own internal processes and systems through the Unified Gateway to ensure that they can deliver customer services successfully from the planned launch date. This was clearly flagged in the trial guidelines presented to industry in September 2012 which were broadly welcomed by all operators involved in the Industry Forum. In fact the main element of feedback from operators related to the number of exchanges available for Trial rather than any issues of timing or duration.

### **Operators planning and readiness for the launch of NGA services.**

eircom Retail is in the final stages of product test for the NGA launch on 8<sup>th</sup> April. Over the last 18 months eircom Retail has invested a significant amount of effort in resources and costs to ensure that the Retail programme was aligned to launch in parallel with the Wholesale planned launch date of 8<sup>th</sup> April. The trial phase has commenced during which it is planned to kick off our pilot to Ambassador customers (eircom employees) from the beginning of March (250 as per the wholesale Pilot Agreement) and run a pilot until launch on April 8<sup>th</sup>. In addition, eircom has engaged its retail Go To Market strategy (including ✂) with a view to a commercial launch on ✂.

eircom Retail has exclusively utilised the information provided by eircom Wholesale through the Industry Forum to inform its product and systems development. There have been sufficient time intervals between the availability of this information and key dates required to be met in the retail product development programme to allow the necessary developments to proceed in an efficient manner.

The fact that eircom Retail could develop products that it is confident will perform to customers' satisfaction based solely on the information provided through the Industry Forum confirms that a reasonably efficient operator could meet the planned launch date. This was achieved while also implementing the fundamental changes required to comply with the company commitments to the EoI standard of non-discrimination with all relevant retail support systems interfacing through the Unified Gateway. This significant change does not arise for other operators who normally interface through the UG for all their existing services.

In the light of this, there should, nor could it, be any concerns regarding an efficient operator's ability to achieve readiness on 8<sup>th</sup> April. Therefore, if other operators have not similarly completed their product developments, this cannot be used to deny the benefits of ultra-high speed broadband to consumers or to deny eircom the opportunity to commence realising some return on its significant investment.

#### **Impact on competition.**

The launch of eircom's Wholesale NGA services is an extremely pro-competitive event creating an alternative platform for retail providers to compete with the services offered on the Cableplatform. As ComRegis aware, UPC does not support the sale of wholesale services from its network. Retail providers utilising the eircom platform have struggled in recent times to compete with UPCs aggressively priced bundles including high speed broadband. The launch of an alternative platform by eircom Wholesale allows those retail providers the opportunity to compete with UPC. Absent this, UPC will be unfettered in reinforcing its dominant position in the urban areas it serves.

The launch of eircom's Wholesale NGA services will enhance the competitive dynamic acting as a catalyst for retail providers to innovate in the delivery of new high speed broadband services and the creation of new services such as IPTV.

eircom Wholesale's NGA service are a critical input to retail providers. The sooner these Wholesale services are launched the sooner competition can be allowed to grow and flourish.

### **Impact on consumers**

The impact on consumers of an earlier launch of Wholesale NGA services can only be considered positive.

The commercial launch of NGA Wholesale will allow eircom Retail (and other retail operators using eircom's network) to fulfil the customer need of increased bandwidth of up to 70Mbps. eircomRetail is ready to offer these speeds to all its customers within the initial NGA footprint from 8<sup>th</sup> April 2013 and any movement on this date will restrict our customers from availing of these benefits.

A launch in April would allow eircom Retail to engage with their customers in advance of the summer period and migrate a significant number of these onto the new technology.

If the launch of NGA based services was delayed until the May date referenced in the ComReg Decision Instrument, eircom has undertaken an analysis ✕

### **Other relevant considerations**

Individual operators have raised a long list of potential issues with the proposed wholesale NGA products in recent weeks. These issues which seem to be motivated by an objective of having the launch date deferred either because they have not made the necessary preparations to launch their own NGA retail products or they are seeking to protect their position in the market and do not want this threatened by the introduction of NGA based services by eircom and its wholesale customers. In one instance, a new entrant to the market who has recently launched retail services but who are obviously late to the table and playing catch up in relation to NGA based services are raising multiple issues, many of which have already been addressed by industry. They have not been part of the Industry Forum for the last 18 months of discussions and obviously, having just entered the market, do not want others getting ahead before they are ready. Other members of the forum have vested interests in using their own cable or mobile platforms than in actually using eircom's wholesale services.

Many of the issues now being raised by Industry are fine details that are likely to apply only to a small minority of transactions. eircom is responding to those queries as efficiently as

possible. However, we do not believe that any of the issues raised so far are such that they should result in postponing the 8<sup>th</sup> April launch. It has been the norm in the launch of wholesale products over the past 10 years that not every detail is fully anticipated and resolved before launch. The general practice is by launch date that a programme of ongoing product improvements is already identified for implementation following launch. We believe that this will also be the case with NGA services.

In conclusion, for all of the reasons identified both above and in eircom's application of 19<sup>th</sup> February, eircom strongly contends that ComReg should grant eircom a derogation to launch NGA services on 8<sup>th</sup> April 2013, as facilitated by ComReg Decision D03/13. This will allow Irish consumers to enjoy the benefits of superfast broadband services as envisaged by the National Broadband Plan.



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**CONFIDENTIAL**

28 February 2013

**RE: COMREG INFORMATION NOTICE NO. 13/17 AND EIRCOM'S REQUEST TO LAUNCH NEXT GENERATION ACCESS ("NGA") SERVICES ON 8 APRIL 2013**

Dear Donal,

This is the response of Sky Ireland ("Sky") to Information Notice No. 13/17 entitled "*Eircom's request for derogation on launch date for Wholesale NGA Services*" ("the Consultation") published by the Commission for Communications Regulation ("ComReg") on 21 February 2013.

Sky has serious concerns about the fitness for purpose of eircom's wholesale NGA product and does not agree that eircom should be permitted to launch NGA services on 8 April 2013.

**1. Introduction**

ComReg has initiated the Consultation following a request by eircom on 19 February 2013 for approval to launch NGA services on 8 April 2013 ("the Application"). The Application is made under paragraph 8.8 of the Wholesale Broadband Access ("WBA") Decision Instrument in the NGA Remedies Decision,<sup>1</sup> which provides as follows:

*"For the avoidance of doubt Eircom's provision of Next Generation WBA, which shall not occur before 20 May 2013, (except as otherwise agreed with ComReg following discussion with industry), shall inter alia be on a non-discriminatory and transparent basis pursuant to Section 8.1 and Section 9.1 of this Decision Instrument. If ComReg is not satisfied that the provision of Next Generation WBA will be offered in accordance with Eircom's obligations set out under this Decision Instrument then ComReg may direct Eircom, pursuant to Regulation 18 of the Access Regulations, to defer the launch of Next Generation WBA products, services or facilities to a later date. In addition and similarly pursuant to Section 8.1 and 9.1 of this Decision Instrument, Eircom may not offer retail services which rely on Next Generation WBA inputs in advance of the making available of the Next Generation WBA inputs and information to OAOs."*

<sup>1</sup> Next Generation Access ('NGA'): Remedies for Next Generation Access Markets Response to Consultation and Final Decision (ComReg Document 13/11, ComReg Decision D03/13) dated 31 January 2013.



Sky notes that ComReg intends to make a decision in relation to the Consultation "...having regard to ComReg's statutory duties following consideration of all submissions in response to this consultation and Eircom's request for approval to launch on 8th April 2013, in addition to any other relevant considerations and material available to ComReg."

Sky welcomes the advent of NGA services in Ireland and intends to offer NGA services to its customers. Sky wishes to provide NGA services of the highest possible standards to its customers and to contribute positively to developments at the industry level.

With the objective of obtaining a fit for purpose, wholesale NGA product and launching our own NGA services, we have actively participated in the NGA industry forums hosted by ComReg.

[REDACTED]  
[REDACTED]  
[REDACTED] We have also closely monitored regulatory developments in relation to NGA, in particular, the publication by ComReg of its NGA Remedies Decision on 31 January 2013.

In order for there to be effective competition in the market, ComReg must satisfy itself that eircom makes available a fully fit for purpose, set of wholesale NGA services on terms that are no less advantageous to its competitors, than eircom provides to eircom retail. ComReg must be satisfied, based on evidence made transparent to industry, that eircom will be compliant with all of its legal obligations under the NGA Remedies Decision, *in advance* of any launch. In addition, Sky considers that ComReg has a duty to ensure, that eircom's NGA launch would not jeopardise the achievement of ComReg's statutory tasks and objectives, including those under sections 10 and 12 of the Communications Regulation Act 2002, Regulation 16 of the European Communities (Electronic Communications Networks, and Services) (Framework) Regulations 2011, Regulation 6 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

Sky does not consider that eircom is, or will be, compliant with its regulatory obligations under the NGA Remedies Decision and eircom should not be permitted to launch NGA services on 8 April 2013. On the contrary, we consider that there are serious concerns in relation to eircom's compliance with its regulatory obligations under the WBA Decision Instrument in the NGA Remedies Decision. Sky considers that the incomplete nature of eircom's wholesale NGA offering (including the deficiencies of its proposed NGA trial) mean that 8 April 2013 (or even 20 May 2013) is premature for NGA launch. If eircom is permitted to launch in these circumstances, there is a real risk of serious harm being done to competition and ultimately, consumers.

Sky sets out its reasons below as to why eircom is and would not be compliant with the NGA Remedies Decision (and the other legal obligations that eircom has). We would also draw ComReg's attention to paragraph 8.21 of the NGA Remedies Decision which provides as follows:

*"That said, where sufficient data is made available prior to notification, during the product development process, for example and where there is evidence that Eircom is fulfilling its non-discrimination obligations, ComReg may consider a partial derogation from the prior notification timelines to ComReg and industry."* (Emphasis added).

ComReg must be satisfied that eircom is fulfilling its non-discrimination obligations before it can accede to eircom's request in the Application. Not only that, under paragraph 8.8 of the



WBA Decision Instrument in the NGA Remedies Decision, ComReg must ensure that eircom complies with all of its other obligations thereunder, including its transparency obligations and its overarching obligation to provide access in a fair, reasonably, and timely<sup>2</sup> manner. That evidence must be robust. In addition, if fair procedures are to be adhered to and the rights of operators not fundamentally impaired, ComReg should share such evidence it has (if any) with operators during the course of the Consultation and prior to making a decision. In any case, Sky has not seen evidence to support the Application (or even a 20 May 2013 launch).

Before responding to the five headings proposed by ComReg in the Consultation, Sky considers it is important to address a number of issues raised by eircom in the Application.

## **2. Sky does not support eircom's invitation to industry to support NGA launch on 8 April 2013**

On 1 February 2013, Sky [REDACTED] received an e-mail from [REDACTED] eircom [REDACTED] inviting Sky to join eircom's NGA trial. [REDACTED] also sought "confirmation" that Sky would support eircom's desire to launch its portfolio of NGA services on 8 April 2013. In response,<sup>3</sup> via e-mails of 4 February and 15 February [REDACTED] outlined why it was "highly premature" to discuss any dates for launch until there was an opportunity to take stock of trial learnings and deal with any other outstanding issues related to NGA launch.

Notwithstanding the above, eircom stated in the Application as follows:

*"On 1 February, eircom formally wrote to all potential NGA customers seeking their support for an early launch of services...We have not been given any cogent, evidence-based reasons at this stage why an earlier launch date would not be feasible or reasonable..."*

Notwithstanding that eircom's invitation merely sought confirmation (or not) of Sky's support for an early launch of NGA, Sky clearly explained why it could not offer that support. The Application omits any reference to the clear views expressed by Sky in response to [REDACTED] invitation. This is a significant omission, given that one of the grounds supporting the Application is eircom's statement that it has not been given "any cogent, evidence-based reasons" why a 8 April launch date for NGA services would be unreasonable. Not only is this inaccurate, Sky notes that eircom *never requested* any such reasons from Sky. Furthermore, when Sky did outline reasons to eircom why it could not support an early launch, eircom, chose to ignore them and did not make them known to ComReg in the Application.

Accordingly, ComReg needs to exercise the utmost caution when it assesses the Application and eircom's grounds for seeking approval to launch NGA services (including claims made about operators' "support" or otherwise, for launch).

## **3. eircom's request for a speedy resolution to dealing with the Application is inappropriate**

We note that eircom has asked ComReg to consider the Application "as quickly as possible" because of its obligation to provide detailed information at least 28 calendar days before

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<sup>2</sup> I.e. the appropriate time.

<sup>3</sup> [REDACTED]





launch.<sup>4</sup> Sky notes that eircom waited a full 19 days after the publication of the NGA Remedies Decision to submit the Application, despite the fact that it had alluded to the possibility of making such an application (as far back as early December 2012) once the NGA Remedies Decision was published (which it was, on 31 January 2013).

#### **4. The duration of the Consultation is insufficient**

The period allowed for responding to the Consultation of 4 working days and it is insufficient. The Consultation was published on 21 February. Sky received notification of it via ComReg's mailing list update at 17.10 on 21 February and responses are due by 17.00 on 28 February. A period of 4 working days is wholly inadequate to respond to the critical issues the Consultation raises and Sky notes that this is not in accordance with ComReg's own published procedures set out in "*ComReg Consultation Procedures*" (ComReg Document No. 11/34). ComReg Document No. 11/34 provides that normally the period for responding to a consultation is 4 weeks and that where ComReg proposes a shorter period of time than four weeks, it will give reasons for doing so. ComReg has given no such reasons on this occasion.

Sky's response to the Consultation is without prejudice to its view that the extremely short period allowed for responding to it is not consistent with fair procedures and impairs Sky's ability to respond to it. Accordingly, Sky reserves the right to make further submissions to the Consultation.

#### **5. Sky's response to the Consultation**

Sky's response to the Consultation is set out in: (i) this letter; and (ii) our letter of 22 February 2013 to [REDACTED] eircom, which is attached at Annex 2 ("the 22 February letter to eircom"). The 22 February letter to eircom was copied to Alex Chisholm (Chairperson of ComReg).<sup>5</sup>

In response to all of the issues raised in the Consultation, we refer ComReg to the opening paragraphs of the 22 February letter to eircom. in which Sky notes that there is an insufficient basis to support a 8 April launch and lists those matters that at a minimum need to be addressed by eircom before a launch of NGA can be considered. These issues (which are not exhaustive) are as follows:

- A comprehensive trial of appropriate duration;
- Provision of 23/7 availability to Query Account ("QA") order type;
- Mitigation of liability arising from the introduction of vectoring;
- A fit for purpose appointing process;
- An appropriate notice period for price information;

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<sup>4</sup> Paragraph 9.13 of the WBA Decision Instrument in the NGA Remedies Decision.

<sup>5</sup> This letter was copied to Mr Chisholm on 22 February. It was written as a formal response to eircom's request for industry support for an early launch of NGA services.



- An appropriate notice period for non-price information;
- Support for key 'customer journeys';
- A substantial clearing/resolution to the large number of outstanding issues raised through the NGA forum; and
- Development of a comprehensive set of Service Level Agreements ("SLAs").

All of the above issues have interdependent and substantial implications for operator readiness, competition, and consumers.

In relation to issue #2 in the Consultation ("*Operators' planning and readiness for the launch of NGA services*") [REDACTED]

Accordingly, Sky does not support the Application for early launch. [REDACTED]

Kevin Barrins  
Head of Broadband & Telephony Regulatory Policy  
Sky Ireland



**Annex 1**





Annex 2





## **BT Communications Ireland Limited (“BT”) Response to ComReg’s Consultation to determine whether to grant a derogation on the launch date for Eircom Wholesale NGA Services.**

Issue 1 28<sup>th</sup> February 2013  
Status – Issued

### **1.0 Introduction**

BT welcomes ComReg’s consultation concerning the derogation request by Eircom to amend Decision D03/13 concerning the launch date for Eircom Wholesale Next Generation Access Services to 8 April 2013. BT considers that a number of outstanding issues prevent such an advancement of the date being possible. Moreover, BT considers that the significant nature of these issues indicate that the earliest date as currently set out in the Decision by which launch could take place (i.e. 20 May 2013) is also too early.

✂

In summary, although certain key documents necessary to enable the launch to take place in a competitively neutral and effective manner were published by Eircom in November 2012 and were relied upon by ComReg when setting the earliest date by which Eircom could launch NGA services, a number of significant issues have since arisen which render even 20 May unrealistically early. For example, BT is mindful of the following issues:

1. Significant amendments to important documentation have taken place since Eircom’s November 2012 publication.
2. Prices have still not been finalised.
3. There remain a considerable number of outstanding issues, including how to deal with the introduction of vectoring.
4. The window to commence trials has slipped and is now too short and too close to launch to resolve any problems of a technical nature.

Our firm position is that, given these serious matters, ComReg should now be considering the criteria for deciding when a fit for purpose service can reasonably be offered by the industry. In our view, industry and ComReg will not be in a position to fix upon a firm launch date until robust trials have been completed and key issues resolved. If these key issues are not

resolved prior to launch, they are likely to generate significant on-going problems and dissatisfaction, both within Industry and consumers more widely, going forward.

In accordance with ComReg's preference we have structured our response under the following headings:

- 2.1 Eircom's engagement, to date, with Operators on NGA related issues.
- 2.2 Operators' planning and readiness for the launch of NGA services.
- 2.3 Impact on competition.
- 2.4 Impact on consumers
- 2.5 Other relevant considerations

## 2.0 Detailed Response

### 2.1 Eircom's engagement, to date, with Operators on NGA related issues.

- a. **Notification** - Eircom's documentation and prices have changed substantively since 20 November 2012, the date upon which ComReg relies in the Decision. For example, the inclusion into the Industry process manual (IPM) on 5 February 2013 of the NGA Home Installation Section (3) is essential to operators proposing to use Eircom's installation service. These and other changes require modifications to our deployment plans and mean that we must on each occasion consider afresh our NGA business models. The following non-exhaustive list is simply a flavour of some of the more recent amendments made by Eircom in this regard, each of which has contributed to delay, additional cost and risks creating uncertainty across Industry:
  - i. On 5 February 2013, the IPM was revised, incorporating significant changes from the original version. As with the changes described above, this is essential for service deployment in the customer's premise for most providers, as NGA Broadband cannot use the existing home telephone wiring.
  - ii. On 6 February 2013, Eircom announced changes to Port Rental charges; the associated changes to WLR rental were positive, but simply serve to highlight the fact that prices are not yet stable.
  - iii. Also on 6 February 2013, Eircom announced New Data Port Extension pricing; whilst pricing clarity is helpful, introducing a charge of €55 at this late stage requires a significant change to business cases.
  - iv. 3
- b. **NGA Pricing** - As ComReg will be aware, BT has raised a number of issues directly with Eircom concerning important aspects of its NGA pricing. BT considers that aspects of Eircom's NGA pricing result in an unreasonable distortion to competition. To date, these issues remain largely unresolved despite repeated attempts to engage with Eircom.
- c. **Launch Dates** – 3

d. **Trials** – ✂

In our view the whole aspect of NGA industry trials has been badly managed by Eircom, leaving insufficient time for adequate testing, discussion and resolution of issues and re-testing. BT considers that the responsibility for any delays fall squarely with Eircom and we believe that completing the necessary work properly before 20 May, let alone 8 April, is no longer possible. Openreach (a functionally separate part of BT which operates its network in the UK) conducted trials in the UK for some 9 months before launching. BT Ireland is not seeking a nine month trial; however we are seeking a sufficient time to trial the proposed products properly to ensure the end-to-end service is fit for purpose and to protect the welfare of our customers and consumers more generally. The time required to complete the trials will depend on:

- the resolution of current issues;
- ✂
- the stabilisation of documentation; and
- The time to resolve issues with Eircom.

e. **NGA Trial Contract** - Eircom has reasonably sought for a legal agreement to be signed to commence this trial; ✂

f. **Managing Technical queries** – ✂

g. **BT Technical Issues** – ✂

h. **VDSL Vectoring – Post Introduction and potential retro-fitting liability** –

✂

The reason for the concern is that vectoring is a new technology and, as is the case with most new technologies, there sometimes exists vendor proprietary characteristics, even though the product may still comply with applicable international minimum standards and recommendations. A genuine concern has been raised as to what happens if an operator deploys end user VDSL Vectoring capable modems from launch and these are later found to be non-compatible with Eircom's adopted version of VDSL Vectoring. Clearly we would expect reasonable testing and re-configuration by all parties to attempt to resolve such issues. However, if technical resolution fails the question remains as to whom then should assume the financial liability of retro-fitting the modems. BT considers that this is an important issue that needs to be resolved prior to launch.

We also have concerns regarding how vectoring can be workable in a wires-only environment as proposed by Eircom, given that it is common practise for customers to purchase their own modems (including grey imports) to replace the service providers modem (unbeknown to the service provider). This is common in the CGA environment and there is no reason to believe it will stop in the NGA environment - resulting in the

vectoring process being contaminated for all customers in that area through no fault of the service provider. ✂

- i. **Engineer Code of Practice** - BT supports a Code of Practice for engineers and considers this must be fully in place with appropriate governance prior to launch. The installation of NGA services will mean a considerable rise in customer visits to install the new NTU and possible extension wiring etc. It is therefore more important than ever that a fit-for-purpose code of practice is in place and working. ✂

## 2.2. Operators planning and readiness for the launch of NGA services.

- a. **BT Readiness** –. ✂

BT considers that it would be wrong of ComReg to assume that the specifications published by Eircom on the 20 November are interpretation or error free and we are running into these issues. ✂

## 2.3. Impact on competition.

BT considers that there will be a serious adverse impact on competition if ComReg grants Eircom's application for approval to launch services on 8 April 2013. The potential for such adverse effects on competition to arise as a result of Eircom's launch were explicitly recognised by ComReg in its Response. For example, at paragraph 8.23 ComReg notes the following:

*“One purpose of the notification requirements associated with Eircom's Transparency obligation is to ensure that there is no unfair first mover advantage, by notifying wholesale inputs according to an overly short timeline within which OAOs cannot develop the systems, processes or other enablers which would be required to develop and/or launch that wholesale input or inputs at a retail level.” (emphasis added)*

As set out above, BT and other Operators have since 20 November 2012 (when Eircom published on its wholesale website pricing and non-pricing information for NGA services) been faced with a multitude of changes which impact directly on their preparations for launch. Sufficient time has not been allowed to enable BT and other Operators to make the necessary changes to systems and processes. Each substantive change by Eircom requires modifications to our deployment plans and means that BT must constantly consider afresh its NGA business models.

BT considers, therefore, that allowing Eircom to bring forward the launch NGA services to early April would in substance provide it with a significant first mover advantage. In essence, BT would not be in a position to complete the necessary product changes in sufficient time to enable us to compete on the merits. Allowing Eircom to take advantage of this position would have the potential to enable it to



further entrench its significant market power in existing markets, while also extending it to new markets.

More generally, BT notes that Eircom's changes to the product (both in terms of the IPM and pricing more generally), combined with the numerous issues arising in trying to implement the relevant documentation, is delaying our ability to launch in a reasonable time and thus impacting our ability to compete.

BT also notes that some operators, ✂, are going to use Eircom 'white label' and end-to-end services. BT therefore assumes that all of the inter-operability testing has remained within the bounds of the Eircom wholesale network, where there is less (if any) dependence on the documentation published to date.

#### **2.4. Impact on consumers.**

BT considers that its concerns set out above in relation to impact on competition are likely to lead directly to harm to consumers. In particular, allowing Eircom to launch NGA services early, before other Operators are in a position to compete effectively, runs the risk of creating a provider with significant market power in the provision of key high-speed broadband services. In particular, once consumers have migrated to Eircom's NGA services in circumstances where other Operators are unable to compete effectively, Eircom would have both the ability and incentive to exploit its strong market position.

In addition, BT also notes that without proper advance testing of Eircom's NGA services, the consumer experience is likely to be poor, as Eircom and other Operators will not have the opportunity to identify and resolve issues affecting the consumer experience. This situation is likely to cause significant frustration to consumers through stress and billing problems. Other potential adverse effects resulting from a lack of proper testing include missed appointments and missing billing components.

Fundamentally, without having submitted the services which Eircom proposes to launch to extensive advance testing to ensure their robustness, BT considers that there is a real risk of consumer dissatisfaction.

#### **2.5. Other relevant considerations.**

- a. **Unified Gateway Hours of availability** – ✂
- b. **Unified Gateway Volume Limitations** – ✂
- c. **Appointment System** - ✂
- d. **Stable Technical Specification** - BT considers that the technical specification of the NGA service should be stable (or 'frozen') six months prior to launch so that our designers and developers can efficiently deploy our systems to interwork with Eircom.

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For enquires about this document please contact [john.odwyer@bt.com](mailto:john.odwyer@bt.com)

## **Annex A – Technical Issues**

**This annex details technical correspondence with Eircom and BT developers (this is bi-lateral activity)**

**Annex A1 – Various Enquiries highlighting general situation – Other than the summary this part of the annex is as received from the technical community.**



**Annex A2 – Specific Issue Highlight BT requests for clarification, that they can take time to resolve and that they are not always direct simple.**



## **Annex B – E-mail seeking co-ordination of issues**



## **Annex C – Confused trial documentation**



## **Annex D – Status of Eircom Vectoring**

