



Commission for
Communications Regulation

Review of eir's Regulatory Governance Model

Responses to Call for Input

Response to Call for Inputs

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Content

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- 1 eircom Limited ("eir")
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25th October 2017

By post and email to: RGM-call-for-input@comreg.ie

Dear Kevin,

eir submission to ComReg Call for Input: Review of eir's Regulatory Governance Model

eir takes its regulatory obligations seriously and has actively participated in the review of its Regulatory Governance Model (RGM). We welcome the acknowledgement of this fact by ComReg's consultants.

"We would like to note in particular the openness, professionalism and constructive manner with which the eir management interacted with us during the review, and thank them for their help and cooperation." (KPMG)

"In addressing these questions, Cartesian had intensive engagements with eir, and would like to thank the staff who attended interviews, dealt with information and follow up requests. We acknowledge that this posed a considerable burden on a number of people." (Cartesian)

The consultants undertook an audit of eir's internal processes that support the operation of its RGM. Cartesian measured the effectiveness of the operational processes against Cartesian's bespoke methodology. eir's RGM was not designed to meet Cartesian's bespoke methodology. However we do acknowledge that the formal documentation of the RGM, the consistency of process operation, and the retention of evidential material could have been better. As such eir established an internal team in early 2016 to work on the views of its own consultants and its internal analysis as well as addressing the emerging concerns of ComReg's consultants as communicated to us in the interim reports in September 2016. Since then eir has undertaken and continues to undertake a significant amount of work to enhance and develop its RGM. There are many recommendations which we agree with, but there are some which we feel are disproportionate or inefficient and the issue the consultants are seeking to address could be dealt with in a different and better way whilst still enabling us to meet



our regulatory obligations. We will be sharing details of this work with ComReg separately.

This Call for Input is an important step in the Review and we look forward to reviewing the submissions of other interested parties and considering these views in the discussions eir will have with ComReg.

eir would highlight that the publication of the KPMG report resulted in a breach by ComReg of eir's confidential information. eir is concerned at the number of instances of breaches of confidential information by ComReg. We welcome ComReg's assurances that it takes these issues seriously and will undertake an internal review. We believe that the conclusions and recommendations of the internal review should be published in an open and transparent manner.

eir also notes that the European Commission has brought infringement proceedings against Ireland due to ComReg's persistent delays in undertaking market reviews. It is important that market reviews are undertaken regularly to ensure that the regulatory burden imposed is proportionate and consistent with the competitiveness of markets. It is equally important to market players that ComReg manage its work programme to ensure all projects, like RGM, are managed efficiently to ensure the best outcomes for the market.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gary Healy'.

Gary Healy
Director of Regulatory and Public Policy

2 ALTO

alto

alternative operators in the communications market

**Call for Input: Review of Eir's Regulatory Governance Model -
Ref: 17/64 & 17/76**

Submission By ALTO

Date: October 27th 2017

1. Introduction

- 1.1 ALTO is pleased to respond to the ComReg Call for Input concerning Review of Eir's Regulatory Governance Model. ComReg – Ref: 17/64 and 17/76.
- 1.2 ALTO has had the opportunity of perusing the external consultant reports commissioned by ComReg and undertaken by KPMG (concerning Governance) and Cartesian (concerning Operations).
- 1.3 This response is structured as follows:
 - (a) first we provide some preliminary remarks;
 - (b) we then discuss the relevant legal proceedings ongoing;
 - (c) we discuss enforcement more generally;
 - (d) we then provide detailed comments on the conclusions of the consultants' reports from KPMG and Cartesian respectively; and
 - (e) we offer some concluding remarks.

2. Preliminary Remarks

- 2.1 The Irish telecommunications industry has seen unprecedented admissions of compliance issues and breaches of regulatory obligations by Eir in recent years¹. The said admissions and compliance breaches were both self-published as part of the Eir Regulatory Governance Model (RGM) reviews undertaken by a unit operating under Joseph Styles (the RGM Reports had been colloquially known as "*the Styles' Reports*") in the Eir Compliance Team and investigated by ComReg independently. The Eir Compliance team had been reporting to Eir's Board via its chairman and separately to ComReg in the form of compliance reports.

¹ Reference in particular the 2015 and 2016 RGM *Styles Reports*

- 2.2 Providing ComReg or any other telecoms regulator with such evidence is unprecedented globally and has effectively removed much of the overhead ordinarily required for a regulator to probe issues that the industry had long suspected, but had been unable to prove.
- 2.3 Notably, in 2011, six years ago, and with a view to becoming compliant and transparent, Eir committed to a programme of voluntary reform. This is noted by ComReg in its call for input document as follows:
- “In 2011, eir announced to industry (and ComReg) that it intended to proceed on a voluntary basis to implement a process of “Wholesale Reform”.*
- 2.4 In late 2015 and under significant pressure from industry, ComReg decided that it had to review the unsatisfactory RGM compliance status of Eir. Notably, some of the 2015 and 2016 versions of the *Styles* RGM Reports exposed huge issues spanning multiple different product sets and systems directly impacting Eir’s wholesale systems and ALTO members’ operations.
- 2.5 In 2016, ComReg announced that it would commission KPMG and Cartesian to review the governance and operational areas of Eir’s business.
- 2.6 The findings made by both consultants are important and striking given Eir’s previous commitments to voluntary reform and governance in 2011. They have made clear that the said voluntary reform and governance has failed.
- 2.7 Compounding that failure, ALTO has recently learned that the Eir Compliance Team has been disbanded. This is in addition to the fact

that the chair of the Eir Board who had commissioned and sponsored the RGM work has also departed the Company.

- 2.8 These are matters of further concern for the industry, given that a level of disclosure had been occurring that was at least informing industry and the regulator as to precisely the extent of the compliance and governance issues that exist and existed within Eir.
- 2.9 The time for voluntary processes and procedures has now passed and ComReg must take concrete meaningful steps which are properly documented to bring forward proper regulatory governance and if necessary by legislative intervention. Industry must be able to hold ComReg to account for completion of these steps.
- 2.10 ALTO notes that ComReg has suggested that regulatory measures are required pursuant to the Access Regulations and in particular Regulations 8 (and in particular 8(5)), 9, 10, 12 and 14 of the Access Regulations.²
- 2.11 ALTO notes that there are certain issues with the Access Regulations that may lead to a position where Eir must offer up governance reforms, as opposed to being forced to make amends by legal instrument. This may result in unsatisfactory outcomes for the market, such as more of the same from Eir, rather than substantive change. ComReg must be aware of this as industry proceeds under the RGM reforms.
- 2.12 ComReg should ensure that it delivers the best outcome for the industry as a whole, and should be bold in its remedial measures. ComReg should explore the most robust methods to carry out this function, which may require it to seek alternative mechanisms (legislative if necessary) to correct the issues of non-compliance.

² European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (“the Access Regulations”).

3. Legal Proceedings

- 3.1 ALTO notes that ComReg has initiated legal proceedings seeking declaratory reliefs and to fine Eir €10m for breaches of regulation under five discrete heads³ broadly with their origins within the RGM Styles reports.
- 3.2 We also note that those proceedings were stayed by the High Court on 18 October 2017, pending the trial of a separate issue concerning Eir's challenge to the State and the transposition of certain Regulations in the State concerning enforcement.
- 3.3 Industry notes that ComReg has no administrative sanction powers at the moment given the challenge and stay imposed by the High Court.
- 3.4 This position is entirely unsatisfactory. The regulator needs to have the power to seek the declarations sought and to seek to penalise (by fine, restraint, or otherwise) any offending company or companies from time-to-time and not just limited to Eir.
- 3.5 We note and support ComReg's submission to the Law Reform Commission ComReg Ref. 16/25 and the '12 Issues' set out in that submission.
- 3.6 ALTO highlights the very pressing need for the following sanctions highlighted under Issue 2, part 4 of the ComReg submission, considering the issues that have arisen within the RGM reviews. Part 4 of ComReg's submission reads:

"4.1 While civil financial sanctions exist for breaches of the law in the electronic communications and postal sectors, they cannot be directly imposed by ComReg. ComReg considers that it would greatly facilitate more effective regulation if it

³ Set out in ComReg Ref. 17/57

could directly impose civil financial sanctions (administrative fines) in appropriate circumstances. ComReg notes the following advantages of such an administrative fining regime:

4.1.1 Quick. In contrast to court imposed financial sanctions, administrative fines could be applied more immediately, though of course still subject to all proper processes being followed.

4.1.2 Proportionality. Administrative fines would act as a greater deterrent for breaches of the law; their effectiveness would, allow for the amount of such fines to be proportionate to the breach in question.

4.1.3 Efficient. Administrative fines would enable the regulator's expertise, including knowledge of the facts, sectors and national markets, to be fully utilised.

4.1.4 Effective Deterrent. Criminal prosecutions are often the most effective and efficient approach to ensuring regulatory compliance. However, in some regulatory cases, criminal prosecution may either not be practical or appropriate because of the evidentiary requirements, the complex economic analysis which may be required, and the criminal standard of proof. As a result, a market participant may not view criminal prosecution as likely and therefore the risk of prosecution may not act as a realistic deterrent in those cases. In such cases, an administrative fining regime may be more practical and appropriate. The mere possibility of the regulator imposing an administrative fine would encourage better compliance." (Emphasis Added)

3.7 ALTO will work to bring forward reform in this area in order to affect change in the Communications market generally. ALTO considers there to be a pressing need for ComReg to have the tools to regulate the market properly, and the ability to remedy and enforce that regulation to make it effective and/or act as a deterrent to non-compliance. The present situation is highly unsatisfactory.

4. **Enforcement Generally**

4.1 ALTO submits that the RGM admissions set out in the *Styles* RGM Reports must be subject to enforcement action.

4.2 ALTO recognises that this will pose a significant workload for ComReg, however it is notable that of the nine headline compliance issues highlighted by ComReg previously, most of those issues are straightforward and do not require significant and complex economic analysis and input. Furthermore, ALTO is of the view that this is a worthwhile use of the regulator's time given the deep and wide-ranging impact these compliance failures have on the industry.

4.3 It is ALTO's view that the current voluntary commitments and existing regulations have been manifestly proven inadequate.

4.4 Stronger regulatory remedies are urgently required with considerable transparency for all to have confidence that those remedies are working.

4.5 ALTO proposes that stronger enforceable regulation including a proper consideration of increasing the independence of Eir Wholesale and full system separation is now required such that it will make it physically and systematically difficult, if not impossible, to breach the compliance and equivalence rules as well as providing the necessary reassurance and confidence to industry.

4.6 As mentioned previously in this submission, ComReg already has overwhelming evidence of compliance breaches by the incumbent. Eir's systems and processes have now also been assessed by two independent consultants, so it is now time to foster root and branch enforceable reforms either with or without Eir's franchise.

5. **The Consultants' Reports**

5.1 ALTO commends Cartesian and KPMG for the objective and clear work that they have undertaken in the RGM Reviews. Industry notes the plethora of issues independently analysed that require urgent attention and remediation.

5.2 Those issues identified and reported upon by the consultants are so numerous and deep-rooted that further promises of voluntary change and Eir managed enhanced supervision are simply insufficient. We strongly hope that ComReg makes a clear signal that it agrees with the need for a legally binding regime going forward and recognises that voluntary undertakings are not sufficient.

6. **KPMG Report 7 July 2017 – Governance**

6.1 KPMG have reached seven objective conclusions which it suggests are key actions for Eir Management's consideration. ALTO deals with each conclusion in turn below.

Conclusion 1

Establish an Independent Oversight Body ('IOB'), as a sub-committee of the Board, to be responsible for the robustness of oversight of the full RGM

6.2 ALTO agrees with the requirement to set up an IOB.

- 6.3 ALTO submits that an IOB must only monitor and report on the progress of manoeuvring Eir towards sustainable compliance and equivalence and to report on any compliance issues it becomes aware of.
- 6.4 An IOB must be no more than a monitoring function. There can be no basis by which ComReg delegates regulatory powers to the IOB.
- 6.5 ComReg cannot and must not abdicate the role of market regulation or oversight to the IOB. In other words, control must remain with ComReg regardless of what is found by the IOB in the course of its work.
- 6.6 ALTO agrees that an IOB acting as a monitor can report to the board of Eir. However, the appointment of all independent persons to the IOB must be fully within the gift of ComReg. Appointments to the IOB should have no connection with Eir at all so as to avoid conflicts of interest and/or an undermining of the regulatory regime put in place.
- 6.7 The IOB must publish half-yearly reports and report on all compliance issues found within Eir regardless of their gravity. Reports should also detail what steps were taken by Eir to alleviate or address in any way the issues reported and arising.
- 6.8 IOB should also meet with industry and be mandated to receive input from industry (including Eir) in discussing issues arising on an *ad-hoc* or structured basis. It should have the power to investigate issues or concerns that are raised by industry where appropriate. ALTO does not suggest that the IOB acts as a substitute for ComReg in facilitating regulated product and systems development such as is the case today.

Conclusion 2

Enhance and maintain the RGM. This will require Senior Management sponsorship, accountability and robust independent assurance on activities overseen by the IOB

6.9 As mentioned above, ALTO is aware that Eir has scrapped the previously existing RGM compliance programme in addition to redeploying staff to other areas in the business.

6.10 Industry has no confidence in Eir's RGM processes as they have operated since 2012 and to date. In many instances reports have had admissions buried in them that have had potentially material consequences to competitors business interests.

6.11 Industry must play a part in new RGM processes and also have a route to discuss matters with the IOB.

6.12 ALTO submits that Eir Board level sponsorship is required to ensure that the IOB functions correctly and that proper systems of accountability and reporting are forthcoming to support and underpin the work of the IOB.

Conclusion 3

Increase the Wholesale Division strategic and operational independence through lower level of reliance on Group governance fora such as the Group Capex Committee, Portfolio Board and Group SMT and Group functions including Regulatory Operations and Group Pricing by strengthening its own decision making fora and operational support functions

6.13 ALTO submits that this is a key conclusion arising from the KPMG Report. It is an objective designed to ensure that the Eir Wholesale Division focusses on its own customer base rather than the wider objectives of the Eir group.

- 6.14 ALTO considers that ComReg should work towards an outcome leading to strategic and operational independence for the Eir Wholesale Division. Ultimately this is the only way to provide a real sense of confidence that Eir's downstream retail operations are not being unduly advantaged.
- 6.15 This has proven entirely possible in other jurisdictions and ALTO submits that Eir must work with ComReg to deploy a solution to satisfy the industry, the regulator and its requirements.
- 6.16 Recent reforms within Eir, creating Open Eir (Eir Wholesale) including networks all report to one managing director. ALTO submits that it should be possible to create independence from the other operating parts of Eir while still be able to meet fiduciary and other obligations to the Eir Group. Eircom did this for years previously to some good effect so it is not an insurmountable suggestion.
- 6.17 It is normal business practice for an enterprise this large to have an internal Profit and Loss accounting system and to be responsible for most of its own investments and financial decisions. This must also be properly deployed within a newly reformed Eir.
- 6.18 Eir Wholesale appears to already have its own Product Development Council (PDC), so there is no need for this to also have to answer to the Group version which appears to cause sensitive wholesale information to be shared with the PDCs of the other Eir lines of business, and for group to set the prioritisation. We understand that most wholesale development will go to developers specialising in wholesale systems such as the Universal gateway. hence there is no need for potentially sensitive wholesale project information to be shared with other lines of business or to even compete with resource as it's already dedicated to wholesale.

6.19 ALTO submits that it is entirely unsustainable for Eir to maintain a shared wholesale and retail line of business pricing team. Our concern is that there is motive and opportunity for this team to manage retail and wholesale prices together, hence potentially giving significant commercial advantage to the downstream Eir businesses. ALTO submits that the pricing functions must be completely split (including physically) and managed within their own lines of business, i.e., Eir Wholesale should have its own regulatory finance department and there should be no possibility for information leakages of Eir Wholesale pricing developments and information to downstream Eir Retail businesses.

Conclusion 4

Change Wholesale employee incentives to focus on rewarding Wholesale's operational and financial performance in isolation from eir's downstream businesses. This would include assessment of Wholesale's performance with regard to both external and internal operational activity and revenues

6.20 ALTO agrees with this finding.

6.21 ALTO suggests that Eir Wholesale employee incentives should only reward for the operation of Wholesale's operation and financial performance and not Eir Group performance.

6.22 ALTO agrees that this would include assessment of Eir's Wholesale's performance with regard to both external and internal operational activity and revenues, including IOB findings – positive and negative.

6.23 This is certainly a key objective in seeking to stimulating correct behaviour from Eir Wholesale and seeking to serve wholesale business interests. Should this conclusion be properly implemented it

will also assist in making overdue cultural changes required to protect the interests and confidentiality of wholesale customer information.

Conclusion 5

Provide greater transparency to the Wholesale investment prioritisation and product development process and, where possible, remove decision making from Group governance fora or functions

6.24 Product prioritisation and the product development process have been massive issues for industry over the past 16 years.

6.25 ALTO notes that the Cartesian analysis suggests that it takes a third longer in time for industry product development requests to be delivered than for Eir's downstream businesses taken over a representative sample.

6.26 ALTO submits that this needs to change immediately and consider that ComReg should investigate this as a major failure of equivalence.

6.27 ALTO notes that the KPMG report highlights that there are four Product Development Councils within Eir. All four Councils escalate and report to the Portfolio Board together, thus it is entirely probable that Eir's downstream retail arms appear learns very sensitive information about the progress of wholesale projects that is not properly made available to other operators. This is most unsatisfactory and requires both structural and system reform and supervision.

Conclusion 6

Consider the most effective way to segregate Wholesale data (both structured and unstructured) at a system level. This can be achieved by either more robust System Access Management and enhanced

***independent assurance or greater system and data separation
(Applications and FileShares)***

- 6.28 ALTO supports this conclusion.
- 6.29 Industry is very aware that Eir has very considerable capability for conducting complex projects. This was recently demonstrated with its roll out of NGA and in particular Exchange launched VDSL (EVDSL).
- 6.30 We consider that it is well within Eir's capability to set up independent systems/instances of systems to provide an essential distance (or functional separation) between Eir Wholesale regulated products and downstream internal businesses.
- 6.31 ALTO notes that in circumstances where Eir is maintaining different solutions for other operators to its own downstream business, this can and does have the effect of creating additional overheads in double developments, double testing, more people costs and a higher risk of equivalence problems. ALTO consider this inefficient and ComReg should be disallowing these additional costs for inefficient operation as eircom are effectively unreasonably bundling the costs of serving its own downstream business onto its competitors.
- 6.32 ALTO submits that Eir's legacy systems must be seriously looked into. Certain of the Eir legacy systems have been previously analysed in published due diligence documents for previous potential change of Eir ownership events which is potentially putting the industry at risk should those legacy systems fail.
- 6.33 ALTO does not agree with any suggestion that may be made by Eir that such changes are excessive, not required or costly.

Conclusion 7

Implement a formal Three Lines of Defence Model to provide an effective framework for the management of risk and clarity regarding the roles and responsibilities of the monitoring and assurance functions in relation to the RGM. The independent assurance functions should have an appropriate mandate, be appropriately resourced and effective in providing assurance on the operation of the RGM

6.34 ALTO shares KPMG's sentiment but submits that at present Eir is not capable of reliably operating the Three Lines of Defence Model. A number of changes are required before this very sensible suggestion made by KPMG could be effective. These changes should therefore be worked to quickly so this solution can be implemented as soon as possible.

6.35 In the main, significant root and branch cultural change (over and above structural organisational change) needs to occur before this suggestion can be implemented. Individual accountability for compliance and sanction must be taught, instilled as a cultural value and 'prosecuted' and/or incentivised within the firm in order to make this happen.

6.36 ALTO submits that Eir should consider hiring external consultants for a period of years to undertake the required cultural change and review compliance and organisational assurance. Eir has previously hired external consultants to up-skill its service agents in or around 2002/2003; the effect of that programme made sure that consumer contacts had the required knowledge and skill to handle issues. This will need to happen again in order bring forward the required cultural changes.

Summary

6.37 ALTO agrees with all of the KPMG conclusions subject to the caveats and comments featuring above. Past experience informs almost all of

the ALTO responses as set out. Regrettably, and given the *Styles* RGM disclosures, we must seek ComReg's assistance in moving towards all of the conclusions reached by KPMG in its governance review and attempt to seek cultural, functional and, where practical, structural change within Eir for the benefit of Eir and the wider communications market.

7. **Cartesian Report 7 July 2017 – Operations**

7.1 Cartesian have reached nine objective recommendations which it suggests are key actions for Eir Management's consideration. ALTO deals with each conclusion in turn below.

Recommendation 1

Document business operational, product development and risk management processes and standardise risk management and control operations within Business Units

Develop detailed documentation for each of the risk management processes identified, based on eir's regulatory obligations. Ensure well-defined criteria for evaluating and assigning risk impact, probability and risk exposure timing.

7.2 ALTO agrees with Cartesian's key recommendation concerning the documentation of Eir's business operational, product development and risk management processes. However, ALTO has concerns as to whether Eir is capable of agreeing what compliance actually is, and in consequence Eir appears not to be able to manage or assess regulatory risk adequately or at all. This is all evidenced by the numerous admissions published by Eir in the *Styles* RGM Reports in recent years.

7.3 While scoping and documentation will ultimately serve the purpose of drawing the required boundaries, ComReg and the IOB may need to

review the regulations to place in focus what precisely what behaviours constitute for example discriminatory and transparency non-compliances.

- 7.4 Further, it needs to be recognised that documentation is not an end in itself. It should be made clear exactly what the ultimate objective is of carrying out this exercise, and how the documentation will be used to secure a more robust and compliant regime going forwards. Further industry needs the confidence (as with all these measures) that costs to Eir of meeting these requirements will not be borne by industry.
- 7.5 ALTO has noted in the KPMG inputs above, that pricing teams sit within one organisation. This *prima facie* leads to an objectively biased pricing process that at this stage does not appear to be documented and does not appear to have any boundaries within which governance and operational compliance can be said to be found.
- 7.6 It is quite apparent from the Cartesian Recommendation that there was a dearth of documented processes within Eir. As a corollary then it is impossible to adequately assess risk and compliance.
- 7.7 The address matching compliance issue arising within the Eir RGM *Styles* disclosures is another salient example of a system and process risk leading to compliance breaches that appears to remain either undocumented or inadequately explained, and could be described as to be found wanting.
- 7.8 ALTO considers that system separation and that independence of Eir Wholesale needs to be established, documented and supervised. See response to KPMG Conclusion 6 above.

Recommendation 2

Develop process standards, escalation criteria, and exception tolerances

Create standards for critical processes, such as for defining exceptions and escalations, and accepting new products for development. This will ensure that all groups carry out their tasks consistently, and that external stakeholders understand the criteria used for making decisions

7.9 ALTO agrees with Cartesian's findings.

7.10 ALTO submits that Eir must now openly discuss and agree with industry how it will work going forward as Eir's processes do not appear to be equivalent at this time. An example of this is that the linkage between the Eir Wholesale Product Development Council to the Eir Group Product Council needs to be ceased immediately

Recommendation 3

Develop a transparent process for handling operator requests

Create a transparent process for managing Operator requests that will avoid protracted development delays, identified in several of the product cases reviewed. This process should be based on clear and objective standards, well-defined stakeholders and roles, milestone points and entry criteria. There should be strong independent oversight of the management of product development, which is required to ensure transparency and fairness to all operators, including eir. This should be supported by adequate evidence retention.

7.11 ALTO agrees with this recommendation, see also response to Recommendation 2 above. Industry is a stakeholder in all Eir Wholesale processes yet industry is treated like the elephant in the room, rather than a viable revenue generating line of business.

- 7.12 ALTO calls for transparency of decision-making as the opacity surrounding issues such as prioritisation undermines confidence in any improvements that are being made and sought.
- 7.13 ALTO members highlight that its members have specific concerns about bids, bid network elements (regulated and unregulated) and bid pricing. In so far as compliance and equivalence goes concerning bids, where regulated elements are included in bids, then the pricing components offered to Eir retail must be precisely the same as those elements offered to other wholesale operators; in other words there should be reliable non-discriminatory and equivalence requirements. It is industry experience that in certain high-end business bids, transparency and compliance can be a concern.
- 7.14 Special Bids concerning regulated products should go through the correct regulatory procedure so all parties can bid equally.

Recommendation 4

Increase visibility of the RAP prioritisation process

Implement a RAP prioritisation process that includes detailed documentation, clear assessment and decision criteria with decision milestones identified in the product development process.

- 7.15 ALTO agrees with this recommendation.
- 7.16 ALTO notes with some concern the disjoint highlighted by Cartesian concerning the differences between Eir's own product development durations versus required industry projects. These differences certainly align with the perceptions shared by industry for some years.

7.17 ALTO submits that ComReg should consider opening a full compliance investigation into equivalence in this area over the recent past.

Recommendation 5

Reduce dependency on forums to progress projects

Review the current industry engagement models to streamline the operation of various channels, including account management for industry and downstream eir. Introduce a project management discipline and standards on all industry participants.

7.18 ALTO does not agree completely with this recommendation.

7.19 ALTO submits that having product discussions in the forums, in the presence of the national regulator ensures proposals receive an open hearing from various operators (large and small) with varying requirements and interests and this reduces the risk of discrimination and further equivalence issues being coded into products. The forum model should not be dispensed with until such a time as Eir can prove beyond any doubt that a culture of compliance, risk and wholesale service exists within its organisation.

7.20 ALTO members frequently attend industry forums and feel that the input and supervision of the regulator does assist in having matters resolved. In a utopian environment perhaps the Cartesian model could apply, but industry does not have the confidence to move to such a model at this time. We would however like ComReg to explore meaningful alternatives or additional support for providers that are not able to attend fora on a regular basis so as to ensure that the industry as a whole has the opportunity to input.

Recommendation 6

Design controls for simplified and comprehensive management

Design controls to simplify evaluations and improve assurance.

Reporting of control operations and outputs should be standardised to simplify tracking of control operation, and assurance reviews.

7.21 ALTO agrees with this recommendation and would like ComReg to note its surprise that this is not in order within Eir.

7.22 Recommendations such as these should form a fundamental part of a quality system without which industry has serious concerns about whether Eir can deliver outputs at all, let alone deliver robust and sustainable regulatory compliance.

Recommendation 7

Trend control results

Develop a process for trending of control evidence results to identify consistently failing controls. Implement escalation processes for failed controls, increase standardisation and oversight into BUs, and define roles of IA and C&E.

7.23 ALTO agrees with and supports this recommendation.

7.24 ALTO notes that auditable controls will be required in the event that an IOB is installed, as suggested by KPMG and commented upon above.

7.25 ALTO also submits that audit of controls should be independent of Eir staff and indeed the IOB, with audit of control becoming a governance KPI for Eir and an incentive issue for Eir Wholesale.

7.26 Please also note ALTO's comments relating to the required independence of the IOB.

Recommendation 8

Maintain visibility of all KPI-reported transaction records. Maintain an audit trail for the processing of all the transaction records for KPI reporting, to ensure that all records are accounted for. This will ensure a clear understanding of which records were excluded from the calculations in the KPI reports, and the reasons for such exclusions.

- 7.27 ALTO welcomes this recommendation with concern, reluctance and surprise.
- 7.28 Cartesian notes that there appear to be gaps in the documentation for the development and operation of KPIs. This is simply unsatisfactory.
- 7.29 ComReg and industry are dependent on KPIs for monitoring equivalence and if the said monitoring is not working then there can be no confidence that Eir is trading its regulated services equivalently or with the expected and required compliance norms.
- 7.30 ComReg must insist that internal KPIs are put up for external scrutiny and reviewable by industry. This is the only way that confidence and transparency can flow from systems and processes.
- 7.31 This recommendation must be acted on immediately so that an accurate account of equivalent trading can be ensured.
- 7.32 ALTO members who are often also subject to regulatory constraints outside this jurisdiction note that this particular independent finding is of critical import to the overall tenor and tone of the RGM Review and ComReg's role as a regulator.

Recommendation 9

Implement independent oversight over critical processes and outputs

Because of the nature and extent of the deficiencies in the operational governance of Regulated Access Products (RAP) development and RMCF, Cartesian believes there should be robust, independent, competent oversight of these and the operation of all regulatory matters covered by this report. The provision of oversight will require operational support of an independent, adequately resourced, proactive regulatory assurance capability.

7.33 ALTO agrees with this recommendation. This is in synchronisation with KPMG conclusion 1. ALTO has set out its issues with regard to independent process review and oversight and not control, a matter which is inherently ComReg's concern.

7.34 Further ALTO agrees that the provision of independent oversight will require operational support of an independent, adequately resourced, proactive regulatory assurance capability.

Summary

7.35 ALTO broadly agrees with the recommendations made by Cartesian, save for some not inconsequential issues set out above.

7.36 ALTO notes that the language deployed by Cartesian must be viewed in light of the clearly very significant review that was undertaken by the organisation.

8. Overall Conclusion

8.1 ALTO commends the work undertaken in this review and call on affirmative and speedy action from ComReg to seek to implement the recommendations made taking the utmost account of the views of the industry.

8.2 ALTO would like to see ComReg act with genuine urgency, and full transparency, in taking the next steps. It has a real chance to make a

difference to the competitive landscape in Ireland, and it must not shy away from taking difficult decisions in order to do this. Regulatory certainty is a key data point used by providers when making investment decisions, and it is critical that ComReg shows it is prepared to use its full range of powers to correct the problems identified once and for all.

- 8.3 ALTO submits that however we arrive at proposals for change, it is imperative that all market participants should get the opportunity to review and comment through full and proper public consultation.
- 8.4 ALTO submits that by consultation it means that transparent discussions must take place, and that all stakeholders are given sufficient time to consider whether the proposals would lead to an improved governance model is agreed that is fit-for-purpose for the whole market. ALTO can provide the real-life practical experience which is necessary to test and evaluate the proposals. We therefore look forward to continuing to input into this process in future.
- 8.5 In the immediate term, ALTO submits that ComReg should continue to pursue enforcement action as already commenced before the courts.

ALTO

27 October 2017

3 Sky



ComReg RGM Call for Input – Review of Eircom’s Regulatory Governance Model
ComReg Reference: 17/76

1. ComReg can invoke its powers to impose **functional separation** obligations on Eircom Ltd (“Eircom”) as an exceptional remedy where there is evidence that existing transparency, non-discrimination and other obligations have failed to achieve effective competition or where it has identified **important and persistent** problems or market failures in relation to wholesale provision by the SMP operator.
2. Sky considers that the evidence presented by KPMG and Cartesian provides ComReg with very strong evidence to support a case for implementation of functional separation. Years (and possibly decades) of failure to comply with existing regulatory obligations highlight how ineffective those obligations have been in driving changes in behaviour, process and systems in Eircom. There can be no credible challenge to the suggestion the problems identified are “persistent”.
3. While many of the proposals in the KPMG/Cartesian reports could amount to welcome improvements on the existing framework, even if all recommendations were implemented, taken collectively Sky considers they still fall well short of what would be delivered through a functional separation obligation which ComReg clearly has the powers to implement.
4. In the worst case scenario (and we believe ComReg should be aiming higher than that) ComReg must settle for the imposition of no less than all recommendations from the external consultants. Anything less than this and we are very likely to find ourselves in a similar situation to what has now been revealed at the conclusion of this most recent investigation. Was this to reoccur the failings will not be Eircom’s alone but rather a reflection of a failure to act on the evidence available today.

We have been here before – voluntary commitments do not deliver

5. The first thing to note from ComReg’s Call for Input overview on Eir’s Regulatory Governance Model (“RGM”) is the following reference:

“In 2011, Eir announced to industry (and ComReg) that it intended to proceed on a voluntary basis to implement a process of “Wholesale Reform””

6. What is patently clear from the reports of both KPMG and Cartesian, is that this “reform” initiative failed to deliver. It is difficult to see how even Eircom could dispute this.
7. What is unclear, however, is whether that failure was as a consequence of a poor plan, poor implementation, inadequate or no genuine commitment to the initiative or a tapering off of that commitment due to changes in the ownership structure of Eircom. Indeed it may be due to a combination of these or other factors.

8. What ought to know now, almost 7 years later, is that neither ComReg nor the wider industry can make the same mistake in accepting some form of “revamped” commitment from Eircom on wholesale reform that is not heavily grounded in the observations and recommendations of the comprehensive Cartesian/KPMG reports.

Industry oversight critical part of solution

9. The Cartesian Executive Summary notes that the Eircom RGM contained 3 main strands, the third of which it was noted included “*compliance reporting to the eir board, ComReg and to Industry*”. Sky would note that despite the Model having been implemented since October 2012 it was almost three years later before any report was presented to “Industry”. It was only following provision of the report to Industry that the scale and impact of the so-called “*equivalence issues*” came to light which in turn prompted ComReg to appoint Cartesian and KPMG to carry out their work. Had the reports been issued to Industry much sooner, discriminatory practices, such as those that pertained to Address Matching that cost OAOs significantly, could have been highlighted much sooner.
10. The lesson to be learned from this going forward is that **regular reporting back to Industry** must be central to any oversight process in relation to the Eircom’s wholesale compliance activity. Sky has previously made submissions in relation to this in response to ComReg market review consultations where we noted that periodic compliance statements from Eircom should not be only provided to ComReg. Industry is in the best position to highlight discrepancy in processes/products if Eircom faithfully relay what processes/products its own retail division are availing of.

Is poor product development still negatively impacting OAOs and consumers?

11. With respect to shortcomings identified by Cartesian under the heading of “*Product Development*” it is of particular concern that it found “*computer programs which were developed for the production of KPIs did not have specifications or test plans...they had not been independently assessed to verify that they performed as intended and generated results per the Decision requirements*”. Many of these developments were necessary in order to manage and maintain contractually binding Service Level Agreements (SLAs) and associated Service Level Guarantees (SLGs). Have OAOs been properly compensated for under performance for several years now? We cannot be certain based on Cartesian’s damning assessment as outlined.
12. Furthermore KPIs has been used to assess Eircom’s performance as a Universal Service Provider. Eircom has multiple multi-million Euro claims before ComReg for a Universal Service Fund. These claims are inextricably linked to Eircom’s performance as measured by KPIs under various USO decisions. The extent to which Eircom actually met its USO targets or indeed the extent to which they might have failed them is now subject to substantial doubt. In ComReg Decision 02/03 it noted the Eircom was being adequately compensated for USO KPI targets being met. We cannot now be sure what level of KPIs were actually hit and if so were Eircom being excessively compensated based on their true performance?

Senior management are clearly involved in key decisions but notably absent in product prioritisation paper trail?

13. The lack of evidence of senior management involvement in terms of decision making on product development is also very concerning. That senior management are involved in such decisions is unquestionable given the significant capital expenditure involved in certain developments. However, it is clear their involvement is on an undocumented basis (increasing scope for discriminatory behaviour) and that may have had significant implications for product development prioritisation when it came to OAO requests. To what extent was this failure to record senior management involvement part of a strategy or an act of omission?

Self-certification will not work when in conflict with commercial incentives

14. The “self-certification” process inherent in the existing RGM is a mechanism that allows Eircom to ‘paper over the cracks’ with subjective adjudication that align to its own commercial incentives – incentives that have been identified by ComReg in various market review decisions. Sky considers the self-certification process to be one of the most significant weaknesses in the RGM from an assurance perspective. At a very minimum an independent oversight board must be mandated by ComReg to address this weakness so that regulatory obligations cannot be trumped by commercial incentives where there is a tension between these competing forces.

Independent Oversight Board imperative

15. We therefore welcome KPMG’s proposal that an Independent Oversight Board (“IOB”) be constituted as sub-committee of the board “*with robust oversight of the full RGM*”. Critically we consider this can only be effective if the IOB is made up of independent membership with appointment to the board only following input and liaison with ComReg. It is of equal importance that those independent members are suitably qualified and equipped from a competency perspective to challenge the Compliance and Equivalent and Internal Audit functions. A “rubberstamp” IOB without the necessary skill set will almost certainly fail in its objectives.
16. Cartesian point out that Operation of Control defects existed in a high percentage of the controls reviewed often over several quarters. In addition there are no company-wide standards to guide business units in the operations of controls and “*aside from the initial development of a control, there were no processes for ensuring that the control mitigated the risks*”. Cartesian’s conclusions in this regard raises further questions about the extent to which the ‘voluntary’ RGM was the product of a “window dressing” exercise rather than an initiative aimed at driving real change with a focus on regulatory compliance.

Equivalence of Input standard must be imposed for all regulated services

17. The failure identified by Cartesian is hardly surprising based on KPMG’s parallel finding that Eircom’s current IT strategy makes no mention of how future BSS/OSS applications will ensure appropriate segregation of data between retail and wholesale among other deficiencies. Again it would appear that compliance with regulatory obligations is at best a low level priority for Eircom.
18. Based on these findings by Cartesian and KPMG an equivalence of input (EOI) standard should be mandated for the future BSS/OSS application landscape. In the past ComReg has issued decisions where it determined that requiring an EOI standard for certain services (in particular CGA products) may not be proportionate. However, those decisions were issued in advance of the information ComReg currently have to hand following the detailed analysis presented by Cartesian and KPMG. Sky would suggest the issue of proportionality ought to be revisited in light of the evidence presented in these reports. It is not in dispute that equivalence of output (EOO) standard suffers as a consequence of still leaving scope for breach of non-discrimination obligations either through act or omission. The EOI standard by definition eliminates that scope.
19. System level segregation between wholesale and retail through an EOI standard must be complimented by meaningful separation of Eircom’s wholesale and retail functions from a business and operational perspective.

Pricing function reform critical

20. As noted by KPMG, Eircom must reduce the operational reliance of the Wholesale division on the Group resource by creating a ‘**Wholesale Pricing**’ function, a ‘Wholesale Regulatory Operations’ function and ‘Wholesale Portfolio’ board. Sky has raised concerns in response to previous ComReg consultations about Eircom’s pricing strategy where it noted

mounting evidence that Eircom were adopting wholesale pricing strategies in a way that optimised the outcome for their retail strategy (e.g. decisions to introduce and remove the WLR discount, current FTTH connection charges, standalone broadband pricing strategy etc.). While OAOs has operated in a climate of uncertainty around wholesale pricing (where a cost orientation obligation had not been/is not imposed on Eircom), Eircom's overall retail-wholesale pricing strategy was being implemented from "central" office.

21. KPMG note that although since September 2016 that Eircom's Group Pricing Function separated into Retail and Wholesale teams, both teams continue to share the same office space and **continue to report to the same Director**. The optical split (undertaken during the review process) appears to be a cosmetic exercise only as the Group Pricing Director is inevitably going to make or recommend decisions that optimise the Group's commercial position even if it is at odds with an optimal Wholesale strategy, in particular when there is no remuneration incentives particular to the operation/financial performance of the wholesale division.
22. Although ComReg's preliminary view in its market 3a analysis was not to impose a cost orientation obligation on FTTH services despite a finding of Significant Market Power, Sky would strongly urge it reconsider this position as a consequence of lack of real differentiation between retail and wholesale strategic planning. Indeed there is evidence that Eircom's wholesale and retail pricing strategy for FTTH continues to be closely aligned where its wholesale arm is charging €270 per installation but its retail arm are charging customers €0 for connection of FTTH – the €270 effectively being a "wooden dollar" transaction between its retail and wholesale arms.
23. Notwithstanding ComReg's preliminary proposal that ancillary FTTH services (which includes the connection charge) should be cost oriented, the fact that for the main charge (monthly rental) ComReg has taken a preliminary position that Eircom should not face a cost orientation obligation is of grave concern given the identified and documented lack of division between Eircom's retail and wholesale activities. Eircom can disrupt competitors with a long term strategy that ensures price uncertainty (from which it will itself be immune) even if it is complying with its transparency obligation notification periods.

Wholesale capex signoff by IOB bring proper focus to compliance in Eircom

24. Cartesian noted that the prioritisation process for RAP development was "opaque" and suggested there was a lack of evidence of decision making by senior management. This manifested itself in wide differences in the elapsed time of product development cases that could not be explained by complexity of the work. This is unsurprising given KPMG's finding that the RGM was not appropriately embedded in Eircom and the wholesale investment and product development prioritisation process was not transparent. Consequently we therefore welcome the recommendation that IOB should sign off on the wholesale capex spending after development of a formally documented set of criteria to support decision making/authorisation.

Current legal issues should be considered in the context of how Eircom should be regulated going forward

25. The current legal issues that arise in the challenge Eircom has taken against the Irish state with respect to ComReg's enforcement powers is a matter that **must now be given serious consideration in the context the RGM review**. Without going into the merits or otherwise of Eircom's case what is clear is that Eircom have a clear incentive to strip ComReg of its primary enforcement capability i.e. the ability to impose fines. If Eircom is ultimately correct about ComReg's lack of powers in this regard then this coupled with the matter of Eircom's documented behaviour by Eircom itself, Cartesian, KPMG and the long list of non-compliance activity recorded by ComReg over the last few years, then it would appear the only mechanism to positively promote compliance within Eircom forthwith is through full functional separation. It is not just reasonable but imperative that ComReg

account for the possible implications of being stripped of its fining capability. Significantly diluted enforcement powers against a background of habitual non-compliance and how best to deal with that potential outcome is an important consideration now for ComReg and Sky consider it is within ComReg's remit to account for this.

Summary

- The KPMG and Cartesian reports point to the fatally flawed nature of the existing RGM within Eircom.
- The serious and persistent nature of the problems identified provides strong grounds for ComReg to seek the implementation of full functional separation in Eircom under its powers.
- A "revamped" version of the existing RGM is doomed to failure and at the very least full implementation of the KPMG/Cartesian recommendations should be mandated.
- Of particular importance is the real separation of Eircom's pricing functions and the need for Independent Oversight Board with appropriate powers and competencies in order to meet its objectives.

27 October 2017

4 Vodafone



Non-Confidential

Review of Eir's Regulatory Governance Model

Vodafone response to call for input

27 October 2017

Executive Summary

The communications sector is pivotal to Ireland's future

- I. The communications sector is key to the Irish economy and of vital importance to its citizens. It is a major contributor to productivity and to the international competitiveness of Irish businesses. It is part of the fabric that enables Irish citizens to communicate with each other, enjoy ever more attractive digital services, and to engage digitally with government services and civil life.
- II. Yet this is a sector that cannot be allowed to stand still. To keep up, we need constant innovation and investment in Ireland's digital networks and the digital services that are offered over them. We need a thriving digital marketplace in which competitors can challenge for customers and succeed as a function of their success in anticipating customer demands, investing wisely and providing services at an attractive price.

Without regulatory intervention, competition will fail and we will not get the investment and innovation required to secure a successful industry capable of meeting Ireland's needs

- III. There are serious challenges to the establishment of fair and sustainable competition. eir is dominant over the local networks needed by its retail business and its competitors to access customers. It is generally not possible for eir's competitors to serve their customers except through eir's network. eir has the ability and incentive to discriminate in favour of its own retail business and to unfairly disadvantage its competitors.
- IV. The consequence of leaving such discrimination unchecked will be that competition will fail, and Ireland's economy and its citizens will suffer as a result.
- V. It is for this reason that regulators, including ComReg, have implemented detailed regulations to secure fair and non-discriminatory access to the network and services over which the communications incumbent has dominance. But discriminatory practices are notoriously hard to detect and police. This is why, in the case of Ireland, the incumbent went further than simply agreeing to comply with a set of externally enforced rules and created a Regulatory Governance Model.

The Regulatory Governance Model was an attempt to give assurance that – despite the inherent lack of visibility of its internal processes – eir would remain compliant with key regulatory provisions

- VI. In 2011, eir committed to develop an enhanced Regulatory Governance Model (RGM). The RGM had three components:
- Group Wide Code of Practice (COP) dealing initially with eir’s Access and Non-Discrimination Obligations and later also with its Pricing and Transparency obligations.
 - Business Unit Process Compliance review programme to ensure its day-to-day processes were compliant with the COP by implementing the necessary Regulatory Controls.
 - Independent Regulatory Compliance & Audit Reports, prepared by eir’s Head of Compliance and Equivalence (C&E) and its Head of Internal Audit (IA), based on their internal reviews to eir’s Board Regulatory Committee (RegCo).
- VII. It is difficult to monitor and enforce compliance with non-discrimination obligations. Incumbents have a strong commercial incentive to favour their own downstream businesses, and when an incumbent’s retail and wholesale operations are part of the same organisation, it becomes near impossible to detect when the incumbent’s retail operations are receiving wholesale services on favourable terms.
- VIII. When eir first implemented the RGM in 2011-12, it constituted an important experiment in regulatory design. The theory was that the RGM could prevent damaging discriminatory practices through a system that, while short of structural remedies, went beyond relying exclusively on detailed conduct remedies. The intention was that there would be compliance through the institution of a governance system – internal to eir and delivered through a voluntary commitment.

We now know that the Regulatory Governance Model “experiment” has failed

- IX. Vodafone has been ever present in the market, seeking to acquire and retain customers by offering well priced high-quality services to businesses and consumers. In order to offer fixed services across Ireland, Vodafone is dependent on eir’s wholesale services and for too long we have been disadvantaged. We have limited control in the prioritisation and delivery of wholesale

products, in wholesale pricing and in provisioning and assurance service levels. This makes it difficult for us to compete with eir's retail services.

- X. We have demonstrated our commitment to invest in Ireland with our SIRO joint venture with ESB. SIRO's network is expected to rollout in 51 towns, allowing us and others to offer high speed innovative future proof services to businesses and consumers, free of the discriminatory constraints imposed by eir. Nevertheless, the economics of rolling out networks, even with the benefit of ESB's existing passive infrastructure, means that challengers will continue to depend on fair treatment by eir to access customers throughout the majority of Ireland.
- XI. We recently carried out a detailed evidence gathering exercise to understand the nature and extent of discriminatory practices by eir. We summarise our evidence in this submission.
- XII. Our experience has been corroborated now by the KPMG and Cartesian reports commissioned by ComReg to examine the effectiveness of the RGM. Both reports demonstrate conclusively that the RGM is failing to ensure compliance. In our view, the catalogue of failings is quite extraordinary, and has had a profound damaging impact on the effectiveness of competition, and the sector's ability to deliver the services Ireland needs.
- XIII. The position is summarised eloquently in ComReg's Information Notice ComReg 17/64:
- The contents of these reports . . . raise serious concerns about the quality of eir's regulatory governance. Based on ComReg's review of the Advisors' reports it is apparent that eir's regulatory governance arrangements including its RGM are not likely to enable eir to ensure compliance with its regulatory obligations. This is a matter of significant concern to ComReg.*
- XIV. ComReg and its Advisors have carried out a thorough and comprehensive review. Their findings point to an urgent need for action.

The Advisors' recommendations are focused on redesigning the current RGM to make it more effective

- XV. The Advisors have suggested remedial action specifically designed to address the deficiencies in the actual application of the RGM.
- XVI. It is understandable that the Advisors should opt to follow this route: they have documented serious failures in the RGM and produced detailed recommendations that closely track each specific deficiency.

But this approach, if implemented in isolation, will fail

- XVII. Vodafone has learned from experience across Europe that incumbents will naturally favour their own downstream businesses. This is because systems and processes, and the notional transactions that dictate the “relationship” between the incumbent’s upstream and downstream operations, are internalised and invisible to outside parties. Favourable treatment goes unobserved and therefore unpunished.
- XVIII. The RGM was an attempt to deal with this issue. But the RGM has failed in the most fundamental of its goals – to secure regulatory compliance by eir. The Advisors’ recommendations essentially represent an attempt to “fix” the RGM – to “try again” given that things did not work out the first time.

What is needed is not an enhancement to the RGM, but an alternative approach designed to address at its core eir’s lack of incentive to comply

- XIX. This approach is flawed because taken alone an RGM cannot deliver compliance by a vertically integrated incumbent. The RGM does not reduce the incentive to discriminate, and nor does it deliver the transparency needed to enable the regulator to detect and punish non-compliance. Even with the RGM, the key transactions remain internal to the organisation. It does not matter how sophisticated its design: the RGM alone cannot deliver compliance. Those that monitor compliance are either internal to eir and therefore aligned to its commercial goals, or external and therefore unable to truly observe the internal behaviour which is hidden and obscure.
- XX. An attempt to create an RGM mark 2 will end in the same way as the first attempt. The first RGM was launched with fanfare and high expectation. We have seen no explanation as to why a second attempt would be able to address the same endemic problems that led to the failure of the first. The detailed and complex nature of the list of recommendations is a testimony to how difficult it is to police non-discrimination within an integrated entity, and why even a reformed RGM would ultimately be doomed to fail.

Only structural remedies can secure better aligned incentives at eir, and the visibility of otherwise opaque relationships between upstream and downstream parts of the business – both are needed if we are to prevent the persistent discriminatory practices that are so damaging to competition and Ireland’s digital future

XXI. We call on ComReg to commence work on a broader set of binding remedies that – alongside an enhanced RGM – will ensure fair competition across Irish communications markets:

- A complete separation of eir’s upstream (dominant) business from its downstream (potentially competitive) businesses. In the absence of clear separation, there will still be an incentive to discriminate, so additional obligations will be needed to increase transparency. ComReg have the necessary powers under the existing Access Regulations to impose an obligation on eir to place its wholesale activities into an independently operating business entity.
- An acceleration and enhancement of eir’s equivalence of inputs (EOI) obligations. As we argued in our response to ComReg’s consultation on the WLA and WCA Markets, “*with EOI, eir and challengers will consume the same access products, using the same interfaces and systems. With the correct reporting, it will be possible to detect more easily if eir is giving itself a superior service*”.
- A focus on passives. For competition to deliver benefits to end users, challengers need to be able to innovate and invest, independently of constraints artificially imposed by its principal competitor acting as its supplier. Alongside separation and EOI, effective and cost reflective passive access has the potential to unleash an innovative competitive dynamic that will help propel Ireland towards the Gigabit society.

XXII. These remedies will need to be implemented alongside a renewed vigour around the existing set of obligations, including:

- A strategic approach to margin squeeze – ensuring retail and wholesale prices are set at levels that do not prevent competitive investments in Ireland’s infrastructure and innovative digital services.
- Cost-based pricing for non-competitive wholesale access products: allowing prices that are too high would not only mean higher prices for Irish businesses and consumers, but would also support margin squeeze that excludes eir’s competitors.
- Targeted regulation to ensure investment in, and the quality of, those wholesale access products needed by eir’s competitors and its own retail business. The SLA payments need

to be of the right form and level to incentivise quality and to fund compensation for poor service paid to retail customers.

- A focus on addressing the benefits of incumbency: with a concerted effort to ensure ease of switching, processes for migrating residential and enterprise customers, and measures that encourage customers to shop around and compare available offers.

XXIII. eir has indicated to ComReg that it will come forward with a proposed response to the recommendations in the Advisors' reports. ComReg has further stated that, were eir to make detailed and legally enforceable proposals to implement the recommendations in the Advisors' reports, then ComReg would consider this response.

XXIV. It is our view that ComReg already has powers to impose and enforce separation. Notwithstanding this fact, if ComReg is to consider undertakings by eir, it must ensure it delivers structural change and it must have binding legal effect. If, following review, ComReg still considers that its powers are not sufficient, as indicated in ComReg's submissions to the Law Reform Commission in 2016 (ComReg Doc 16/25), then Vodafone would support the introduction of explicit statutory provisions in this regard.

XXV. Any ComReg uncertainty over the exact extent of its powers should not be seen as a reason to avoid consideration of the structural changes needed to secure competitive outcomes in the interests of consumers. Indeed, analysis of legal options for reform, and any changes that might be needed, would naturally be a component of any such review.

XXVI. A second RGM will not deliver the digital future that Ireland needs – only a combination of more focused and more radical measures will deliver the Gigabit future needed by both businesses and citizens in Ireland. It is vital therefore that ComReg does not limit its consideration of next steps to proposals to improve the effectiveness of the RGM, but that it broaden its consideration to the full suite of options for a structural reform of eir.

Introduction

1. On 13 July 2017, ComReg issued a call for inputs¹ which it published alongside reports from KPMG and Cartesian, which it had appointed as independent advisors to assist it with its review of eir's Regulatory Governance Model ("RGM"). As an input to this project, ComReg issued the call for inputs to seek the views of interested parties in respect of the contents of the Advisors' reports.
2. It is clear that ComReg and its advisors have put forward a thorough and comprehensive report and Vodafone Ireland welcomes this review and its input is detailed below.

Only effective competition can deliver what Irish consumers need and in telecoms this can only be achieved through the right regulatory intervention

3. Effective competition provides the best mechanism for delivering consumer choice, quality and affordable prices. Competition itself drives further investment and innovation by all firms in the market.
4. However, in telecoms, the high cost associated with building local access networks has meant that competitors have had to rely on gaining access to the incumbent's local copper network to reach their customers and deliver services to them.
5. This dependency has given rise to two main problems.
 - First, **there is an absence of competition at the local level, and incumbents are therefore dominant.** This gives them the incentive and ability to abuse their dominant position by engaging in anti-competitive behaviour, such as charging high wholesale access prices.
 - Second, a **competitor's main supplier at the wholesale level (and only supplier for access to its customers) is also its main competitor for the retail services it is trying to sell.** The result is that the incumbent uses its dominance at the local access network to engage in (discriminatory) practices which favour its own downstream businesses.

¹ https://www.comreg.ie/media/dlm_uploads/2017/07/ComReg-1764.pdf.

6. Faced with these challenges, regulators (including ComReg) have usually intervened both on the supply-side, through policies directed at firms, and on the demand-side, through consumer empowerment policies to ensure effective engagement. On the supply side, some of the key obligations imposed by regulators have tended to address incumbents' discriminatory practices.
7. It is within this context that ComReg accepted the Wholesale Reform Programme offered to it voluntarily by eir in 2011. The key objective of this programme was to ensure eir's processes were non-discriminatory and to achieve this eir itself committed to the development of an enhanced Regulatory Governance Model (RGM), based on the following three building blocks:
 - a) Group Wide Code of Practice (COP) dealing with eir's Access and Non-Discrimination obligations – this set out the high-level principles which underpinned the eir business processes and procedures;
 - b) Business Unit Process Compliance review programme intended to ensure eir's day-to-day processes were compliant with the COP by implementing the necessary Regulatory Controls, with the Statements of Compliance reports (SoCs) as the periodic outputs of this programme; and
 - c) Independent Regulatory Compliance & Audit Reports, prepared by the Head of Compliance and Equivalence (C&E) and the Head of Internal Audit (IA), based on their internal reviews to the Board Wholesale Reforms Committee (BWRC) on an approximately six-monthly basis.
8. **However, Vodafone analysis of eir's market practices, eir's own compliance review, and the conclusions of ComReg's Advisors' review of the RGM, each demonstrate that the current system is fundamentally broken, and failing to ensure eir compliance with its key regulatory obligations.**

Vodafone's extensive analysis has demonstrated that the RGM has failed to secure compliance – with eir repeatedly using its dominant upstream position to prevent others from competing

9. We have looked at our commercial and operational experience in running a fixed line business in Ireland to see if there are practices that continue to inhibit our ability to compete. We have

found several constraints to our success that we believe demonstrate that eir's practices have quite simply not been constrained by the existing suite of regulatory provisions. It constitutes further evidence that the RGM has failed to secure its aim of baking compliance into eir's operations.

10. More specifically, we have a number of observations to make in relation to eir's failures in the following categories, which have had a detrimental effect on our business:
 - a) The 2011 Wholesale Programme has not worked;
 - b) There is no separation between eir's wholesale and retail pricing teams;
 - c) Product Development Councils do not work;
 - d) System Access does not work;
 - e) Current engagement channels do not work; and
 - f) Internal Audit, Compliance and Equivalence controls are wholly inadequate.

11. We discuss these in more detail below.

(a) 2011 Wholesale Programme has not worked

12. In section 3.3 of the May 2016 industry update on eir's RGM, eir talk about revising their internal Code of Practice *'to include all our Regulatory Obligations which include Access, Non-discrimination, Transparency and obligations around price control.'*²
13. It defies reason that their **internal Code of Practice did not include details on all of eir's obligations around access, non-discrimination, transparency and price control from the outset**. These are a fundamental part of eir's regulatory obligations to ensure the effective functioning of the telecoms market in Ireland. As a result, our confidence in eir being able to implement any revised RGM appropriately is severely diminished. Clearly any future undertakings from eir would need to at least be subject to regular (detailed) independent audit and reporting.

² https://www.eir.ie/opencms/export/sites/default/content/pdf/regulatoryinformation/industry_update_2016.pdf, page 24.

(b) There is no separation between eir's wholesale and retail pricing teams

14. The structure of the group pricing function is wholly inadequate: the KPMG report confirms this was comprised of staff that worked on both wholesale and retail pricing until September 2016. eir's (low) level of commitment to change is also evidenced in the fact that the change they imposed to the **structure of the pricing teams in September 2016 did not separate the teams who continue to remain located in the same office, with both teams reporting to the Director of Group Pricing and having access to the same shared drive.**
15. The fact that there is no segregation of teams demonstrates the current system is not working.
16. As a wholesale customer, we are required to provide confidential commercial information to eir on an ongoing basis including information around forecasts, changes to wholesale product mixes, technology development plans such as [Confidential Text Removed]. We would require the highest standard of confidentiality attached to this commercial information.
17. The fact that eir's retail and wholesale pricing teams have access to the same shared folders defies any logic and cannot be explained away. It demonstrates that despite decades of regulatory obligations to ensure non-discrimination, eir does not have the capability on its own (or is unwilling) to establish the structures that are necessary to adhere to its obligations.

(c) Product Development Councils do not work

18. There are clear concerns arising from the current structures of product development procedures. The KPMG report highlights that, while there is a Product Development Council, there is no separate Wholesale Portfolio Board in place to approve and prioritise Regulatory Access Products (RAPs) and related IT resource. As a result, we are concerned that **wholesale product development prioritisation is heavily influenced by the prioritisation and capex requirements of eir's own downstream (retail) business.**
19. One important consequence of this is that eir's wholesale customers – including Vodafone – are not equal partners alongside eir's retail business in determining strategic access network investment decisions or in the development of access services based on those network investments.
20. As an example of this, we note that open eir currently uses the VDSL2 17a (17MHz) profile and wants to add the VDSL2 profile 35b for CVDSL. The VDSL2 35b profile extends the frequency

band to 35MHz allowing higher downstream (DS) speeds: users currently on 100Mb/s could receive 250Mb/s with the new standard. Operators will require new CPE to support 35b speeds. It is clear that open eir has taken this strategic investment decision with the needs of eir retail in mind – business plans and strategies of its retail competitors have not been a consideration.

21. Industry do not have a fully documented or clear process for submitting an access request or a Statement of Requirement (SoR). We are not able to attend meetings on prioritisation - we have no details of such meetings, who is in attendance and the prioritisation rationale. If eir retail sit on such prioritisation meetings then this gives rise to serious equivalence concerns.

(d) System Access is not working

22. **The KPMG report indicates 59% of the application estate are not subject to Business Access Review (BAR).** This has the potential to harm access seekers including Vodafone.

23. To provide context, in eir's own assessments of its regulatory compliance they have identified issues around system access including:

- access to information on technician comments;
- access to richer address information;
- access to richer fault diagnosis data;
- additional line testing capabilities;
- access to network performance data;
- access to outage data and major outage notifications;
- direct contact to technicians for service updates and out of hours repairs; and
- richer leased line fault data.

24. These admitted equivalence issues place a material constraint on access seekers' ability to access and win customers, to access the required information to ensure a better customer provisioning experience and to ensure proper assurance processes are in place when a fault arises.

25. These have a real effect on our ability to compete and to deliver a positive experience to our customers. For example, if Vodafone wants to deliver enhanced services, such as television, we rely on line testing data to make sure the line has the capability to deliver a quality TV product over the broadband service. In respect of faults resolution, we need to understand the status of

our customer's fault so we can resolve it, while also creating clear expectations on the resolution. Without fair access to details on outages, we are not able to build customer expectation of potential issues in advance.

(e) Current engagement channels have not worked

26. We note the key recommendation in the Cartesian report is to reduce the dependency on industry forums to progress projects and that a project based approach holding all parties accountable for actions should be established.
27. **Vodafone agrees that the existing industry forums have not worked.** The forums are not the appropriate vehicle for progressing technical projects and, in our experience, the inherent bureaucracy has led to delays in deployment of critical technologies, SLA improvements, product and process improvements.
28. At a minimum, we would advocate that industry needs to have a new forum (which ComReg attends) that has direct oversight of issues, process gaps, engagement difficulties and challenges. Projects would not rely on the monthly forum process to progress. The objective of the new forum would be to bring together the industry collective and it would require ComReg attendance to hold eir to account on its equivalence obligations including SLA performance, KPI standards, network investment/rollout, prioritisation reports etc.

(f) Internal Audit, Compliance and Equivalence controls are wholly inadequate

29. **It is clear that there are wholly inadequate Internal Audit, Compliance and Equivalence controls.** We refer to the compliance and equivalence cycle which currently only reviews a control group once every 2½ years. The audit cycle means a group of controls is only reviewed once every 4 years.
30. The Cartesian report highlights what is already evidenced by eir's own report to industry, approved by eir for publication, which detailed regulatory governance failings including equivalence issues. We further note that the Cartesian report highlights concerns around the self-certification approach in eir and advise that it *'is not reliable enough, nor consistently applied, to assure the successful operation the Regulatory Governance Model'*. It is reasonable to suspect that the report that industry have received, notwithstanding the serious equivalence concerns highlighted, is only the tip of the iceberg in terms of equivalence concerns.

31. To avoid any doubt, equivalence issues in eir could have led to financial losses for Vodafone. For example, in ComReg document 16/03 ComReg found that eir was rejecting Wholesale Line Rental (WLR) orders where certain eir Retail Virtual Private Network (VPN) services existed on the line. ComReg's view is that this failure meant eir failed to meet reasonable requests for access to wholesale products as required by Section 6.1 of ComReg Decision D07/61. [Confidential Text Removed] These observations are in addition to the specific issues we brought to ComReg's attention last year, including:
- a) eir's retail and wholesale pricing that constrains competitors' ability to compete and invest, to the detriment of Irish consumers;
 - b) The SLA regime has historically been ineffective in ensuring the provision of high quality products by eir, and changes have taken too long to negotiate;
 - c) Equivalence issues which take too long to resolve;
 - d) Underinvestment by eir in its own network;
 - e) Information asymmetries between eir's downstream business and its wholesale customers; and
 - f) Barriers that make it harder for businesses and consumers to change provider.
- (a) The regulatory regime appears to allow a mix of eir retail and wholesale pricing that constrains competitor ability to compete and invest with confidence, to the detriment of Irish consumers**
32. We have recently highlighted our concerns to ComReg³ about **retail discounts applied to their quadplay bundles** sold to new customers. We are strongly of the view that, with any realistic assumptions as to likely customer lifetimes, this pricing squeezes competitors and prevents competition in the market.
33. We are also concerned that eir's **high wholesale pricing tactics are undermining Vodafone's ability to invest in next generation access (NGA) products and our ability to launch innovate superfast broadband services**. One such example [Confidential Text Removed].

³ Submissions to Consultation on Price control obligations relating to Bundles ComReg Reg 17/5s 8 September 2017

34. These wholesale price increases are not supported by any evidence of increases in eir’s cost base and are therefore a key example of eir’s ability to “squeeze” operators seeking to compete with eir based on alternative voice technologies. We note, in this context, that the current margin squeeze tests do not cover these alternative voice technologies.⁴
35. In the market for enterprise customers, it becomes difficult to detect pricing practices that prevent carriers from providing a competitive alternative to eir. This is because any margin squeeze complaint requires visibility of retail pricing, something which is not available to competitors of the incumbent.
36. The outcome across products is clear. Alternative carriers struggle to make a reasonable return and this in turn means that business cases for investment deeper into eir’s network that would genuinely challenge the position of the incumbent cannot be made.
37. In this context, we note, **at 13.0%, the low proportion of DSL lines that have been unbundled⁵, contrasting, for example, with 61.0% of DSL lines in the UK.⁶**

(b) The SLA regime has historically not been effective in ensuring the provision of high quality products by eir, and changes have taken too long to negotiate

38. A dominant provider regulated only on price **with insufficient control over the quality of its services will find it a profitable strategy to underinvest, and to deliver products of insufficient quality.** The consequence is both substandard service to customers, and a distortion of competition that then causes further harm to consumers through lack of competitive pressure.
39. We have had serious concerns in this area and believe that traditional conduct remedies alone – even if supported by an enhanced RGM for eir – will not give sufficient confidence that harmful outcomes will be avoided. In 2016 we carried out a detailed analysis of a number of areas related to the SLA regime. For example, as set out in eir’s self-assessment of its performance against the RGM objectives, it had taken a number of **years and an industry dispute to achieve a resolution on improved assurance for SLAs.⁷**

⁴ ComReg’s NGA Decision (D03/13) specifies three wholesale margin squeeze tests, between: end-to-end bitstream and NGA bitstream; NGA bitstream and VUA; and VUA and SLU.

⁵ <https://www.comreg.ie/publication-download/quarterly-key-data-report-q2-2017>, page 38.

⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0017/105074/cmr-2017-uk.pdf, page 144.

⁷ Industry update on eir’s Regulatory Governance Model (RGM), May 2016, page 45, https://www.eir.ie/opencms/export/sites/default/content/pdf/regulatoryinformation/industry_update_2016.pdf.

40. We had particular concerns at that time around **eir's extended use of "storm mode" during winter periods in 2015/2016 in all parts of Ireland except Dublin**. eir has had discretion in determining when a fault has been caused by "severe" weather conditions and therefore become exempt from the SLA regime – this has meant end-users losing out as they have had to wait longer for their faults to be fixed and have not received compensation as standard. Maintaining a functioning network through variable weather conditions should be a business-as-usual activity in a well-run communications provider.⁸ The Cartesian report has confirmed that eir's declaration of Storm mode is not based on the period of storm conditions. We accept the increased severity of storms will lead to longer clearance times however the level of resource and overall state of the network are a serious concern.
41. We also had concerns about the **lack of transparency surrounding the use of non-standard provisioning**. Where the provision of a service has been deemed non-standard it has been exempt from the SLA regime. The decision as to whether a service qualifies as non-standard has been based on eir's own assessment against the criteria for non-standard provisioning. However, we had limited (if any) ability to verify eir's own assessment. This meant eir had an increased incentive and ability to claim for non-standard service provisioning abusing the regulatory framework. Again, this is something that eir was able to determine and the consequence was that the normal – already insufficient – incentives to deliver good service were effectively suspended.

(c) Equivalence issues take too long to resolve

42. It took **eir around 15 months to reduce identified equivalence issues** from 20 (in December 2014) to 4 (in March 2016).⁹ Many of the issues identified required new system development to ensure that open eir's wholesale customers had access to the same level of service as eir's downstream businesses regarding fault reporting/repair and service provisions.
43. The sheer number and the time taken to address these equivalence issues demonstrates that the current system is not working. The main reason for this is the piecemeal approach taken to resolving non-discrimination issues which have arisen, rather than putting in place a regulatory model which prevents these issues from arising in the first place.

⁸ We note that ESB did not invoke storm mode during the same period.

⁹ Industry update on eir's Regulatory Governance Model (RGM), May 2016, page 51.

44. There are numerous examples of issues which – while many are now resolved – persisted and caused harm for substantial periods of time. For example, while eir’s downstream business was able to arrange a fault appointment from current/next day in a 2-hour slot, wholesale customers needed to wait at least 2 days and could only book an AM or PM slot. We cannot be certain when this discriminatory practice first emerged. The issue was first formally opened in October 2015. However, the ability for all operators to arrange an appointment in 1 day was not implemented until April 2016 and the ability for all to have the same slots was not in place until December 2016. In the meantime, challengers were not able to compete fairly, while consumers suffered directly through substandard processes and delays to fault repairs, and indirectly through a lessening of competitive intensity.
45. As part of the RGM, internal compliance also involves the review of the operation of the controls in the areas of change control, pre-order/ordering, provisioning and fault reports/repair. The purpose of these reviews has of course been to identify risks of non-compliance with eir’s non-discrimination obligation and where risks are identified to put in place controls to mitigate these. eir’s May 2016 self-assessment against the RGM set out its levels of compliance on pre-ordering/ordering controls to deliver NGA, NGN and current generation services to eir’s downstream and open eir’s wholesale customers. It demonstrated the failure of the RGM when it reported that out of **23 pre-ordering/ordering controls four were found to have operated in “some respect” and four “did not operate” at all in the relevant period**. Furthermore “in 5 cases it was not possible to determine if there had been an adverse impact on the product being delivered in a non-discriminatory manner as sufficient data was not available for comparative purposes.”¹⁰
46. The **RGM appears to have permitted a large number of differences** – differences in systems and processes identified by eir in how RAP products are provided to wholesale customers that they claim can be justified as they provide no material benefit. In May 2015, eir identified 22 such differences, increasing this number to 31 by May 2016.¹¹ The process of agreeing differences is cumbersome and time consuming, and should ComReg or competitors not agree with eir’s own views on these issues, further delays are introduced before a satisfactory solution can be implemented.

¹⁰ Industry update on eir’s Regulatory Governance Model (RGM), May 2016, page 83.

¹¹ Industry update on eir’s Regulatory Governance Model (RGM), May 2016, pages 61-64.

(d) We are concerned that eir is severely under-investing in its network

47. There is no visibility as to whether eir is investing adequately in its network, or in the engineer force required to maintain the network. As a major customer, we would want reassurance that a major strategic asset in Ireland is not being neglected to the ultimate detriment of Ireland's population and its economy.
48. Establishing whether eir has under-invested in its network or its operational set-up is complex to determine in practice. However, we are concerned about the fact that **eir significantly reduced the headcount of its own operational and technical staff** for its fixed line business in the last 10 years (by around 55% or more than 2,600 FTEs). We recognise the fact that these staff reductions might have led to increased operational efficiency and might also have involved an increase in the use of third-party outsource providers – however we are not able to verify this. Equally, we are not able to verify whether eir has earmarked sufficient capex to maintain its network.
49. More specifically, we note the presence of an **investment gap in eir's account around 2011**, which is likely to be the result of eir being close to bankruptcy due to its very high debt levels. It is difficult for us to ascertain the reasons why eir was so debt-laden at the time. Since then, senior lenders of eir have taken full control of the company after it emerged from a restructuring process that cut €1.7bn of debt from its balance sheet – and only then did eir confirm that it would progress with a five-year plan to roll out high-speed broadband and invest in its wireless network (while at the same time also cutting about 1,000 jobs).¹²
50. We are deeply concerned that **eir is not facing the right incentives to invest**. With a poor SLA regime and a poor competitive environment, eir has the incentive and ability to maximise its profits by under-investing. If eir were to be subject to stronger penalties it would have an incentive to maintain investments where needed to deliver service quality. The RGM – even with enhancement – is not capable of addressing this issue.

¹² <https://www.ft.com/content/8c25780a-b3e9-11e1-a3db-00144feabdc0>

(e) We do not have confidence that the information we are receiving regarding key parameters of eir's wholesale services is of the same quality as is visible to eir's downstream businesses

51. Given the opaque structure of dealings between open eir and eir retail, **we have serious concerns that eir retail may be getting key information, for example on rollout, in advance of its competitors.** We believe we also have poor quality and cumbersome access to inventory information systems and to eir's back office systems, such as pre-qualification / DSLAM information, eir engineer appointment calendars and access to the address book for provisioning. We also have concerns that eir retail may have superior access to open eir's engineers and fault handling systems.
52. For example, in July 2014 eir identified that its own retail arm had access to a greater range of address matching capabilities than was available to industry. eir advised ComReg in December 2015 that it had completed an address matching remediation programme. However, in January 2016, following industry complaint, it was found that address matching issues had not actually been resolved. ComReg published a finding of non-compliance in February 2017.¹³
53. The result of these forms of discriminatory treatment would be that our customers could receive an inferior service, as a result of matters which are entirely beyond Vodafone's control. This behaviour is the consequence of a regulatory system that does not enforce systems separation within the incumbent's competitive and non-competitive businesses. The lack of separation makes it very difficult to provide reassurance that adequate protections are in place to prevent this from happening. An RGM model would not be capable of providing the required level of reassurance.

(f) eir has legacy advantages, with a risk that difficult switching and complex migration processes will prevent competition from delivering full benefits to consumers and businesses

54. Where there are barriers to customers' ability to change supplier, this will naturally favour the incumbent and will limit the extent to which competitors can provide challenge and force improvements to services delivered to consumers.

¹³ Notification of finding of non-compliance to Eircom Ltd for breach of non-discrimination obligations regarding address matching – 22 February 2017 ComReg doc 17/14

55. Our analysis has revealed areas of concern. **For enterprise customers, we have experienced significant shortcomings in eir's ability to support an orderly migration of customers acquired by Vodafone, particularly for VPN services.**
56. **For residential broadband customers, we have significant concerns around the migration process.** For example, we do not know if migration timeframes are the same for Vodafone customers as they are for those that eir has gained, and the consequence of winback activity in this context. We also have reservations about switching processes and the need for customers to provide their universal account number (UAN) before they are able to change supplier. Given the lack of system separation, we cannot have confidence that eir Retail is prevented from having direct access to the UAN where the customer has been unable to provide it.
57. We will always have concerns where there are practices that increase friction and make it harder for consumers to benefit from a seamless hassle-free process for changing providers. We use sales channels that make it difficult for the customers to obtain the UAN at the time of purchase. We are at risk of losing customers we would otherwise gain were it not for this unnecessary step in the process. And this will mean an increase in customer acquisition costs which will naturally favour those suppliers focused on retention (i.e. incumbents) relative to those that are focused on acquisition (challengers). Another risk with the existing process is that it may force the customer to contact its existing supplier (which will often be eir) to obtain the UAN, thus making winback more likely.
58. Ireland is one of just two countries in Europe where it is necessary for consumers to provide a code in order to change their broadband or voice supplier. Regulators elsewhere have come to realise that there are alternative ways to prevent slamming¹⁴ that do not have such a chilling effect on the ability of challengers to deliver positive consumer outcomes through the competitive pressure they exert.
59. As with other areas that inhibit competition and the ability of challengers to compete effectively, an enhanced RGM will not be able to address the endemic advantages that accrue to eir. We note that Vodafone has found it extremely difficult to sustain sufficient margins in fixed given the difficult trading environment resulting from discrimination and high barriers to

¹⁴ The practice of switching a customer from one service provider to another without the customer's authorisation.

customer acquisition. [Confidential Text Removed] This is not an environment that encourages competitive investment and innovation, and the result is that consumers do not see the benefits they would see from a dynamic market in which competitors can compete fairly for their custom.

60. The current practices restrict consumer choice and limit the customer experience. Vodafone is pushing hard to provide choice to consumers. We must provide our services at competitive prices however we are constrained by wholesale pricing. We must be in a position to set a clear expectation for our customers that we will install their broadband services at the time we committed, to the required quality and in the event any issues arise we will provide clear commitments on when any issues will be resolved.

It is not surprising that conduct remedies, including the RGM, have failed to protect retail competition: we have seen the same damaging discriminatory practices by incumbents throughout the markets in which Vodafone operates

61. In our experience, anti-competitive behaviour by incumbents is endemic, and a feature we believe we have observed throughout the EU and beyond. In 2016 and 2017, Vodafone carried out an extensive evidence gathering exercise to understand better through our own detailed operational experience in those countries where Vodafone is present, how our ability to compete has been affected by incumbent practices.

62. Our analysis demonstrates that Vodafone's European operating companies may have experienced many instances of anti-competitive practices. Vodafone's April 2017 report "Preventing Discrimination"¹⁵ sets out numerous recent examples of alleged discriminatory behaviour. We highlight below the main activities within the product lifecycle that were affected:

- **Strategic investment, product development and roll out decision-making:** In most European countries in which Vodafone operates, the incumbent's wholesale product development process is discriminatory. Vodafone is not an equal stakeholder alongside the incumbents' retail businesses in determining the incumbent's strategic access

¹⁵ <https://www.vodafone.com/content/dam/vodafone-images/public-policy/reports/pdf/preventing-discrimination-030417.pdf>.

network investment decisions (such as the deployment of VDSL or G.FAST instead of FTTP) or in the development of access services based on those network investments. While there may be voluntary industry working groups or similar in some of these countries for certain products, they appear to have little or no material influence on key incumbent access network and product decisions. Incumbents have an incentive to make decisions based on their own priorities, sometimes without due regard for the interests of paying wholesale customers.

- **Access to information for product operation and management:** Vodafone is concerned that, in a number of countries, the quality, reliability and format of VDSL or fibre availability information received from the incumbent is inferior to that provided to its own retail businesses. For instance, Vodafone is aware of examples in a number of countries where VDSL or fibre services do not appear to be available for a customer, based on the information provided to Vodafone by the incumbent, and therefore Vodafone is unable to supply the customer. However, the same customer's premises does appear on the incumbent's retail business' availability checking system when the customer approaches the incumbent directly.

Vodafone is also concerned that incumbents provide information on planned VDSL roll out to their own retail divisions before they notify Vodafone with the same information. Vodafone is often provided with roll out information only four to six months before roll out and with a limited degree of granularity. This may provide incumbents' retail businesses with greater opportunity to market retail VDSL products before Vodafone can do so.

- **Access to systems and processes for product operation and management:** Vodafone's experience is that wholesale customers are commonly required to use separate wholesale systems and processes. A severe lack of transparency of the systems used by incumbents' own retail businesses means that it is extremely difficult to verify whether these different systems provide the same experience. Vodafone is concerned that in many cases they do not.
- **Engineering force:** We have seen concerning practices in relation to the incumbent's provisioning, repair and migration. For example, we regularly observe difficulties with

engineer visits to customers' homes. Where appointments are missed, the resulting rescheduled visits mean customers experience poor customer service, and those customers are significantly more likely to cancel their order or switch to other operators.

We have also carried out a detailed analysis of competition and regulatory cases into incumbent anti-competitive behaviour in EU member states

63. As well as examining Vodafone's direct experience of incumbent practices throughout Europe, we have carried out a detailed examination of public domain information on European Commission, national competition authority and national regulator cases against incumbent operators for discriminatory behaviour. We have found that in many cases, the incumbents were reoffenders, having committed similar infringements before.
64. In our report "Preventing Discrimination"¹⁶ we summarised over 20 examples of competition and regulatory cases regarding findings of discrimination across the EU. Below we reproduce examples since 2010 from outside Ireland. Our "Preventing Discrimination" paper details a larger number of examples from before 2010.
- **BT** was found by Ofcom to have misused contractual terms through the late delivery of leased lines services to wholesale customers without their consent and to have failed to pay compensation for those delays. In March 2017, Ofcom fined BT €69 million, reduced by 30% to **€48 million** due to BT's admission of liability and agreement to pay its affected wholesale customers in full. The amount that will be paid to BT's wholesale customers in compensation is estimated at **€347 million**.
 - **Telefónica** was fined **€3 million** in March 2017 by Comisión Nacional de los Mercados y la Competencia for discriminating in favour of its own downstream business during its work force strike. It was also fined **€5 million** in December 2016 for breaching its SLAs and discriminating in favour of its downstream arm in the provision of local loop unbundling (**LLU**) maintenance services.

¹⁶ <https://www.vodafone.com/content/dam/vodafone-images/public-policy/reports/pdf/preventing-discrimination-030417.pdf>.

- **Orange** was fined **€350 million** by the French Competition Authority in August 2015 for discriminatory provision of information relating to wholesale local loop access. Orange exploited its dominant position in the wholesale LLU market through providing challenger operators restricted and slow access to technical information essential for offering a good quality of service to enterprise customers, while allowing unrestricted access to such information by its own retail subsidiary.
- **KPN** was fined **€8 million** by the Authority for Consumers and Markets in July 2015 for failing to disclose information to challenger operators about certain wholesale business services guaranteeing quicker resolution of service disruptions and providing fast internet and television services and consequently failing to supply these services to challenger operators. The ACM noted that this was not the first time KPN had been fined for this type of conduct.
- **Orange** was ordered to pay **€7 million** in damages by the Paris Court of Appeals in 2015 for refusing a retail rival access to its network to provide high speed internet service, causing untimely exit of the challenger operator from the market.
- **Bulgarian Telecommunications Company** was fined **€1.9 million** by the Commission for the Protection of Competition in Bulgaria in 2015 for imposing unfair and discriminatory terms in the interconnection contract for voice calls and unilaterally terminating the agreement with a challenger operator based on such unfair terms.
- **Slovak Telekom and Deutsche Telekom** (Slovak Telekom's parent company) were jointly fined **€38.8 million** and Deutsche Telekom (**DT**) was fined an additional **€31.1 million** by the European Commission in October 2014 for refusing to provide local loop access to challenger operators. Slovak Telekom withheld network-related information from challenger operators, artificially reduced the scope of its unbundling obligation and imposed unfair terms and conditions in its reference offer for local loop access.
- **Telecom Italia** was fined **€88.2 million** by the Italian Competition Authority in May 2013 for discriminatory provision of wholesale access to its infrastructure. Telecom Italia engaged in high levels of rejection of rivals' requests for access, often citing inaccurate reasons for the rejection and provided preferential treatment to its own retail division.

- **KPN** was fined **€20,604** by the Authority for Consumers and Markets in 2013 for providing discriminatory VDSL access to its own retail division. This was in breach of its non-discrimination obligation.
- **KPN** was fined **€22,000** by the Commission of the Independent Post and Telecommunications Authority in 2012 for discriminatory practices in relation to the number of engineers required for the installation of a new technology that increased the capacity of copper lines.
- **Telecom Polska** was fined **€127 million** by the European Commission in June 2011 for impeding the access of challengers to its wholesale LLU and bitstream services. Telecom Polska imposed unreasonable contractual conditions on its rivals, engaged in various tactics to delay and frustrate negotiations, rejected a high number of rivals' access requests for unjustified reasons, provided inflated cost estimates for establishing collocation and provided incomplete and inaccurate access information.
- **KPN** was fined **€30 million** by the Commission of the Independent Post and Telecommunications Authority in 2011 for discriminatory provision of information to its own retail arm on changes in tariffs and terms of wholesale line rental service prior to a government tender. This limited the challenger operators' ability to submit a competitive bid for the tender.
- **OTE** was fined **€5.7 million** by the National Telecommunications and Post Commission in 2010 for causing unjustified delays in the provisioning of LLU and imposing unreasonable access conditions.
- **Telecom Italia** was subject to an antitrust proceeding opened by the Italian Competition Authority in May 2010 on the suspicion that it had engaged in an anti-competitive refusal to provide information to one of its retail rivals. The information withheld was crucial for the retail rival to prepare bids for large scale government and private sector tenders and related to changes in wholesale prices, the wholesale terms that Telecom Italia was willing to offer, development plans relating to optical fibre, etc. Telecom Italia also refused to offer certain wholesale services to its retail rival. In this case in 2012 the ICA accepted commitments from Telecom Italia to change its conduct, therefore there was **no fine** imposed.

The reports from KPMG and Cartesian now provide further extensive corroboration that the regulatory regime, and the RGM, are resolutely failing to ensure compliance by eir with essential non-discrimination requirements

65. Vertically integrated firms which control the assets needed by competitors will always have an incentive to favour their own retail businesses. And with these vertically integrated firms, as regulators grow more effective at policing discriminatory practices, so the firms will become more sophisticated in the nature of the discrimination, making it more subtle and harder to detect.
66. And with this, competition is distorted, and opportunity for consumer benefit and economic growth squandered.
67. The question is whether, despite these incentives and practices, a system of internal governance can succeed in securing compliance within the incumbent, such that it treats competitors and its own retail businesses equally.
68. Vodafone's experience in Ireland shows that in the case of eir's RGM, this has not been the case.
69. Given the findings from eir's self-assessments and the catalogue of alleged breaches, ComReg commissioned the Advisors to consider how well the RGM was delivering on its objectives.
70. The conclusion of these reports is, categorically, that it has not.
71. Examples from the KPMG report include its conclusions that:
 - The RGM has not been subject to robust independent monitoring;
 - eir's wholesale division remains operationally dependent on Group functions, increasing the risk of inappropriate sharing of confidential information with its own retail business;
 - eir's wholesale division's incentive structures are not aligned with the operational and financial performance of the division, increasing the risk that staff act in the interests of eir Group as a whole, including its retail operations;
 - The RGM has not been embedded within eir;
 - The process for determining investment and prioritising product development within eir's wholesale division is not clear or transparent, which makes it difficult to understand

how the relative demands of eir's retail division and its competitors can be considered fairly;

- The IT strategy does not show how future developments will ensure data related to wholesale and retail access will be segregated, nor does it robustly address the need to restrict the flow of confidential information between the wholesale and retail divisions;
- Governance and management of systems and data access and handling of confidential data is not robust;
- A lack of resources, formality and prioritisation mean that RGM assurance mechanisms are not fully effective.

72. Examples from the Cartesian report include its conclusions that:

- eir's product development processes are opaque;
- Risk management control processes are not mature or robust enough to enable risks to be assessed and controls to be operated on a consistent basis;
- There are no standards for self-certification within business units, nor for the maintenance of evidence of certification;
- There are a lack of tolerance settings and standards for process and measurement thresholds;
- eir's internal reviews show significant control defects, but their scope is limited and the reviews infrequent;
- There is no overall owner for internal assurance, with a lack of clarity on accountability;
- There is no assurance over the pace for remediation;
- There is a lack of independent oversight over product development prioritisation
- There is no formal process for dealing with operator requests and actions from the forums – with no project plans nor milestone management for tracking the progress of requests.
- There were flaws in the systems designed to ensure accuracy of KPI metrics

- Several controls fail consistently from cycle to cycle, but still no process exists to identify consistently failing controls.

73. These are comprehensive and robust reports produced by ComReg’s Advisors – we have reproduced a small selection of the deficiencies found so as to give a flavour of how extensively the RGM has failed to deliver even to its most basic of objectives.

74. To summarise, KPMG concluded that the “*maintenance and maturity of the RGM requires improvements, some of which will be significant, in the areas of governance structures, incentives, management of [confidential information], pricing, product development and prioritisation, monitoring and independent oversight*”.

75. Cartesian concluded that the RGM “*is not sufficiently robust and reliable to enable regulatory risks to be assessed and controls to be applied in a reliable and consistent manner*”.

76. While both sets of Advisors are focused on how the RGM can be reformed to increase the likelihood of it delivering eir compliance, we would note a vital piece of broader context contained within the KPMG report:

Finally, we are cognisant that there are various governance and operational models available to eir and ComReg with regard to the provision of greater governance and operational independence to the Wholesale Division, from other aspects of eir’s business. These include EU defined separation options under Articles 13(a) and 13(b) of the Access Directive. As is the case in other countries, the regulatory and business environment is continuing to evolve and change, with greater or more focused models of separation required to address this changing environment. Therefore, the recommendations included within this report should not be seen as limiting the extent to which these various governance and operational models could be implemented by either eir or ComReg.

77. This is highly relevant to ComReg’s consideration of its next steps. In exploring the correct remedy for the failure of the RGM, it is important to understand why the RGM failed. Was it because the RGM constituted a good model which happened to be badly implemented? Or was it because an organisation cannot successfully design and embed a complex internally focused governance model the intention of which is to prevent the organisation from acting in its own best commercial interest?

78. If there is a possibility it could be the latter, then ComReg's next steps cannot be limited to a consideration of incremental improvements designed to address the specific identified failings of the current RGM. As the KPMG report has intimated, there are a broader set of separation options available to secure the independence of eir's wholesale division from its competitive business, and it is vital that the scope of ComReg's upcoming review is broad enough to consider the relative merits of this full range of options.

We should not be giving the RGM a second chance through complex detailed remedial action . . . rather we should be exploring options for separation of eir's upstream dominant assets from its downstream (potentially competitive) business

79. Both KPMG and Cartesian have made a series of recommendations aimed at improving the current RGM model. But the current model cannot be strengthened and it cannot be fixed, because the model is fundamentally flawed: it is broken at its core.
80. This is because it relies on detailed and complex governance and operational provisions that are themselves very difficult to track and verify. They are insufficient to counter the fundamental and endemic incentive on the incumbent to use its upstream dominance to favour its downstream operations.
81. The proposals from KPMG and Cartesian will go some way to address the specific issues they have uncovered, but they will not address the inherent failing of the system. If we proceed with these recommendations and do nothing else, we will find ourselves in exactly the same place we are now – looking at a new set of failings and at an incumbent that continues to discriminate successfully to its own commercial benefit, at the expense of competitors' ability to challenge and at the expense of investment, innovation and cost efficiency.
82. We do not need a further refinement of the existing model – we need an entirely new model that addresses the root cause of the failures identified. This means a full and complete separation of eir's dominant upstream business from those areas which compete with others, supported by full EOI to ensure eir's incentive to discriminate in favour of its own downstream arm are diminished and the remaining risk around this issue is mitigated by having in place good detection and punishment systems.
83. Only by instituting this step change can we have full visibility of the way that eir's wholesale business is transacting with all its wholesale customers. And only then can we be confident that there is thriving competition between a number of innovative scale players, and thus reap the benefits that this will bring – to consumers and businesses, to the Irish economy and to the citizens of Ireland as they seek to exploit ever better digital communications to engage with each other and with the services offered by the Irish administration.

84. The prize from fixing the discrimination problem in Ireland is substantial. Vodafone has demonstrated that it is willing to invest in Ireland's communications infrastructure. Our SIRO joint venture with ESB is building a network that is expected to rollout in 51 towns. For those premises covered, SIRO's wholesale customers, including Vodafone, will be able to offer innovative high-speed services to businesses and consumers, without the constraints of eir's discriminatory practices.
85. However, even with the benefit of ESB's existing passive infrastructure, challengers will continue to depend on eir's wholesale services to access customers in most of the country. Only complete separation of eir can prevent discrimination and ensure the benefits of competition extend to all of Ireland.

Evidence shows that separation can, and does work to the benefit of consumers

86. The two case studies outlined below show that the separation of the incumbent's wholesale arm from its downstream retail arm is becoming a necessary condition to reduce the level of anti-competitive discrimination in the telecoms market.

Case Study 1: New Zealand and structural separation

87. New Zealand implemented the structural separation of the incumbent fixed line operator in late 2011. This has materially increased competition in retail broadband, delivered greater investment and innovation, and reduced the need for complex regulation.¹⁷
88. Structural separation in New Zealand was voluntary. Telecom New Zealand (Telecom) demerged in order to participate in a Government-funded programme of investment in a new, open-access FTTH network that will ultimately connect 84% of the population (the UFB Initiative). The demerger of Telecom created two new businesses:
- Chorus, which became a wholesale only provider and New Zealand's largest fixed communications utility business; and
 - Spark (as it is now known), which remained New Zealand's largest provider of communications and IT services.

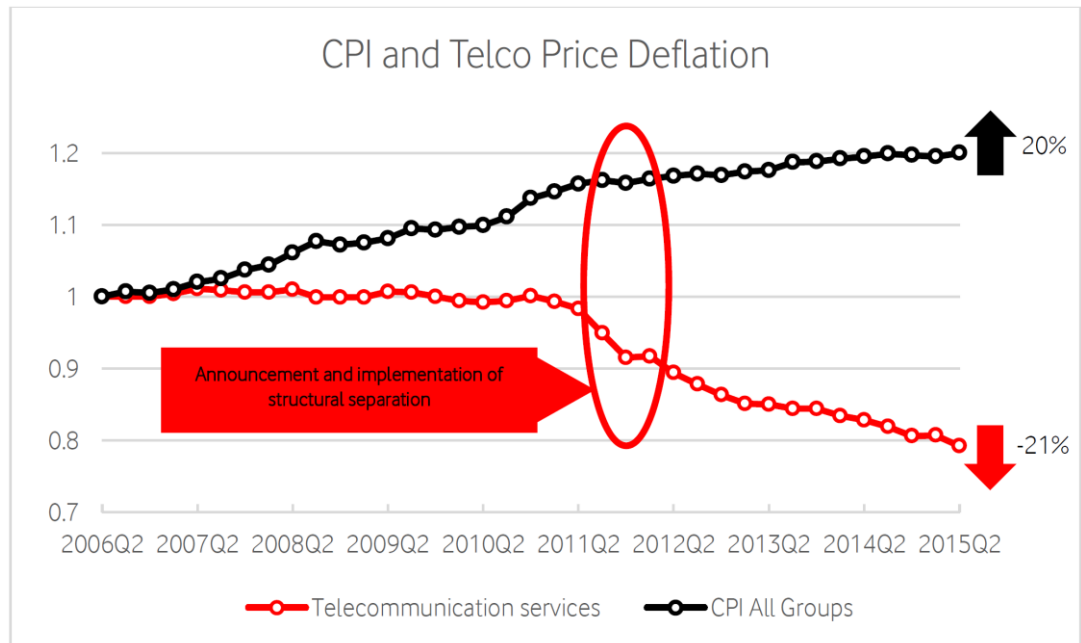
¹⁷ https://www.ofcom.org.uk/data/assets/pdf_file/0019/58222/vodafone_annex_5.pdf

89. The benefits of structural separation, for Telecom shareholders as well of the rest of New Zealand, were far greater than just Telecom's participation in the UFB Initiative. As the New Zealand Commerce Commission observed in its consultation on structural separation, it promised the potential of "substantial benefits" through:

"...[b]reaking the link between retail services and the access network [encouraging] competition at the retail level and [reducing] the need for detailed regulation of the interface between the two..."

90. This is precisely the outcome structural separation has so far achieved in New Zealand:

- **Increased investment.** New Zealanders are benefitting from ongoing investment in next generation technologies. New Zealand has the second highest industry reinvestment rate in the OECD; the second highest fibre uptake rate in the OECD at June 2017, and internationally competitive pricing, with Commerce Commission benchmarking showing fibre and copper pricing 8% below the OECD average, while mobile pricing is 31 – 49% below OECD averages.
- **Intensified competition.** The investment in New Zealand's communications market, underpinned by the separated market structure for fixed infrastructure, has delivered great results for consumers. It has unleashed intense competition, driving innovation and value. At its simplest, the impact of structural separation in unlocking the potential of a competitive retail market is demonstrated in a comparison of New Zealand's Consumer Price Index against the deflation of the price of communications services as a sub-set of that measure. Despite steady inflation generally, New Zealanders receive considerably greater value from communications services.



Source: Vodafone

The benefits New Zealanders have received through intensified competition and investment include: lower prices, faster broadband speeds, higher data caps, and a range of innovative new products, services and partnerships.

91. The above benefits were achieved through the implementation of structural separation which ensured:
- The removal of significant regulatory burdens, delivering a simplified and more effective regime;
 - The creation of two new businesses, which have performed better for their shareholders and for New Zealand; and
 - A step-change in the competitive retail broadband market.
92. As a result of the changes, some aspects of the task of regulation became simpler, with structural separation and wholesale-only provision removing the issue, and the need for monitoring, of equivalence and non-discrimination.

Case Study 2: The UK and legal separation

93. In its Strategic Review of Digital Communications, Ofcom raised serious concerns that the functional separation from BT of Openreach, its upstream wholesale arm, had failed to remove

the incumbent's ability to discriminate against competitors.¹⁸ Specifically, Openreach's continued vertical integration within BT Group meant that new investment decisions were taken at a group level (rather than by Openreach itself) - creating a risk that such decisions were made in favour of BT's own downstream retail business, to the detriment of its competitors.

94. On 10 March 2017, BT agreed to a legal separation of Openreach. As a result, Openreach will become a distinct company with its own staff and management, with its own strategy and a legal purpose set up to serve all of its customers equally.

95. More specifically:

- **Openreach will become a distinct company.** Openreach will be incorporated as a legally separate company within BT Group, with its own 'Articles of Association'. Openreach – and its directors – will be legally required to make decisions in the interests of all Openreach's customers, and to promote the success of the company.
- **The Openreach Board will run the company.** The Openreach Board that BT has established, which has a majority of directors independent of BT, will become the Board of the new company. It will be responsible for running Openreach, under a new governance agreement.
- **A separate strategy and control over budget allocation.** Openreach will develop its own strategy and annual operating plans, within an overall budget set by BT Group.
- **Executives will be accountable to the new Board.** Openreach's CEO will in future be appointed by, and accountable to, the Openreach Board. BT Group will be able to veto the appointment of the Openreach CEO, but only on notification to Ofcom. The Openreach CEO will then be responsible for other executive appointments, and will report to the Openreach Chair – with a secondary accountability to the CEO of BT, limited to necessary legal, fiduciary or regulatory obligations.
- **Staff will work for Openreach.** The legally separate Openreach will directly employ all its 32,000 staff, who will be transferred across from BT. This will allow Openreach to develop its own distinct organisational culture.

¹⁸ https://www.ofcom.org.uk/__data/assets/pdf_file/0035/98855/Openreach-consultation-2017.pdf

- **Assets will be controlled by Openreach alone.** Openreach will have control of those assets – such as the physical access network – required to deliver on its purpose. The Openreach Board will make decisions on building and maintaining these assets: BT will hand these powers to Openreach, while retaining a title of ownership.
- **Consultation and confidentiality for Openreach’s customers.** Openreach will be obliged to consult formally with customers such as Sky, TalkTalk and Vodafone on big capital investments. In the future, customers will be able discuss ideas in a ‘confidential phase’ without these being disclosed to BT Group, as well as further protections for confidential customer information.
- **Distinct branding.** BT will be removed from Openreach branding, to reflect these changes and the company’s greater independence.

96. Ofcom’s new dedicated Monitoring Unit will be assessing how Openreach is delivering on its objectives and measuring the results in the market in terms of availability of fibre broadband, coverage of ‘decent’ broadband, and changes in quality of service.^{19,20}

Alongside structural remedies, there are some key regulatory actions that ComReg should consider if it is to secure a step change in competition, investment and innovation for the benefit of consumers

97. The focus of our submission is that ComReg now needs to go beyond a narrow consideration of the RGM, and consider alternatives to secure a level playing field, especially around options for separation of eir.

98. For completeness, there will still be a need for complementary actions from the regulator to support good outcomes for consumers.

99. For example:

- If Ireland opts for any form of separation that falls short of full ownership separation, then some incentive for discrimination will remain and so protection against margin squeeze and full Equivalence of Inputs (EOI) will still be required.

¹⁹ <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2017/openreach-statement>.

²⁰ https://www.ofcom.org.uk/data/assets/pdf_file/0020/104474/delivering-independent-openreach.pdf.

- If left unchecked, eir will have the incentive and ability to discriminate at every step of the product lifecycle including: its investment plans, the products it wants to develop and where, when and how they are rolled out. eir will be able to control information provided to wholesale customers and will have the ability and incentive to misuse wholesale customer information. It will also continue to discriminate in access to IT systems and processes and constrain increases in quality of provisioning, repair and migration services to wholesale customers.
- Vodafone's position is that full EOI is required on NGA and CGA products. Where full EOI is not practical then eir's retail arm should be required, in as many cases as possible, to use the same systems and processes for its own retail arm as is used for wholesale customers.
- Regardless of the model of separation, for those parts of the network where eir remains dominant, controls will need to be in place to prevent abuses of dominance: protecting against overcharging, underinvestment and insufficient quality in provisioning and repair will all be necessary.
- Competitive investment in which challengers have proper control of the services they offer their customers is the real prize, because it incentivises and rewards innovation and success in delivering products consumers value. Passive access can help to deliver this and making passives work needs to be a key priority for the regulator.
- We have found serious obstacles to competition resulting from incumbency benefits, where friction increases customer acquisition costs and lessens competitive intensity, favouring those that, for legacy reasons, have a high proportion of customers. It will be necessary to explore actions to counter these effects.

Conclusions

100. Vodafone strongly believes that on its own, a further refinement of the existing RGM will not work – we need an entirely new model that addresses the root cause of the failures identified in the Advisors’ report. This means a complete separation of eir’s dominant upstream business from those areas which compete with others. Unless Ireland moves to full ownership separation, structural reform will need to be supported by full EOI to ensure eir’s incentive to discriminate in favour of its own downstream arm are diminished and the remaining risk around this issue is mitigated by having in place good detection and punishment systems.
101. Both the case studies from New Zealand and the UK provide strong evidence that implementing a separation model – where necessary in combination with other remedies – has the effect of reducing discrimination. Separation of eir in Ireland would yield significant benefits to Irish consumers and the economy.
102. In both the UK and New Zealand the incumbent voluntarily agreed to separate – with legal separation in the UK and full ownership separation in New Zealand – in the context of a decision by the authorities that change was required to secure the long-term sustainability of competition in the market.
103. In New Zealand, Telecom structurally separated in order to participate in the Government-funded programme of investment in a new open-access FTTH network. In the UK, BT agreed to legal separation in the expectation that Ofcom would otherwise notify the European Commission and advise that the imposition of an exceptional remedy was required in the form of legal separation.²¹
104. Under the Directive and the Irish Regulations, ComReg has available to it the same powers that Ofcom used to extract from BT the commitment to implement legal separation. In short, ComReg can conduct an investigation as it is now doing and mandate separation ‘as an exceptional measure’ if it were to consider it necessary.²²
105. Given the challenges ahead, and the evidence that Irish consumers and businesses are missing out due to the stifling of competition, it is essential that ComReg now conducts a broad review. This will need to consider options for the separation of open eir from the rest of the business,

²¹ https://www.ofcom.org.uk/data/assets/pdf_file/0026/94940/Final-signed-letter-to-the-European-Commission-281116.pdf.

²² S.I. No. 334/2011 - European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, Section 14 Functional Separation. <http://www.irishstatutebook.ie/eli/2011/si/334/made/en/pdf>.

rather than limit itself to the specific remedies proposed by the Advisors which have the more limited aim of securing incremental improvements to the RGM.

106. Vodafone is looking forward to engaging in this debate with ComReg and supporting the regulator in any way it can to assess the best means of proceeding with a complete separation of eir in Ireland.

5 BT

BT Communications Ireland Ltd “BT” Response to the ComReg Call for Inputs:

REVIEW OF EIR GOVERNANCE MODEL **Publication of Reports and Call for Inputs**

Issue 1 – 27th October 2017

Executive Summary

BT Ireland (BT) welcomes the opportunity to respond to this vitally important consultation. It is especially relevant at this juncture when it would not be exaggerating to state that the regulatory environment in Ireland is at a watershed. Specifically, market entrants perceive that it is now questionable whether Ireland is even compliant with European Legislation, as it no longer appears that ComReg is actually able to fully enforce the European Communities Access Directive, is against a background of apparently deficient structures for regulatory compliance for many years, as is manifestly the case from the two independent reports.

BT considers there is an urgent and pressing need for ComReg firstly to put in place adequate resources and structures to facilitate proper application of all relevant regulations and secondly to ensure that there are review mechanisms to ensure compliance is effective. BT simply cannot countenance continuation of the status quo and we cannot accept any recurrence of the catalogue of non-compliances by Eircom, for example documented in the Regulatory Governance Model (RGM)¹ and the nine non-compliance notifications against Eircom published to date by ComReg².

Against this backdrop, we welcome the objective and detailed analyses in both the KPMG and Cartesian Reports and whilst we had previously understood there were numerous compliance issues as for example already published in the RGM, the KPMG and Cartesian Reports both provide substantive independent evidence that further challenges Eircom’s ability to support sustainable compliance and equivalence going forward.

There is historic precedence for this position. In December 2011, Eircom offered voluntary reform which was taken by industry in good faith; however in August 2015 its RGM statement highlighted a catalogue of issues which in our view demonstrated reform had not in fact actually occurred. In January 2013, the Regulator in its NGA Remedies decision (D03/13) enhanced the Next Generation Access (NGA) regulatory remedies to what is known as the Equivalence of Input (EOI) standard. In our view the RGM further demonstrates that EOI has also failed to be effective.

We cannot continue like this; whilst some may argue the track record of non-compliance is primarily a technicality, such a perspective simply glosses over the substantial commercial harm and general

¹ Eircom Regulatory Governance Model Issued by Eircom Ltd. and Dated 10/8/2015

² ComReg Publications: 16/103, 16/102, 16/101, 16/100, 16/99, 16/91, 16/60, 16/02, 17/14

frustration these matters have caused both to the wider infrastructure and services industry, and to end customers.

BT has had to withhold some relevant information in this area given that there is the potential for legal proceedings and which may additionally place information requirements on ComReg itself. However, section 2 of our response illustrates with some quite simple case examples how the track record of Eircom non-compliance has led to commercial and customer harm.

In summary, we consider it has been demonstrated that far stronger regulatory remedies are required to establish sustainable compliance, particularly in the area of equivalence. History shows that simply trusting Eircom to ‘do the right thing’ - and which has largely been the approach to date in the form of its voluntary commitment from 2011 and the application of standard Equivalence of Outputs (EOO) and EOI remedies within the structures used to date – are simply untenable. We provide below some specific observations and suggestions with respect to the proposed Independent Oversight Body (IOB) and secondly, on the extent of separation that is appropriate in this particular case.

Way Forward

BT Ireland believes substantive action must be taken to ensure the Irish telecommunication market can operate fully and effectively for the benefit of Irish citizens, the State and communications providers. BT Ireland believes ComReg must mandate the creation of an independent oversight body to monitor Eircom’s compliance with its regulatory obligations and, most importantly, require Eircom to establish a functionally separate wholesale unit within Eircom to serve Eircom retail units and external communication providers equally and equivalently with Equivalence of Input products, independent workforce and separated systems.

Way forward – The Independent Oversight Body (IOB)

KPMG and Cartesian propose that an Independent Oversight Body (IOB) is established. The ComReg Call for Input states that Eircom has indicated to ComReg it will come forward with proposals to the recommendations in the reports. BT would like to offer the following comments specifically with respect to the IOB proposal and which we see as absolutely critical to the reforms being required.

1. To ensure ComReg can enforce any solutions it must immediately resolve the issue of the apparent suspension of its ability to apply “Administrative” enforcement powers. The European Regulatory Framework is a comprehensive system of regulation with checks and balances built into it, such as rights to bring complaints, have disputes resolved, non-compliances investigated and questionable decisions appealed. If you have a gap somewhere, then it unbalances the regime and in theory could distort the ability of all parties to compete on a level playing field.
2. We are concerned if the Eircom board control the IOB and it has the remit to set its own rules, this will be in effect a continuation of voluntary regulation which we consider has completely failed. In effect it could be viewed as rewarding Eircom for its past failures.
3. We therefore consider it fundamental that ComReg specifies stronger remedies for equivalence, compliance and in particular transparency, as “more of the same” will not resolve these problems. The remedies have to create and maintain meaningful ‘distance’ between Eircom Wholesale and the rest of Eircom Group and the IOB should be able to observe and monitor this gap

4. The primary role of the IOB should be to monitor the implementation of the new stronger regulatory remedies and compliance with those remedies. In this configuration the IOB could be answerable to the Eircom board, but until such a time there is wider regulator and industry confidence in its operation it must have an obligation to publish in the public domain a detailed compliance report (which is independently audited) on an annual basis. The IOB should also have a mandatory obligation to immediately report the detection of non-compliances to ComReg to ensure it does not risk becoming complicit and compromised in such issues.
5. Regarding composition of the IOB, we accept that the members of the IOB should at least include one senior manager from Eircom to ensure a proper communication path into Eircom, but it should also have independent personnel whose selection has been agreed by ComReg and it should be anticipated that that most of the IOB will not be employees of Eircom. Eircom should not have a dominant membership on the IOB to avoid distorting its outcome.
6. Any material instances of non-compliance with these new stronger remedies should come with strong and meaningful consequences for Eircom. These remedies must provide strong and adequate incentive for compliance in the first place.

Way forward – Functional Separation

The European Framework offers two approaches within the Access Directive³ that permits regulators to apply stronger regulatory remedies in certain circumstances beyond the usual SMP conditions such as price controls and non-discrimination.

- a. The first is Functional Separation (EU Directive Article 13a and Irish Transposition Article 14) – commonly known as mandatory functional separation; and
- b. The second is in effect Voluntary Functional Separation by a vertically integrated undertaking (EU Directive Article 13b and Irish Transposition Article 15).

Our view is the issues highlighted by the RGM, the multiple ComReg non-compliance notices and the KPMG and Cartesian reports are so numerous and in many cases serious that ComReg should now pursue the implementation of Article 14.

It will then be for Eircom to consider whether it will bring forward an Article 15 voluntary solution in lieu of ComReg progressing the Article 14 option. We would be supportive of ComReg progressing the Article 15 Voluntary option if a reasonable and appropriate offer were made. This would not imply legal separation it must be emphasised. However, the package of measures should at a minimum include requirements for full system separation and the independence for wholesale to set its own strategy whilst still part of the Eircom Group.

The IOB should have the essential role of monitoring the implementation of this package of measures and validate ongoing compliance by Eircom at group level.

In the event that an appropriate Voluntary Offer is not forthcoming by Eircom, we believe that ComReg should continue proceedings towards Mandatory Functional separation.

³ European Communities Access Directive 2002/19/EC of 7 March 2002 as amended by Directive 2009/140/EC of 25 November 2009.

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- Annex B. **2011 Eircom Offer of Voluntary Reform**

1. Introduction and Market Background

BT Ireland (BT) welcomes the opportunity to respond to this vitally important consultation. We believe that the two studies commissioned by ComReg by KPMG and Cartesian illustrate not only why current regulatory arrangements are unsatisfactory and prompt the need for regulatory reform in the Irish market, but also more fundamentally why previous attempts at reform to ensure compliance with regulatory obligations appear to have failed.

It cannot be over emphasised that the promotion of an efficient and dynamic telecoms marketplace in Ireland is pivotal to the wider economic health of the country and facilitate not only competitiveness in the world marketplace but also connectivity for all of its citizens. Recent research shows that a truly single and competitive telecommunications market would drive Productivity, Economic and Welfare gains, across the EU28, of €90B *per annum*⁴. Ireland has a large, and growing business sector and demanding sophisticated telecommunications services, has material benefits to gain from a truly single and competitive telecommunications market and hence a key role to play.

In the absence of an effectively competitive market, regulatory remedies, mandatory or voluntary, are put in place in order to 'replicate' a competitive market and to allow transition to effective competition. During this transitional phase, it is imperative that regulatory compliance is not only applied but that it is seen transparently adhered to and working in practice. Only then does the transitional phase provide the necessary regulatory certainty which is required to stimulate competing investments which are the *sine qua non* of the regulatory end goal itself: a vibrant and fully competitive market in which the artificial support of regulatory remedies is no longer required.

The last five years have been extremely disappointing not only in the repeated failure of Eircom to adhere to its mandatory regulatory obligations but also to those voluntary arrangements it put in place itself as well. As just one example, the issue of address matching and which was identified in the RGM simply shows that lessons are not being learnt.

In December 2011, Eircom made a wide-ranging commitment to fundamentally change the way it provided wholesale services to the industry, the essence of which was to ensure that they were done on a fair and equivalent basis comparable to supply to its own downstream businesses⁵. This was at the time of the development of Next Generation Access (NGA) services. In January 2013, ComReg formally imposed a somewhat higher regulatory threshold for these services to be provided on an EOI basis.

✂

BT can provide ComReg with further details of the damage that these non-compliances have caused to our business. We consider it evident that Eircom has not made any serious attempt to meet its own commitment of good regulatory behaviour. We note that ComReg has published nine non-compliance notifications on Eircom and we believe it likely that more will appear in due course

⁴ Page 83, "Business communications, economic growth and the competitive challenge" (WIK – Consult), 2013. http://www.wik.org/uploads/media/Final_Report_BusinessCustomers.pdf

⁵ Eircom Presentation: Voluntary Wholesale Reforms – Overview of Proposal to Industry – Gibson Hotel, Dublin, 13th December 2011. Copy attached at Annex B of this paper.

especially given that inspection of the RGM in detail indicates that many supposed remedies do not always address the original underlying non-compliance.

The findings of the two independent studies confirm our suspicions albeit the situation is in many respects even worse than imagined. It is little comfort to learn that the problems of the past five years have been proven to be systemic and arising not only from inherently inadequate processes to provide services on a non-discriminatory basis, but also of equally weak oversight procedures which allow continuous failure not to be rectified. Altogether it has been an exceedingly frustrating and tiresome experience for BT over this period.

BT has come to the conclusion that the sheer extent of failure at every level following both voluntary commitments and light touch regulatory intervention - requires an escalation in the type of remedy required and that the only viable solution in these circumstances is some form of Functional Separation (FS). This should be proportionate and focussed but there is in reality no better alternative now which will command confidence of industry and ensure that Ireland gets the competitive world class telecoms services that it requires.

2. THE DAMAGING NATURE OF PERSISTENT NON-COMPLIANCE BY EIR

Whilst the reports by KPMG and Cartesian are technical in nature explaining in granular detail the weak governance and operational environment in which the non-compliance has arisen, they provide an objective set of information rather than a subjective view of the issues. We set out below four factors which we consider at least contribute to why the cumulative impact of a multitude of deficiencies at every level is in fact material.

(i) The presence of many regulatory breaches can accumulate

A non-trivial breach may not, on close inspection, turn out to be very important. But the converse can also be the case and the cumulative impact of these failures can be a great deal more than each individually.

(ii) Failures which are of particular importance to entrants

Entrants to telecoms markets rarely attempt to replicate the portfolio of the incumbent across all downstream retail markets and in all geographies. For this reason, infrastructure based entrants who wholesale upstream services typically also rely on only some market segments for their commercial base.

Whilst it may be argued that this is strategic choice which actually allows entrants more flexibility, such choice is only feasible where there is compliance in the relevant markets and service in question. Where there is non-compliance, the financial impact on the entrant will be disproportionate. Telecoms is generally characterised by significant fixity in many costs both of infrastructure and also of support systems. This is shown in economies of scale and scope

(iii) Obstacles facing entrants establishing a distinct brand

Entrants need to be able to differentiate their propositions making use of their own unique assets at both the infrastructure and service levels. Where there are common upstream inputs which many downstream competitors use, it is important that these are supplied to a common standard such that it does not become a source of confusion to customers as to responsibility for failure.

Please see Section 2 Cases 1 and 2.

- (iv) The overall structure of compliance has undermined the confidence of the industry to invest

It can be argued that the failure of Eircom to establish systems and processes capable of identifying where failure was likely to occur and then ensure these could be swiftly rectified has seriously damaged industry confidence in the credibility of the entire regulatory regime in Ireland. This situation position is supported by the KPMG and Cartesian Reports which contain condemnatory findings in relation to these matters.

See Section 2 Case 2.

2. Linking Non-Compliance to Harm to Competitors and Customers

2.1 Introduction

We consider the non-compliance can cause harm to other operators and customers. We have kept the explanations and cases at a fairly high level.

To the layperson the non-compliances that have been documented in the RGM and separately the findings of non-compliance published by ComReg appear technical and of little consequence. However that is often not the case and some can lead to considerable commercial harm both to competitors and customers, including a huge level of frustration to both.

We have selected two specific example cases as follows:

1. Address Matching Discrimination
2. Discriminatory and lessor Fault Facilities provided to competitors

2.2 Case 1 - Address Matching Discrimination

Eircom state in their 1st published RGM document of August 2015 (Dated 10/08/2015) that they offered themselves a richer address matching solution. The following is an extract of the 2015 RGM report.

“Eircom Consumer and Business have access to richer functionality and data for customer address identification and searching than was available to other operators. This information was accessible through a system called AI (Address Interface) and enabled the agents to identify addresses for all customers connected to the Eircom Network (including other operator customer details).” Italics added.

Why is this issue?

Until recently Ireland did not have unique postal addresses for premises and this was more pronounced in rural Ireland where different properties even in different Counties could have the same address on the Eircom address database. Even with the recent introduction of Eircodes, Eircom has not yet fully synchronised its address database with the Eircode system.

When a customer contacts a provider that is not-Eircom for a new service, it can be extremely difficult for that operator to match the address the customer knows and is offering for their property with that recorded on the Eircom systems. This is something which has to be undertaken simply to know the physical location to deliver service. ✂

Examples of Costs that may occur to the Operator

- Lost revenue as sale fails.
- Additional personnel required (and all associated overhead costs) of having people carry out the task of trying to locate the correct address.
- Damage to company reputation. The failure to locate something as simple as an address can give the impression of incompetence.

Examples of Costs that may occur to the End User

- Customer frustration at something that should be simple and straight forward can be hugely frustrating and waste a lot of time – and potentially disruption to their work.
- Customers’ loses choice and may end up experiencing higher ongoing costs by staying with their current provider.
- Customers also may not enjoy service packages that both European and Irish legislation allows them to purchase.

Address matching difficulties was a common occurrence and the lost revenue to the potential new operator can be substantial when the cost per lost customer is multiplied by the total volume of customers lost.

The customer also loses as their right to switch provider may not be fulfilled; they have wasted time trying to help the operator match the address; and they may not enjoy the potential for choice of service, and potentially lower costs and or with different features. Again, when multiplying the harm to each customer with the volume of all customers that have suffered harm the impact may be considerable.

Further delays in Remediating the Discrimination.



2.3 Case 2 - Discriminatory and lesser Fault Facilities provided to other operators.

2.3.1 Introduction to the Case

As below Eircom’s own downstream Retail has a vast array of superior fault resolution advantages over other operators.

2.3.2 The RGM provides the following on the discriminations towards fault repair. These are all extracted from the August 2015 RGM and the only change is to add italics.

“eircom Consumer and Business have access to richer fault information for their customers than is available to operators. This is caused by their native access to FHS which contains some data that is not made available to operators through the UG. This information included items such as Line signature, Capacitance Balance and Fault History prior to service commencement with the current operator. “Italics added.

“Some eircom Retail agents have access to additional line testing capabilities via MLT client. MLT client allows dial tone, noise and overhearing tests to be performed on the line. Other operators do not have the equivalent capability. “Italics added.

“As part of the NGA reviews, a gap was identified whereby downstream businesses had access to the Ops Site. The Ops Site is an eircom Networks site which contains network performance reports for provisioning and repair etc. In general the information is not segregated between eircom downstream and other operators and may contain a richness that is not available to other operators through the UG. A short term solution was put in place at the time involving a Warning Message on the site which restricted use of the site to Fixed Access Operations (FAO) staff and a long term solution which was designed to restrict access based on User IDs was implemented in May 2014. During this process reviews it came to light that staff from eircom Consumer / Business were accessing files on the Ops Site despite the warning message. This was caused by some eircom staff/agents bypassing the front screen security and clicking the URL link (that they had stored as bookmark or link in document etc.) to the actual report which sits on the Ops site. “Italics added

“GT Dashboard is a Networks system that is updated with Outage Notifications/major faults. It also sends notifications to Operators through a ticker message on the UG. Downstream businesses don’t access UG for legacy

products they have read-only access to GT Dashboard to get their outage updates. GT Dashboard contains richer information than is available to operators on the UG. "Italics Added

"Through accessing eTIPs (a Networks system that provides contact details for technicians) eircom Consumer and Business customer care teams directly contacted technicians and got service updates and arranged for out-of-hours repairs or installs to be carried out on an exceptional basis. This capability was not available to other operators. "Italics added

"eircom Business have access to richer information for their customers in relation to provides and faults for Leased Line Products than was available to operators. This is caused by their access to DataPlus which contains some data that is not made available to operators through the UG. This information includes items such as technician comments and status updates. "Italics added

"eircom Business had access to richer information for their customers in relation to provides and faults for Leased Line Products than was available to operators. This was caused by their access to Midas which contains some data that is not made available to operators through the UG. This information included items such as technician comments and status updates. "Italics added

"eircom downstream businesses' faults have different start and end time for faults. This is caused by the SLA clock in fault handling systems for downstream businesses starting 30 minutes earlier (8.30am) than the SLA clock for other operators (9am). For example, this could result in the target resolution times for downstream faults being earlier than those for other operators, where faults are logged prior to 8.30am. "Italics added

"eircom Business had the ability to leave legacy leased line faults in pending clear for a longer time than was available to other operators. Even though eircom Business were encouraged to close these faults promptly they could, however, leave them pending while trying to contact the end customer to confirm that the service had been restored again. "Italics added

"eircom downstream businesses' have different repair parameters for PRA faults. This is caused by a misalignment of the SB-WLR PRA product and the downstream PRA product." Italics added

2.3.2 How do these discriminations create harm to operators and end customers?

We understand that some network faults are a fact of life. However when faults do occur they can be very disruptive to a business or to home life, particularly with the increasing dependence on broadband.

The objective for both the customer and the operator is to fix the problems as quickly and painlessly as possible and for many, the experience can be poor with long delays in restoring service and no knowledge of what is happening. The issues identified by Eircom above in italics highlight that: it provided itself with better tools to analyse faults; it had better information on the cause of the problem; and it had direct contacts to the technician on site to its downstream arms increasing ability for its own downstream businesses to resolve problems more quickly and for keeping the customer better informed.

Examples of Harm that may be Caused

Delays in fixing faults to telecoms services such as Voice and Broadband services can be highly frustrating to end customers both residential and business. The increased dependence on the internet and broadband acts to increase customers' dependence on communications services and the loss of service is increasingly important.

Examples of Costs that may occur to the operator

1. Payment of compensation to customers for extended loss of service.
2. Longer duration faults tend to cause multiple communications between the service provider operator and the customer unnecessarily wasting the time of both. Requires more resource to be employed.
3. Damage to the reputation of the service provider/operator.

Examples of Cost that may occur to the end user

1. For home workers or businesses the loss of service can be very disruptive to their work.
2. Wasted time taking time off work to meet if access to the premises is required on multiple occasions.
3. Potential damage to reputation of customers working from home etc. and business due to lack of communication.

Multiplying the costs of the impact of each fault multiplied by the volume that have delay can lead to substantial losses to both customers and service providers.

3.0 BT's views on the next steps.

3.1 Introduction

We welcome that ComReg is seeking to address the compliance and equivalence issues raised in the RGM. What is clear is that a combination of issues need to be addressed as discussed below.

3.2 Enforcement Powers for the Regulator.

1. For some years ComReg has identified concerns (as submitted to the Law Reform Commission⁶) with its limited powers for enforcement and which appear limited compared to other regulators such as Ofcom. Although we do not know the outcome of the current legal cases between ComReg and Eircom, and we are not commenting on the details of the case, we consider it a positive and commendable step that ComReg is attempting to use the powers (Regulation 19 of the Access Directive (as transposed into Irish Law SI 334 of 2011) it does possess.
2. It is imperative that ComReg have fully functional enforcement powers to ensure Eircom and other Authorised operators uphold the legislation (The Regulations) and the various Decisions it has issued.

3.3 Voluntary Reform

In 2011 Eircom volunteered it would reform and the RGM published August 2015 suggests the reform failed ☒. We conclude the voluntary approach has failed and a new approach is required.

3.4 Continuation of "More of the Same" Regulatory Remedies

In 2013 ComReg (NGA Decision D03/13), in accordance with standard European Regulatory practice, increased the standard of NGA regulatory remedies to the higher Equivalence of Input (EOI) standard. In certain basic aspects of compliance with EOI, such as publishing reference offers, ComReg has even issued non-compliance notices against Eircom for breaching this basic obligation. Many other issues such as address matching indicate that the even the older and weaker Equivalence (EEO) was still failing – ☒. Hence it is clear the standard regulatory remedies are not sufficient to resolve these problems and a different course of action is needed as envisaged by the Directives.

3.5 Way forward – The Independent Oversight Body (IOB)

KPMG and Cartesian propose that an Independent Oversight Body (IOB) is established. The ComReg Call for Input states that Eircom has indicated to ComReg it will come forward with proposals to the recommendations in the reports. BT would like to offer the following comments specifically with respect to the IOB proposal and which we see as absolutely critical to the reforms being required.

1. To ensure ComReg can enforce any solutions it must immediately resolve the issue of the apparent suspension of its ability to apply "Administrative" enforcement powers. The European Regulatory Framework is a comprehensive system of regulation with checks and balances built into it, such as rights to bring complaints, have disputes resolved, non-compliances investigated and questionable decisions appealed. If you have a gap somewhere,

⁶ ComReg published document 16/25 – Response to "Regulatory Enforcement and Corporate Offences" Issues Paper from the Law Reform Commission.

then it unbalances the regime and in theory could distort the ability of all parties to compete on a level playing field.

2. We are concerned if the Eircom board control the IOB and it has the remit to set its own rules, this will be in effect a continuation of voluntary regulation which we consider has completely failed. In effect it could be viewed as rewarding Eircom for its past failures.
3. We therefore consider it fundamental that ComReg specifies stronger remedies for equivalence, compliance and in particular transparency as “more of the same” will not resolve these problems. The remedies have to create and maintain meaningful ‘distance’ between Eircom Wholesale and the rest of Eircom Group and the IOB should be able to observe and monitor this gap
4. The primary role of the IOB should be to monitor the implementation of the new stronger regulatory remedies and compliance with those remedies. In this configuration the IOB could be answerable to the Eircom board, but until such a time there is wider regulator and industry confidence in its operation it must have an obligation to publish in the public domain a detailed compliance report (which is independently audited) on an annual basis. The IOB should also have a mandatory obligation to immediately report the detection of non-compliances to ComReg to ensure it does not risk becoming complicit and compromised in such issues.
5. Regarding composition of the IOB, we accept that the members of the IOB should at least include one senior manager from Eircom to ensure a proper communication path into Eircom, but it should also have independent personnel whose selection has been agreed by ComReg and it should be anticipated that most of the IOB will not be employees of Eircom. Eircom should not have a dominant membership on the IOB to avoid distorting its outcome.
6. Any material instances of non-compliance with these new stronger remedies should come with strong and meaningful consequences for Eircom. These remedies must provide strong and adequate incentive for compliance in the first place.

3.6 Way forward – Functional Separation

The European Framework offers two approaches within the Access Directive⁷ that permits regulators to apply stronger regulatory remedies in certain circumstances beyond the usual SMP conditions such as price controls and non-discrimination.

- a. The first is Functional Separation (EU Directive Article 13a and Irish Transposition Article 14) – commonly known as mandatory functional separation; and
- b. The second is in effect Voluntary Functional Separation by a vertically integrated undertaking (EU Directive Article 13b and Irish Transposition Article 15).

Our view is the issues highlighted by the RGM, the multiple ComReg’s non-compliance notices and the KPMG and Cartesian reports are so numerous and in many cases serious that ComReg should now pursue the implementation of Article 14.

It will then be for Eircom to consider whether it will bring forward an Article 15 voluntary solution in lieu of ComReg progressing the Article 14 option. We would be supportive of ComReg progressing

⁷ European Communities Access Directive 2002/19/EC of 7 March 2002 as amended by Directive 2009/140/EC of 25 November 2009.

the Article 15 Voluntary option if a reasonable and appropriate offer were made. This would not imply legal separation it must be emphasised. However, the package of measures should at a minimum include requirements for full system separation and the independence for wholesale to set its own strategy whilst still part of the Eircom Group.

The IOB should have the essential of monitoring the implementation of this package of measures and validate ongoing compliance by Eircom at group level.

In the event that an appropriate Voluntary Offer is not forthcoming by Eircom, we believe that ComReg should continue proceedings towards Mandatory Functional separation.

Annex A - Analysis of the KPMG Conclusions and Cartesian Recommendations

A.1 Introduction

The objective evidence provided by both KPMG and Cartesian suggests that the current operating compliance and equivalence model within Eircom is not-conducive to sustainable compliance as there are too many areas of the business and systems that are inter-linked, add-hoc in nature or have the potential for a breach to occur to enable Eircom Wholesale to operate non-equivalently to entrants. In addition, Eircom wholesale, still combines (although in a slightly more segregated way) a regulated unit and a downstream commercial unit in direct competition with external operators purchasing wholesale regulated services.

In our view, this structure risks further compliance and equivalence issues and raises the serious spectre of risks to wholesale customer confidentiality. ✂. We consider the Eircom downstream commercial wholesale operation should be completely separated from the regulated wholesale business and not just 'a re-arrangement of the chairs on the deck'. There should also be checks that there is sufficient logical and physical separation of these units to prevent confidential customer information passing between the units.

The issues identified by the reports are so numerous and deep rooted that change to processes and a promise that it will be 'grand' are simply insufficient. Our view is that the voluntary commitment and existing regulation has proven over many years to be inadequate and thus stronger regulatory remedies are urgently required with considerable transparency for all to have confidence that the remedies are working. Stronger regulation, such as independence of Eircom Wholesale and system separation are both required to ensure that it is in practice actually difficult to breach the compliance and equivalence rules.

✂

Fundamentally, we perceive that a cultural change is needed and this will only happen if it is driven from the top of the organisation.

A.2 Analysis of the KPMG Conclusions and the Cartesian Recommendations

We note that the KPMG presentation to BT offered Conclusion and Cartesian offered Recommendations and we have maintained this terminology in our analysis. The analysis is split as follows:

- Part A - A review of the KPMG conclusions with a view to understanding the Governance issues observed within Eircom.
- Part B - A review of the KPMG conclusions with a view to understanding the Governance issues observed within Eircom.

A.3 Part A – A review of the KPMG conclusions with a view to understanding the Governance issues observed within Eircom.

These conclusions were presented by KPMG to BT Ireland in the presence of ComReg and Cartesian on the 20th September 2017 and align with their earlier published document of the 7th July 2017.

KPMG Conclusion 1

Establish an Independent Oversight Body ('IOB'), as a sub-committee of the Board, to be responsible for the robustness of oversight of the full RGM;

BT response

1. We agree there is a requirement to set up an Independent Oversight Body ("IOB") but we consider it should be limited to monitoring and reporting of the implementation of measures set or agreed between Eircom and ComReg and the ongoing monitoring and reporting of compliance matters.
2. We consider ComReg needs to strengthen its investigative role and address manifest shortcomings by Eircom. We have set out a range of measures which imply tighter regulation that makes it far less likely for Eircom to be non-compliant in areas such as discrimination and equivalence. Examples include the independence of Eircom Wholesale and full (virtual) system separation of Eircom Wholesale from other parts of Eircom. We stress that it is empowered only to ComReg to set the rules – by its nature the IOB will not have any legislative powers and we do not envisage the IOB to be more than a monitoring function.
3. With a more limited IOB role of monitor we agree the IOB should be answerable to the Eircom Board however ComReg must have a say in the selection of the members of this body.
4. Until confidence is established in the IOB it must publish into the public domain annual reports of its work and non-compliances detected or reported to it; the nature of the compliance issues; whether serious or minor; and what was done to mitigate the issue. Serious issues should immediately be brought to the attention of ComReg to ensure that the IOB does not become embroiled in the resolution of problems directly.
5. To assist ComReg we suggest reviewing Section 10 of the undertakings that BT committed to Ofcom concerning the details of operation of both the Equivalence of Access Office (EAO) and the Equivalence of Access Board (EAB).

KPMG Conclusion 2

Enhance and maintain the RGM. This will require Senior Management sponsorship, accountability and robust independent assurance on activities overseen by the IOB;

BT Response

We believe consideration is required as to how the RGM could interface with a future IOB as many of the reporting aspects of the RGM could be carried out by the IOB. Additionally, there needs to be more clarity how the RGM will be working with the regulatory and internal audit departments within Eircom. Potentially the RGM could become a part of Internal Audit to ensure regulatory compliance.

KPMG Conclusion 3

Increase the Wholesale Division strategic and operational independence through lower level of reliance on Group governance fora such as the Group Capex Committee, Portfolio Board and Group SMT and Group functions including Regulatory Operations and Group Pricing by strengthening its own decision making fora and operational support functions;

BT Response

1. We consider this to be a very important conclusion and for us a key objective to ensure the Eircom Wholesale Division is focusing on its customer base rather than the wider and often conflicting objectives of the wider group. We consider it is possible to create strategic and operational independence for the Wholesale Division and as part of a wider package of reform this is pivotal to ensuring future compliance and equivalence issues but will require the commitment of the board of Eircom to make it effective. BT has been able to find an acceptable solution with its regulator in the UK which goes way beyond what is suggested here for Ireland and we see no reason why Eircom cannot find a workable solution with ComReg in this matter.
2. Given the size and scale of the relatively recently formed Eircom Wholesale (branded open eir) which now includes networks all under one managing director it should be possible to create independence from the other operating parts of Eircom whilst still be able to meet fiduciary and other obligations to the Group. The creation of virtual separation of systems is a key development and will likely actually offer advantages for wholesale such as simpler systems.
3. Eircom Wholesale already has its own Product Development Council (PDC) and there is no need for this to also have to answer to the Group equivalent which appears to cause sensitive wholesale information to be shared with the PDCs of the other Eircom lines of business, and for group to set the prioritisation. We understand that most wholesale development will go to developers specialising in wholesale systems such as the Universal Gateway (UG), hence there is no need for potentially sensitive wholesale project information to be shared with other lines of business or to even compete with resource as it is already dedicated to wholesale.
4. Shared Wholesale and Retail Pricing team. This is a most serious concern and basically needs to stop. We understand the team has since been split into wholesale and retail but under the same leader which is still not acceptable. Our concern is that there is motive and opportunity for this team to co-ordinate retail and wholesale prices together, hence potentially giving significant commercial advantage to the downstream Eircom businesses. In our view, these functions should be split (including physically) and managed within their own lines of business. I.e. Wholesale should have its own regulatory finance department and there should be no possibility of leakage of wholesale pricing development to downstream retail businesses.

KPMG Conclusion 4

Change Wholesale employee incentives to focus on rewarding Wholesale’s operational and financial performance in isolation from Eir’s downstream businesses. This would include assessment of Wholesale’s performance with regard to both external and internal operational activity and revenues;

BT Response

1. We agree Wholesale employee incentives should only reward for the operation of Wholesale’s operation and financial performance. We agree this would include assessment of Wholesale’s performance with regard to both external and internal operational activity and revenues.
2. We consider this a key objective to stimulating the right behaviour to serving wholesale business and should assist in making the cultural change to protecting the interests and confidentiality of wholesale customer information.

KPMG Conclusion 5

Provide greater transparency to the Wholesale investment prioritisation and product development process and, where possible, remove decision making from Group governance fora or functions;

BT Response

1. ✘ We note Cartesian in its analysis (page 50 of the Cartesian Report) suggests it takes a third longer in time for industry product development requests to be delivered than for Eircom’s downstream businesses taken over a representative sample. We consider this should change immediately and consider that ComReg should investigate this as a major failure of equivalence.
2. Please also see our comments in response to KPMGs conclusion 3.

KPMG Conclusion 6

Consider the most effective way to segregate Wholesale data (both structured and unstructured) at a system level. This can be achieved by either more robust System Access Management and enhanced independent assurance or greater system and data separation (Applications and FileShares); and,

BT Response

1. We expect the initial Eircom response towards the system separation of Eircom wholesale systems from the rest of the Group is to argue that it is too difficult and costly. ✘

2. A second important learning is that there is benefit in untying downstream dependencies in the systems as this opens new opportunities to focus on what is required for wholesale rather than having to consider multiple different downstream systems including some with legacy issues.
3. Legacy issues. ✂
4. We note attempts (documented in the RGM) by Eircom to limit system access to appropriate lines of business have not been wholly successful and staff have not followed instructions so we are concerned again with the apparent poor culture for compliance in Eircom. ✂
5. Following the storm named “Darwin” in February 2014, Eircom had to provide additional manual provisioning information to BT to overcome the additional workload caused by the storm and such was far more informative than previously available via the automated systems. Given the reluctance of Eircom to open the same facilities on the UG we are still doubtful as to whether we are receiving full equivalence in the area of provisioning information.
6. We are fully aware that Eircom has considerable capability for conducting complex projects as demonstrated with its roll out of NGA and in particular Exchange launched VDSL (EVDSL) and consider its well within their capability to set up independent systems/instances of systems to provide an essential distance between Wholesale regulated products and downstream internal businesses.

KPMG Conclusion 7

Implement a formal Three Lines of Defence Model to provide an effective framework for the management of risk and clarity regarding the roles and responsibilities of the monitoring and assurance functions in relation to the RGM. The independent assurance functions should have an appropriate mandate, be appropriately resourced and effective in providing assurance on the operation of the RGM.

BT Response

1. We consider the current environment within Eircom is not yet capable of reliably operating the Three Lines of Defence Model and a number of changes need to be made before this sensible conclusion of KPMG can be effective.
2. There appears to be little penalty or sanction on Eircom employees for breach of compliance which is inconsistent with managing compliance. Without personal consequences it is then questionable why would employees would care about compliance. This also needs to be addressed otherwise the effectiveness of the assurance actions will be undermined.
3. We consider the independent assurance functions should be conducted by a reputable external and independent body (at least in the initial three years) as confidence is low that Eircom have the incentive to actually conduct these properly.
4. It is important Eircom are concerned about the consequences for non-compliance and this needs to re-enforced internally for the assurance proposals to work.

Once the above are in place we can see value in the three lines of defence process as employees will have an incentive to be compliant and confidence that the audits and regulatory function will appropriately address breaches.

A.4 Part B – A review of the Cartesian Recommendations with a view to understanding the Governance issues observed within Eircom.

These Recommendations were presented by Cartesian to BT Ireland in the presence of ComReg and KPMG on the 20th September 2017 and align with their earlier published document of the 7th July 2017.

Cartesian Key Recommendation 1

Document business operational, product development and risk management processes and standardise risk management and control operations within Business Units

Develop detailed documentation for each of the risk management processes identified, based on eir’s regulatory obligations. Ensure well-defined criteria for evaluating and assigning risk impact, probability and risk exposure timing.

BT Response

1. We agree that the processes should be documented as this reduces the risk of ad hoc non-compliant processes and communications taking place and using accredited quality systems should bring consistency. For example, we consider it wrong that wholesale projects have to be reviewed in the sight and potential influence of Eircom’s downstream businesses as appears to be the happening with the Wholesale Product Development Council requests going to the Group Portfolio Board which meets in the presence of the other downstream Product Development Councils.
2. We consider system separation and independence of Wholesale needs to be established and we have addressed in our response to KPMG Conclusion 6 how improvements in technology can assist in this. Once these are achieved we agree the documentation and processes are necessary to lock this in.

Cartesian Key Recommendation 2

Develop process standards, escalation criteria, and exception tolerances

Create standards for critical processes, such as for defining exceptions and escalations, and accepting new products for development. This will ensure that all groups carry out their tasks consistently, and that external stakeholders understand the criteria used for making decisions

BT Response

1. We note that the process for accepting new products for development has improved, documented and put onto a Web portal. However, we still have serious concerns how certain projects are prioritised initially and how such priority is maintained as they move through the development path. We are most concerned as to the Cartesian finding that industry projects take a third longer to develop and consider this is something that ComReg should commence investigation for equivalence. We do not accept that industry projects are more difficult as some of the Eircom proposed projects have been considerably complex.
2. We therefore agree with Cartesian findings; however Eircom need to openly discuss and agree with industry how prioritisation will work going forward as it does not appear equivalent at this time. The linkage of the wholesale Product Development Council to the Group Product council needs to be ceased immediately.
3. We need more certainty as to what has been requested will be delivered and we need to see confirmed details of what is actually going to be delivered at an earlier stage in the process. We have experienced outcomes such as to WRAP 23 that were never completed and numerous attempts to have this project completed have failed. To the layman this appears meaningless; however, it prevented BT from determining in many instances whether a new customer broadband service could be deployed over LLU vs Bitstream and had significant commercial implications.

Cartesian Key Recommendation 3

Develop a transparent process for handling operator requests

Create a transparent process for managing Operator requests that will avoid protracted development delays, identified in several of the product cases reviewed. This process should be based on clear and objective standards, well-defined stakeholders and roles, milestone points and entry criteria. There should be strong independent oversight of the management of product development, which is required to ensure transparency and fairness to all operators, including eir. This should be supported by adequate evidence retention.

BT Response

1. Please also see our response to Cartesian Recommendation 2.
2. We agree with this recommendation but based on a difficult history of product development we have serious concerns as to whether Eircom has the willingness to accept strong independent oversight. In view of this concern we consider that the regulator must create regulatory remedies to force such oversight otherwise we believe this recommendation simply will not be sustainable.
3. We need to see transparency of decisions as the opaqueness around issues such as prioritisation is undermining confidence in any improvements that are being made.
4. Additionally, all projects must be clearly identified from the outset; we have on occasions noticed poorly defined projects which immediately suggest to us something is being slipped through. This must stop and all projects must be clearly identified from the outset with full information available.

5. Another issue that we consider must cease is the introduction and sale (including price) of future regulatory products during the commercial bid process by Eircom Wholesale. We experienced this with the WUP product and received pricing and product material close to the bid closure date. The late nature of the timing and lack of detail meant that BT could not use this future regulatory product in our bid to the same customer. Additionally, if we had won we had no contractual certainty that Eircom would then supply it to us. We raised a complaint to ComReg at the time.
6. If new regulated products are needed, compliance with equivalence requires this should go through the correct regulatory procedure so all can bid equally.

Cartesian Key Recommendation 4

Increase visibility of the RAP prioritisation process

Implement a RAP prioritisation process that includes detailed documentation, clear assessment and decision criteria with decision milestones identified in the product development process.

BT Response

1. ✂
2. Please also see our earlier responses.

Cartesian Key Recommendation 5

Reduce dependency on forums to progress projects

Review the current industry engagement models to streamline the operation of various channels, including account management for industry and downstream eir. Introduce a project management discipline and standards on all industry participants.

BT Response

1. We partly agree with reviewing the industry engagement model but consider dependency on a new forum structure should be increased to progress projects rather than reduced. We believe reducing the dependence on the forum would gift Eircom a divide and conquer opportunity. Having product discussions in the forums at ComReg, in the presence of the national regulator ensures proposals receive an open hearing from various operators (large and small) with varying requirements and interests and this reduces the risk of discrimination and further equivalence issues being coded into products.
2. However that said, we consider there is scope for the addition of an independent trusted body – reporting to ComReg to actively and continuously track the progress of projects and ensure that project management is working with the powers/agreement to refer problems to the regulator as necessary.

3. The UK operates the Telecom Adjudicator scheme and which reports to Ofcom and takes the role of facilitating industry product development discussions, allowing the regulator to focus on policy etc. The Telecom Adjudicator reports to Ofcom which ensures its independence.
4. However, we still cannot accept the previous 2011 offer of Eircom that it should control a Telecoms Adjudicator function with the industry paying for it. This does not achieve the requirement for independence.
5. We consider all the meeting should be held at a neutral location such as the Regulators Offices so that all can have their fair say, which we believe does not always happen when we move away from ComReg's offices.

Cartesian Key Recommendation 6

Design controls for simplified and comprehensive management

Design controls to simplify evaluations and improve assurance. Reporting of control operations and outputs should be standardised to simplify tracking of control operation, and assurance reviews.

BT Response

1. We agree with these recommendations and are surprised as these should in any case form a fundamental part of a proper quality system and without which we would have serious concerns as to whether Eircom can deliver any outputs or sustainable regulatory compliance.
2. The dependency on documented procedures and process becomes even more important in light of any Eircom personnel turnover.

Cartesian Key Recommendation 7

Trend control results

Develop a process for trending of control evidence results to identify consistently failing controls. Implement escalation processes for failed controls, increase standardisation and oversight into BUs, and define roles of IA and C&E.

BT Response

1. We agree with this Recommendation as such provides a high level indicator and confidence that the controls to achieve sustainable compliance are working. In particular it is important that the controls are independently audited on a regular basis with critical controls audited on a more regular basis.
2. In our view the oversight must be truly independent for this to work and please see our comments on the IOB.

Cartesian Key Recommendation 8

Maintain visibility of all KPI-reported transaction records. Maintain an audit trail for the processing of all the transaction records for KPI reporting, to ensure that all records are accounted for. This will ensure a clear understanding of which records were excluded from the calculations in the KPI reports, and the reasons for such exclusions.

BT Response

1. We were surprised and concerned to note in the Cartesian report that there appeared to be gaps in the documentation for the development and operation of KPIs. The Regulator and the Industry is dependent on some of the KPIs for monitoring equivalence and if the monitoring is not working there can be even less confidence that Eircom is providing its regulated services equivalently.
2. We consider this Recommendation should be acted on immediately so that an accurate account of equivalent offers can be ensured.
3. We are further concerned to ensure that Eircom should publish the definitions and formulas of exactly what is being measured in the KPIs.
4. Separately there needs to more openness about the development of the definition of KPIs than emanating just from bi-lateral discussions between Eircom and ComReg. Operators run live networks and often have the operational detail of the nuances in how something is measured and this can add further value to what the KPI is presenting.

Cartesian Key Recommendation 9

Implement independent oversight over critical processes and outputs

Because of the nature and extent of the deficiencies in the operational governance of Regulated Access Products (RAP) development and RMCF, Cartesian believes there should be robust, independent, competent oversight of these and the operation of all regulatory matters covered by this report. The provision of oversight will require operational support of an independent, adequately resourced, proactive regulatory assurance capability.

BT Response

1. We agree with both the Cartesian Recommendation and the similar conclusion of KPMG for the need for the implementation of Independent Oversight Body (IOB) including mandate over critical processes and outputs. We have explained both our reasons and concerns to ensure this is successful in response to KPMG Conclusion 1, Section 3 and the executive summary.

2. Subject to our concerns on the issue of an Independent IOB, we agree with the Recommendation of Cartesian that the provision of oversight will require operational support of an independent, adequately resourced, proactive regulatory assurance capability. This will be a difficult job and it is important that it is appropriately resourced with the required expertise and quantify of people to do the job properly.

Annex B – ✂

✂