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Submissions to Consultation

Rental Price for Shared Access to the Unbundled Local Loop

Submissions received from respondents

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Response to ComReg Doc. 08/23:

Rental Price for Shared Access to the unbundled Local Loop

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EXECUTIVE SUMMARY

- The role of regulation in the electronic communications sector is to foster efficient investment and sustainable competition. It is eircom's view that this can only be achieved by ComReg following an approach that is technologically neutral. This means that ComReg should not set out to encourage the use of Line Share or other LLU products without first establishing that this is the appropriate course of action. It also requires that ComReg conducts a proper market analysis considering all relevant factors including the existence of alternative infrastructure. Operators should be free to choose among cable TV, Fibre, wireless solutions including mobile (GSM and 3G). Regulation should not be designed to bias decisions in favour or a particular technology or to unduly advantage a particular operator who may now wish to avail of Line Share.

- eircom disagrees with ComReg's analysis of the situation in the Irish broadband market and considers that ComReg has not supported its reasoning with appropriate evidence. In particular, eircom disagrees that the price for Line Share is excessive and/or that the price of Line Share has impeded broadband growth in Ireland. Far from being excessive having regard to the method of allocation of common costs used in accordance with Decision Notice D8/01, the current price does not allow for the recovery of the incremental costs arising from the fact that the line is shared.

- eircom disagrees in this regard in the strongest possible terms that the current price for Line Share leads to an over-recovery of cost. eircom's Regulatory Accounts clearly show that eircom does not over-recover its costs.

- ComReg cannot compare relative prices while applying inconsistent approaches to wholesale pricing for ULMP, Line Share, Single Billing - Wholesale Line Rental and to regulation of retail access products.

- Furthermore, the current price for Line Share results from the methodology set out in Decision Notice D8/01 notably concerning the allocation of common costs. This Direction is currently in force and requires eircom to allocate 50% of the cost of the local loop to Line Share rental. This is what eircom does. It does not lead to over-recovery. It is simply an allocation. ComReg has not explained why the methodology set out in Decision Notice D8/01 has suddenly become obsolete and to such an extent that an interim price based on arbitrary benchmarking represents a better alternative in achieving a cost-oriented price.

- eircom disagrees that a change to the rental price for Shared Access to Unbundled Local Loop is urgently required. We note that the current price methodology is in place since 2000 and has not been changed since, despite a review in 2004. eircom is not aware of a relevant trigger event which would require that the earlier economic analysis be abandoned and replaced with an arbitrary "benchmark". eircom is strongly of the view in this regard that the fact that one operator may have changed its strategy and may now wish to avail of Line Share but at a different price is not in and of itself a consideration that is open for ComReg to take into account.

- eircom understands that the now overdue market analysis of wholesale unbundled access to the local loop is currently underway and will include a full review of the full ULMP rental price and all associated prices including Line Share. Any change in Line Share price should be based on proper analysis. eircom submits that ComReg may only amend the methodology used to arrive at the price for Line Share following a market analysis in accordance with the Framework and the Access Regulations. Any amendment otherwise adopted would constitute an unlawful use by ComReg of its powers.

- In addition, ComReg's proposed methodology – setting the price for Line Share at the average of the prices practised in 14 EU Member States – does not comply with the requirements set out in the Access Regulations and in the Access Directive as interpreted by the European Commission in the context of the Article 7 procedure. The European Commission in particular requires in relation to benchmarking that the NRA concerned justifies the choice of the comparator countries with regard to an objective set of carefully selected criteria. In addition, where the relevant obligation is one of cost-orientation, only cost-based prices can serve as a basis for comparison. These requirements are clearly not met by the benchmark chosen by ComReg.

- ComReg's inappropriate benchmark results in a price which is absolutely disconnected from eircom's relevant costs and which is arbitrary. Because it does not reflect the conditions in the Irish market and ignores entirely important policies such as the allocation of common costs between narrowband and broadband products, this price will send misleading signals to the market, ultimately to the detriment of consumer welfare. eircom accordingly rejects ComReg's conclusion that prices in Ireland should be set at a simple average benchmark of prices for similar products in an arbitrary set of countries.

RESPONSE TO CONSULTATION QUESTIONS

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

eircom understands ComReg's reasoning to be as follows:

- Ireland is at the lower end of the scale for broadband roll-out compared with the EU 15 countries and one factor contributing to the low take up is the high price of Line Share as compared with most EU 15 countries;
- The high price of Line Share is due to the use of an inappropriate methodology set out in D8/01 where the underlying cost of the entire local loop is shared equally between voice and data with lines rented under LLU Line Share being effectively treated as half lines;
- It is inappropriate because it gives too high a price for Line Share as compared with eircom's broadband product and because it results in a price which seems to represent an over recovery of cost when narrowband access revenues are taken into account, in circumstances which may be conducive of a margin squeeze;
- It did not matter before because there was little demand for Line Share; this has now changed, with demand from one operator, requiring that the supposed inadequacies of D8/01 be addressed immediately.

eircom disagrees with ComReg's reasoning on two main counts. First of all, the factual basis for ComReg's reasoning is either unsubstantiated and/or inaccurate therefore raising serious doubts on the integrity of its analysis. eircom would in particular point to the following:

- eircom disagrees that Ireland is at the lower end of the scale for Broadband **roll-out** with the EU 15 countries and does not believe that the Report of the European Commission cited by ComReg (COCOM07-50, European Commission: "Broadband Access in the EU: Situation at 1 July 2007") supports ComReg's belief: the Report does not deal with broadband roll-out or availability but primarily with retail demand and reliance on various methods of wholesale access. In addition, the Report rather suggests that the conditions in Ireland are currently conducive to rapid growth of fixed broadband, contrary to ComReg's beliefs. The Report thus highlights that "*growth was highest in Demark, followed by Luxembourg and Ireland*", with "growth" referring to absolute growth in terms of lines per 100 population, and not simply a percentage of a low base.

- ComReg offers no evidence to support its belief that the alleged low take up in Ireland is due to the comparatively high price of Line Share. There are many other factors which may explain low take up in Ireland, including low PC penetration, an absence of relevant internet services for end users, excessively low prices for dial-up internet and leased lines, and relatively high, but fully cost justified, prices for full unbundling. eircom also refers to our response to Question 3 where we show that there is no correlation between the price of Line Share and broadband penetration and take up. In addition, while the recurring price for Line Share service in Ireland is higher than other countries of the so-called "EU15", eircom considers that it is not appropriate to describe the price in Ireland to be "expensive" without taking into account the relative price levels in each country. Ireland is a high cost economy, and many prices, from newspapers to Regulatory levies, are much higher in Ireland than in other EU states.

- ComReg's assertion that there are 2,111,814 fixed lines in service in Ireland is misleading in the context of a local loop unbundling. We believe 2,111,814 is the approximate number of fixed paths, including those which cannot be shared by way of LLU Line Share, such as ISDN lines. (ISDN uses the full spectrum of frequencies on the copper line, and as such an ISDN line cannot be shared with a broadband service. ISDN lines provided using Basic rate access are counted as two paths. ISDN lines provided as fractional rate or primary rate may result in between 15 and 30 paths.) In addition, many fixed lines are now provided by Cable TV networks, or by wireless operators. This means that the actual number of copper pairs in service providing PSTN service, which are available for sharing, is closer to 1.5 million, or almost 30% less than the figure quoted by ComReg.

Secondly, eircom fundamentally disagrees with ComReg's suggestion that the methodology currently used to determine the price of the Line Share product, as set out in D8/01, is inappropriate because it produces too high a price as compared with other countries but also as compared eircom's wholesale broadband products. eircom does not agree with ComReg's view that the current price for Line Share allows eircom to over-recover its costs thereby creating the circumstance for a margin squeeze. We address ComReg's argument in further details below.

- First of all, it is inaccurate to describe the methodology set out Decision Notice D8/01as resulting in "lines rented under Line Share being effectively treated as half lines". In fact, Decision Notice D8/04 states that "The line rental cost for the line sharing product is set at 50% of that for the unbundled local metallic path. The economic argument for this approach is set out in Appendix 1." Appendix 1 in turn examined 5 alternative approaches to allocation of common costs where multiple services utilised the same facilities. Two of the approaches, Ramsey Pricing and Efficient Component Pricing rule (ECPR) were rejected as being impractical. The three other approaches include Co-operative Bargaining Theory, Shapley allocation, and Share of the Stand-alone costs. The ODTR argued that each of these three methods led to the same conclusion that common costs should be shared equally where two services use the same facility. The ODTR did not make any allowance for incremental costs associated with Line Share.

- In this context, eircom disputes that any over-recovery of costs occur under the current pricing methodology and notes that ComReg has not provided any evidence whatsoever that this is the case. (eircom accepts that this is indeed difficult to do while applying inconsistent approaches to wholesale pricing for ULMP, Line Share, Wholesale Line Rental and to regulation of retail access products). eircom would also like to point out that the current price for Line Share does not allow for the recovery of the incremental costs arising from the fact the line is shared.

- Thirdly, the situation, even where described in the terms chosen by ComReg, is not "conducive to the creation of a margin squeeze" as ComReg believes. A margin squeeze occurs where the price charged in the upstream market by a vertically integrated operator does not enable its competitors to operate profitably in the downstream market, having regard to the integrated operator's downstream prices. eircom notes that no reference is made to its retail prices in the Consultation Document and that in any case the price of its Bitstream product is determined in accordance with ComReg Decision Notice D1/06 precisely with the purpose of avoiding margin squeezes. In this context, the issue concerned is not one of margin squeeze but one of the relationship between two (regulated) wholesale prices. A number of observations are called for:

  - To the extent that ComReg is concerned with the differential in price between Bitstream and Line Share, as Line Share could be used by operators to offer a range of products, and in fact is most likely to be used to offer services based on ADSL2+ technology in excess of 8Mb/s, eircom would suggest that a more appropriate basis for price comparison would be the price of eircom's 12Mb/s Bitstream product, currently €75 per month.

  - As suggested above, however, properly considered, the issue raised by ComReg arises from the co-existence of various wholesale products priced according to different methodologies. eircom, which, as ComReg would be aware, has repeatedly called for cost-based regulation of Bitstream prices, is of the view that an adequate framework for encouraging efficient investment calls for consistent price regulation of access products based on their costs. This means that any inadequacy between various wholesale regulated prices cannot be reviewed independently of each other and the price for Line Share cannot be reviewed "in parallel" of the review of LLU and Bitstream prices. This is a matter than can only be addressed in the context of the full review of the broadband access markets, including LLU and Bitstream. Revoking Decision Notice D8/01 before completing this review is entirely inappropriate.

- eircom does not understand ComReg's view that the inadequacy of wholesale prices relative to each other did not matter before but matters now because one operator appears to have changed its strategy. eircom strongly objects to any intervention by ComReg under the regulatory framework motivated by the individual requirements of an operator. ComReg's role is to regulate certain markets in order to foster competition and efficient investment. This means that it is ComReg's role to create the proper conditions for investment including by setting appropriate prices for various wholesale products, where justified. According to the ERG itself:

  > "*the NRA has the ability to change the incentive properties of the regulatory framework over time but must do so in a predictable and transparent manner so that business decisions can be planned accordingly*."[1]

  In other words, operators should decide their strategy having regard to the regulatory framework, including available regulated products – not the other way around. We return to this issue in our response to Question 5.

[1] Revised ERG Common Position on the approach to Appropriate Remedies in the ECNS regulatory framework, Final version, May 2006, p. 63.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

eircom disagrees with the premise of the question, which alleges an over recovery of cost, in disregard of Question 1. As explained in our response to Question 1, no over recovery of cost exists.

eircom also strongly disagrees that revoking Decision Notice D8/01 is an appropriate course of action at this point in time. On the contrary, eircom is of the view that, for the reasons set out below, revoking Decision Notice D8/01 in the manner suggested by ComReg would constitute a decision in excess of its powers and would accordingly be unlawful.

ComReg appears to argue that revoking Decision Notice D8/01 is needed now because the changes in market conditions are such that amending the price for Line Share cannot await completion of the analysis of the markets for LLU and Bitstream. eircom contests that the changes to which ComReg refers are, in and of themselves, changes which can justify an amendment of eircom's obligations such as the one proposed by ComReg in the Consultation Document. We refer to our response to Question 1 in this regard.

In addition, revoking Decision Notice D8/01 and imposing a new method for the determination of Line Share price clearly amounts to amending an obligation which has been imposed on eircom following ComReg's finding in Decision Notice D8/04 that eircom has significant market power on the market for wholesale unbundled access. (And it is not accordingly tantamount to "specifying an obligation" for the purpose of Regulation 17 as ComReg appears to suggest in the Draft Decision Instrument.)

In this regard, while ComReg points in the Consultation Document to Section 12 of the Communications Act, 2002 which sets out the objectives of ComReg in exercising its functions, the procedures and means by which ComReg can achieve these objectives must conform to those set out in the Framework and Access Regulations. As ComReg is no doubt aware, the Framework Regulations require that prior to imposing, withdrawing or amending an SMP obligation a market analysis in accordance with Regulation 27(2) is carried out. The purpose of such market analysis is precisely to take account of changes in the market. This is why also market analyses must be carried out *regularly* and in any case as soon as possible after the European Commission publishes a recommendation on the relevant product markets to be reviewed (cf. Regulations 26 and 27 of the Framework Regulations). eircom refers to the Recommendation of the European Commission of 17 December 2007 where the Commission explained thus:

> *"The definition of relevant markets can and does change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change. With the Recommendation 2003/311/EC having been in force for more than four years, it is now appropriate to revise the initial edition on the basis of market developments."*

In these circumstances, it is clearly not possible for ComReg to argue that the changes in the broadband market since 2007 (or 2004 or 2001 for that matter) justifies that it does not first complete the market analysis of the relevant markets concerned. Market reviews are precisely meant to take account of those changes in the "market dynamic" referred to by ComReg.

eircom further notes that interim measures can only be adopted pursuant to Regulation 20(8) of the Framework Regulations which, any case, ComReg has not invoked. (eircom agrees that in any event the circumstances in which Regulation 20(8) is applicable are not met, namely that "there are exceptional circumstances justifying an urgent need to act" – such that the Regulator is dispensed of the need to consult: Regulation 19(2) of the Framework Regulations.)

Q. 3. Do you agree of disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

The Consultation Document includes, pp. 7-8, four figures illustrating variations across the EU 15 Member States in the provision of broadband according to different criteria, including Line Share pricing, broadband penetration and DSL access share. ComReg concludes on the basis of these four figures that LLU Line Share in Ireland is expensive and suggests that this excessive price explains Ireland's comparatively low broadband penetration. For the reasons set out below, eircom disagrees that the figures relied upon by ComReg support these conclusions.

First of all, as noted in our response to Question 1, Ireland is a high cost country and many goods and services have higher nominal prices in Ireland than in other countries. In this context, any meaningful comparison ought to be based on an analysis which involves the use of purchasing power parity (PPP). In addition, and very importantly, ComReg ignores the fact that the (cost-based) price for LLU in Ireland is higher than in the other EU 15 Member States and that, in this context, the price for Line Share as compared with the price of LLU is similar, and even lower, than in other countries.

It is thus apparent from Figure 2 that Line Share recurring charges as a percentage of the full unbundled price range across the EU 15 Member States from **5% to 60%**, which in itself is an incredibly broad range. As in Ireland, a ratio of 50% applies in Denmark while in two of the arbitrary countries selected by ComReg (Sweden and Finland), higher percentages of 56% and 60% respectively apply. We note that a comparison of Line Share percentage across all EU countries (excluding Ireland) would reveal the highest percentage at 76%, while the simple mean is 47.4%.

We further note that these three countries are among the four countries with the highest broadband penetration rates per 100 population in July 2007.[2] While this might suggest that a high percentage allocation to Line Share is correlated with high penetration, however, the second highest penetration rate is achieved in the Netherlands, where Line Share price is set at 5% of the LLU price. We therefore conclude that there is no correlation between percentage share and penetration rate.

On the basis of the figures included in ComReg's Consultation Document, no correlation appears to exist either between the absolute level of Line Share price and broadband penetration rate (although the absence of correlation may be explained by the fact that the comparisons as mentioned above do not take account of the general level of prices). Thus, Sweden, Denmark and Finland have among the highest absolute level of Line Share price. Austria, which has the second highest absolute level, and a percentage of 49% of full LLU, also has above average penetration of broadband. Belgium, which has a high penetration per 100 population, has a similar proportion of Bitstream to Ireland and Spain, with the third highest use of Line Share, is on par with Ireland for broadband penetration.

It is clear accordingly that ComReg's conclusion that eircom's price for Line Share is comparatively expensive is simplistic and does not reflect in any way the incredibly broad variation of LLU pricing across the EU 15 Member States used (arbitrarily) for the purpose of the comparison.

[2] COCOM07-50, as cited by ComReg above.

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

eircom continues to reject the promotion by ComReg and the European Regulator Group (ERG) of the "ladder of investment" concept in consultations and ERG Common Positions. As eircom, in concert with members of the European Telecommunications Network Operators Association (ETNO), has argued in submissions in relation to the ERG's broadband reports, the concept of a 'ladder of investment' was originally set out in a number of policy papers in Europe.[3] It does not, however, have a rigorous theoretical underpinning in economics literature and some of the early proponents of the approach, including Martin Cave, have now revised their views[4]. Empirically speaking, the 'ladder of investment' concept is also at odds with experience in markets where no 'ladder' is required for entry to occur provided provision is made for access to non-replicable facilities. eircom notes thus that in Ireland, contrary to what the theory suggests, not only none of the operators utilising full unbundling ever used simple resale, but also in fact all bar one moved to unbundling before taking Bitstream services.

The 'ladder' thus is at best a metaphor to describe the regulatory policy-making belief that allowing access to different levels of existing access network infrastructure eventually will lead to entrants investing in their own access networks. Oldale and Padilla,[5] in a review of the pros and cons of antitrust in deregulated markets published by the Swedish Competition Authority, compare the 'ladder of investment' to the now discredited notion from trade theory in the 1970's of "infant industry protection". The following extracts from their paper summarise the reasons for their conclusion:

> "*The "ladder of investment" theory places on regulators a heavy responsibility – not only must they act to make sure that consumers are protected in the short term, but they must also manage the evolution of market structure. This would be a challenge even in a well-understood and stable industry. And even more so in industries, such as the electronic communications industry, that are neither well understood nor stable."* [p. 71]

> *"The proponents of the "ladder of investment" appear to believe that, despite their undifferentiated offerings, those access-based entrants will be able in the short run to acquire an installed base of customers on which to make positive rents, and that those rents will allow them to develop their own networks step by step, so that over time the access-based entrants become infrastructure competitors. According to this view, in the long run, the markets subject to intervention will remain fragmented but populated by competitors who own their own facilities. But is it reasonable to expect that entrants offering relatively undifferentiated services succeed in the marketplace, accumulating the rents that could allow them to develop their own networks? Is it possible to reconcile market fragmentation with sustained investment and innovation? The answer to both questions appears to be a qualified no."* [pp. 74-75]

In addition, and in any event, as ComReg would be aware from the 2004 paper cited in the Consultation Document – "*Making the ladder of investment operational*", hereafter the Paper – applying the principles of the ladder of investment concept is a delicate exercise that requires a very careful assessment of market conditions. eircom refers in particular to the seven steps set out in the Paper. Step no. 1 in particular requires to rank replicable components of the value chain for relevant products by their case of replicability on the basis of empirical evidence or modelling of cost structure while Step no. 4 requires the regulator to "*choose the mode of intervention, which can be […] either based upon rising access prices (relative to cost) subject*

[3] Martin Cave and Ingo Vogelsang. November/December 2003. "How access pricing and entry interact". Telecommunications Policy, Volume 27(10-11), pp. 717-727.

[4] Martin Cave December 2004. "Making the ladder of investment operational", paper presented to European Commission.

[5] Alison Oldale and A. Jorge Padilla. 2004. "From state monopoly to the "investment ladder": competition policy and the NRF." In "The Pros and Cons of Antitrust in Deregulated Markets", Konkurrensverket, Swedish Competition Authority.

to a short transition period where necessary, or upon the projected withdrawal of mandatory access". The ERG has also highlighted that "*when implementing the ladder, NRAs need to customise it in terms of timing, pricing and product design to national circumstances and take into account structural/exogenous factors such as disparity of population density or the existence/non-existence of alternative network infrastructures as well as the development of the market*." None of these analyses and considerations appears to have been considered by ComReg.

It is difficult to see in these circumstances how ComReg's proposal to modify Line Share pricing and reduce it after eight years with no thorough analysis of the markets concerned and of the potential impact of the reduction in terms of investment incentives, having regard in particular to the relative difference between Bitstream and LLU prices relative to costs, can be said to be based on the ladder of investment approach. (We refer further to our response to Question 5). The ladder of investment approach clearly does not support prices based on arbitrary benchmarking.

More generally, eircom would note that, perhaps, it should welcome biased regulation that encourages other operators to rent eircom's assets rather than building their own infrastructure, where it is economic to do so. However, eircom cannot agree that encouraging investment in LLU should be ComReg's policy. ComReg should encourage economic efficiency by giving the correct economic signals. In many cases, investment in LLU may be viable but investment in other technologies (Bitstream, shared loops, Cable TV, Mobile networks, other wireless networks or optical fibre build) may be more economically efficient. Certainly, the ladder of investment theory does not support that ComReg distort the market purely to increase the number of unbundled loops in Ireland.

Q. 5. Do you agree or dis-agree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

eircom disagrees with the premise of the question which suggests that Decision D8/01 includes an anomaly in need of amendment. eircom refers in this regard to its response to Questions 1 and 2 above.

eircom agrees with the principle that inter-platform competition should not be distorted and that ComReg must ensure its decisions do not cause any such distortion. Inter-platform competition, where alternative operators use their own infrastructure, is the most sustainable form of competition and should be encouraged, not discouraged, by regulation.

However, to the extent that ComReg meant to ask whether respondents consider that the proposed direction to reduce Line Share rental to a price reflecting the simple arithmetic average of the Line Share prices practised in 14 other EU Member States would negatively impact competition from other platforms, eircom disagrees with ComReg's conclusion that inter-platform competition would not be impacted.

We must stress that eircom agrees with the principle that competition will not be distorted if the full cost of a fully unbundled loop, or a shared loop, is recovered in aggregate. However, eircom considers that the correct way to ensure this is the case is to conduct the appropriate analysis of costs in Ireland, and not to apply a simple average of the prices applied elsewhere. eircom accordingly does not agree with ComReg's proposal to replace the methodology set out in D8/01 and note that ComReg has not explained how a benchmarking exercise leading to a price entirely divorced from costs is less likely to distort inter-platform competition (other than by pure coincidence) than a cost-based method such as the method set out in D8/01.

Inter-platform competition will not be distorted only if the price of LLU and Line Share reflects the appropriate cost of a shared loop. In eircom's view, the appropriate cost of a shared loop should encompass both the incremental costs of line sharing and an appropriate share of common costs. If no appropriate analysis is made of these factors in deciding the price for Line Share, the price, because it is not based on costs, will be arbitrary and accordingly likely to cause competitive distortions as, in all likelihood, it will be too low or too high.

If it is too high, use of Line Share would be discouraged, and alternative, inefficient solutions (Bitstream, full unbundling or own infrastructure) may be adopted. If the proposed price were too low, inefficient use of Line Share would be erroneously encouraged. In this regard it appears to eircom that ComReg in advocating the reduction in the Line Share price is doing so in order to artificially encourage greater 'intra-platform' competition (between alternative users of eircom's copper loops) in a manner which will (albeit unintentionally) distort 'inter-platform' competition (for example between copper loop based broadband services and wireless based broadband services). By mandating a significant reduction in price, which is not based on rigorous economic analysis but instead on an erroneous assumption of over recovery of costs and a simplistic application of price benchmarks, ComReg may encourage economically inefficient investment in local loop based assets which will then compete with other platforms (including wireless) and diminish the investment case for these platforms, ultimately to the detriment of consumer welfare. It is also to be noted that a price, unsubstantiated by the required analysis, will also distort investment in local loop assets and may ultimately reduce investment in such assets.

Furthermore, the market will react not only to the new level of Line Share rental price, but also to the direction of movement from the current price. If the new price were an increase, further increases might be anticipated. As the new proposed price is a very substantial reduction, further very substantial reductions may be anticipated. Such anticipation may drive operators' decision making. If the forthcoming analysis were to result in an increase in Line Share price, even a small upward change might prove that many operators made wrong decisions based on misleading market signals.

If ComReg were to move to a new price for Line Share and commit to maintaining the benchmarking approach for the foreseeable future, market distortions are likely. If ComReg were to move now to a price based on a faulty benchmark, but to commit to using a different, unspecified methodology within the next twelve months, market distortion is absolutely certain.

ComReg may note in this regard the comments of the ERG in the Remedies Paper:

> "*The setting of access prices is a complex task. If access prices are set too low then there is a risk that the new entrants will not have an incentive to roll out their own infrastructure (nor will the incumbent have sufficient incentives to upgrade and maintain their network). There is also the danger of inefficient firms entering the industry. This factor is especially important where new technologies or networks are being deployed as the NRA tries to encourage efficient investment in infrastructure and promote innovation. On the other hand, if access prices are set too high, otherwise efficient new entrants may be dissuaded from entry and there is also the danger of inefficient investment. Thus, NRAs will have to keep in mind the impact of their decisions on the incentive to build, in instances where replicability is feasible. This will require, for instance, a consistent pricing structure when more than one type of access is offered*.
>
> *NRAs must still deal with the issue of how to give new entrants the incentive to roll out their own infrastructure. NRAs may have to signal in their reviews that they view some remedies as bridging a gap so that new entrants can more easily make incremental investment but that market players cannot base their long-term business models on the basis of these remedies alone.*"

We consider ComReg's proposal will undermine the market economics and result in inefficient allocation of resources. This may be extremely damaging to the development of the Irish economy.

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

Section 4 of the Consultation Document to which Question 6 apparently refers deals with a number of approaches to cost recovery and appears to conclude as follows:
- there is no one costing methodology for LLU Line Share pricing;
- it can be assumed that the allocation of costs common to the low frequency and high frequency portions of the local loop should be entirely allocated to the low frequency. This approach is consistent with the approach adopted by a number of European authorities; and
- there should be no over recovery of cost.

As mentioned in our response to Question 5 in particular, eircom does not disagree with the principle of full recovery of costs and the principle of no over recovery of costs. eircom considers however that the main issue in this regard does not concern those principles as such but their implementation. In this regard, ComReg has not provided any argument as to why the economic analysis set out of D8/01 has suddenly become invalid. Even more importantly perhaps, ComReg has not provided any explanation as to the reasons why the price it now proposes, calculated as the simple average of the price of shared access in the EU15 Member States, is likely to achieve a level of cost recovery which is more appropriate than the result based on the method set out in D8/01.

Insofar as the allocation of all common costs to the low frequency is concerned, eircom notes that the international precedents upon which ComReg seeks to rely are dated and may have since been overcome by market developments and new market analyses. Thus, for example, Article D. 99-24 of the French Code of Post and Telecommunications cited by ComReg was revoked on 30 November 2004. Without taking a view as to the proper allocation of common costs between narrowband and broadband services, eircom would point out that a number of issues arising in relation to market developments and their impact on the use of narrowband and broadband access must be carefully considered before being in the position to reach any conclusion.

In this regard, a central concept in pricing Line Share in Ireland to date is that the common costs of the line should be shared between the traditional PSTN (narrowband voice) service and emerging broadband services. The more allocated to PSTN, the higher the PSTN price and the lower the incremental broadband price. In the short term, it may be appropriate to allocate a high proportion of costs to the PSTN to allow lower broadband prices, to encourage adoption. In the longer term, however, some customers may wish to use mobile telephony for voice services and to use their fixed line primarily for broadband. Others may use VOIP over Broadband for voice applications. In this scenario, the bulk of the fixed network cost should be allocated to broadband services. Reducing the percentage allocation at this point in time could be a major strategic mistake. The application of Ramsey based pricing could address this issue and while eircom accepts that there are practical difficulties in applying this theoretically sound model (but does not accept that these difficulties cannot be overcome) it seems perverse that the direction of the price change proposed is running opposite to the direction in marginal utility derived by consumers of cooper loop services. This issue alone is of sufficient significance that prices should not be changed in the arbitrary manner now suggested by ComReg. Rather, any price changes must await the outcome of full market reviews as required by the Access Regulations and as proposed to be undertaken by ComReg later this year.

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

eircom strongly opposes ComReg's approach because it is unnecessary, inappropriate and arbitrary, and unlawful. It is eircom's view that ComReg cannot replace the methodology set out in D8/01 without first completing the LLU market review; ComReg in this regard has not pointed to any factors which require actions in such urgency that the review of the LS price could not await completion of the review under way. In addition, eircom is of the view that the setting of price by reference to arbitrary benchmarking only is not permitted under the Access Regulations, 2003 and any decision of ComReg to impose such methodology on eircom would accordingly be unlawful.

(i) ComReg cannot revoke Decision D8/01 without first completing the LLU market review, currently under way.

As explained in our Response to Question 2, the Regulatory Framework does not allow ComReg to amend existing obligations imposed on eircom by reason of a finding of SMP without conducting first a market review. This is particularly the case where the relevant findings were made almost four years ago. Only where the conditions of Regulation 20(8) are met can interim measures be imposed. In such case the urgency of the case is such that it does not allow for consultation. This is clearly not so here and there is accordingly no reason which ComReg can invoke for amending eircom's obligations before completing the full review of the market for LLU. eircom notes in this regard that Regulation 14 of the Access Regulations allows for the imposition of obligations relating to cost recovery and price controls only:

> "*in situations where a **market analysis** indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze to the detriment of the end-users*". (our emphasis)

(ii) Setting a price on the basis of benchmarking as proposed by ComReg is not permitted under Regulation 14 of the Access Regulations

Even if ComReg had completed the required market analysis (which it has not), Regulation 14 does not entitle ComReg to impose a price control based on arbitrary benchmarks. In particular, Regulation 14(3) provides as follows:

> *"The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.*"

However, for the reasons set out in our response to Question 5, ComReg's proposal clearly does not, and cannot serve to promote efficiency and sustainable competition and is accordingly incompatible with the provision of Regulation 14.

eircom notes in addition that it would continue to be subject to an obligation of cost orientation under section 9 of Decision Notice D8/4. eircom strongly disagrees with the use of benchmarking in the context of an obligation of cost orientation. It is difficult to understand how a price entirely divorced from the costs associated with the provision by eircom of Line Share, and accordingly arbitrary, could be found compatible with such obligation and better able to achieve efficiency and effective competition than a price based on a cost-based methodology. The following excerpt from the ERG Paper on Remedies also casts doubts as to the rationality of ComReg's approach in this context:

> "*To the extent that it would be considered disproportionate to impose cost-orientation and cost-accounting obligations (e.g. on small operators) or where appropriate cost models do not yet exist, other forms of price-control could be considered for such operators, such as benchmarking against the larger operators who are under a cost-orientation obligation. Benchmarking ties the price in one market to the price in another comparable market (sometimes in the form of an international comparison). Benchmarking also has a number of other valuable uses. In the context of cost-oriented prices, it may be used as a cross-check on the outputs of a cost model. On the basis of a suitable comparison, it may also be used to set reasonable prices or as a cross-check on the reasonableness of a retail-minus price derived from the incumbent's financial data*."

This in eircom's view strongly suggests that benchmarking is not an appropriate method in the context of an obligation of cost-orientation, and certainly not where a cost model already is in place and has been so for the best part of ten years.

Even if benchmarking was available to ComReg, it is clear in any case that the condition set under Regulation 14 that for its use, namely that the benchmark be chosen from "comparable competitive markets", is not met. eircom would like to point to the high standard set by the European Commission in its comments under Article 7 of the Framework Directive in Case DK/2005/0204, as follows:

> *"The Commission considers that if a NRA decides to impose price regulation on the basis of a comparison with other countries, it should carefully select the objective criteria and clearly justify the reasons for which it believes that the relevant market(s) in these countries are, on the background of those criteria, most suited as the basis for the comparison, taking into account differences between conditions prevailing on the relevant market(s) in the countries compared and its home market. Furthermore, under the current circumstances of the provision of mobile call termination, only where the prices for mobile termination have been set on the basis of an appropriate cost accounting model and relevant cost accounting data to reflect cost orientation, can the prices can be considered as appropriate to serve as a basis for comparison. Therefore, NITA should clearly justify in the final measure for what reasons it considers that the three countries, i.e. Sweden, Finland and Norway, as most suitable for the comparison."*

It is clear from the Consultation Document that ComReg has not so much chosen the comparator countries on the basis of carefully selected objective criteria but rather on the basis of general, irrelevant and at times inaccurate observations:

- ComReg's main criterion for selecting the benchmark countries – the EU15 (or rather 14) – appears to be "*because in general these countries tend to have the most developed telecommunications sectors in terms of broadband in Europe".*

- ComReg then justifies the choice of the EU 14 on the basis that "*the relative level of cost in these countries are likely to be more similar to Ireland than more (sic) "accession" countries given their different economic histories"*. As explained in our response to Question 1, eircom disagrees that the level of costs in Ireland is similar to that in the EU 14 and notes in any case that ComReg has supported this assertion with any data whatsoever. In any case, eircom fails to see the relevance of the accession countries' economic histories. The dismissal by the European Commission of the choice by Denmark of other Scandinavian countries, generally considered to have similar economic models and levels of economic development, clearly confirms that such observations do not amount to carefully selected criteria.

- eircom would also like to point out that the reason for ComReg to exclude non-European countries, namely, that "*it would [have needed] to do more work to ensure that differences in the underlying regulatory regimes do not create difficulties in* *comparison*" also applies in relation to European countries. In particular, difference in product specification for Line Share even within the EU15 create such difficulties while the wide disparity of prices and ratios of Line Share to fully unbundled prices suggest that NRAs do not apply rules consistently (as ERG (07) 53rev1b –extract in Annex 3- appears to confirm). We also note that ComReg on occasion resorts to selective use of data from the US, New Zealand, Australia and elsewhere (eircom refers in this regard to p. 13 of the Consultation Document).

- ComReg's further justification that a significantly different benchmark is unlikely to have resulted had other countries been taken into account, "given the interim nature of ComReg's proposal" appears to be irrational. The result of a benchmarking exercise depends on the input itself, namely in the present case the prices practised in the selected countries, not on the length of the period during which it is to apply.

It also follows from the comments of the Commission in Case DK/2005/0204 cited above that only cost-based prices can be used for the purpose of benchmarking in the context of an obligation of cost-orientation. This is clearly not the case of the prices selected by ComReg which do not appear to be actually based on costs themselves and/or determined using consistent methodologies. On the contrary, by ComReg's own account (p. 13) "*there is no one constant costing methodologies applied across Europe for LLU/LS".* The table overleaf from a December 2007 ERG consultation paper[6] confirms that there is not a common modelling approach across Member States and those prices in certain Member States, such as Germany, are themselves based on benchmarking!

Importantly, the serious shortcomings of ComReg's approach result in an absolutely meaningless price. As the comments of the ERG cited above suggest, it is only where sufficient information to set the price is not available in the relevant market, that the use, by way of benchmarking, of price information which is available in similar markets in other countries may be useful in appropriate circumstances. In this regard, a signal that prices in other markets provide a suitable basis for such benchmarking is that they are grouped around a single average. Inspection of the data presented in Figure 1 and Figure 2 of the Consultation Paper for the 14 selected countries shows that there at least three distinct groupings (around €2, €3 and €4-€9). ComReg appears to have made no attempt to determine if the markets making up these groupings share any set of common characteristics that might be appropriate to the Irish market. In this circumstance, The use of a simple average of the extraordinarily wide range of prices (from 13% to 213% of that average) is a travesty of any robust benchmarking methodology and results in a price proposed by ComReg that is completely arbitrary and thereby unacceptable. This arbitrariness is clearly apparent when one considers that several different benchmarks could be constructed which would all provide wildly diverging results. We consider below just three alternatives for the purpose of illustration.

- Based on the data available in the European Commission's 13th Implementation report (see the table overleaf), eircom notes that, had the prices for Line Share in all EU countries been taken into account, the benchmark proposed by ComReg, based on the simple average of the price of shared access in the EU27 countries as at October 2007, would have been an entirely different figure to that proposed by ComReg– namely, €3.60[7] based on the simple arithmetic average of the EU 27 excluding Ireland.

- Another possibility would be to adjust the full LLU price by the EU14 average of percentage of Line Share price as compared to LLU, namely 36% as per Figure 1, p. 7

[6] ERG (07) 53rev1b, "Annex – Evidence Based Analysis and Benchmark," which is annexed to ERG (07) 53rev1, "ERG Report on best practices on regulatory regimes in wholesale unbundled access and Bitstream access."

[7] Source: EU SEC (2008) 356 Volume 2: Commission Working Document: Progress report on the single European Electronic Communication Market (13th Report), figure 114, page 109. The diagram shows an average of €3 but the mean of the data is €3.76

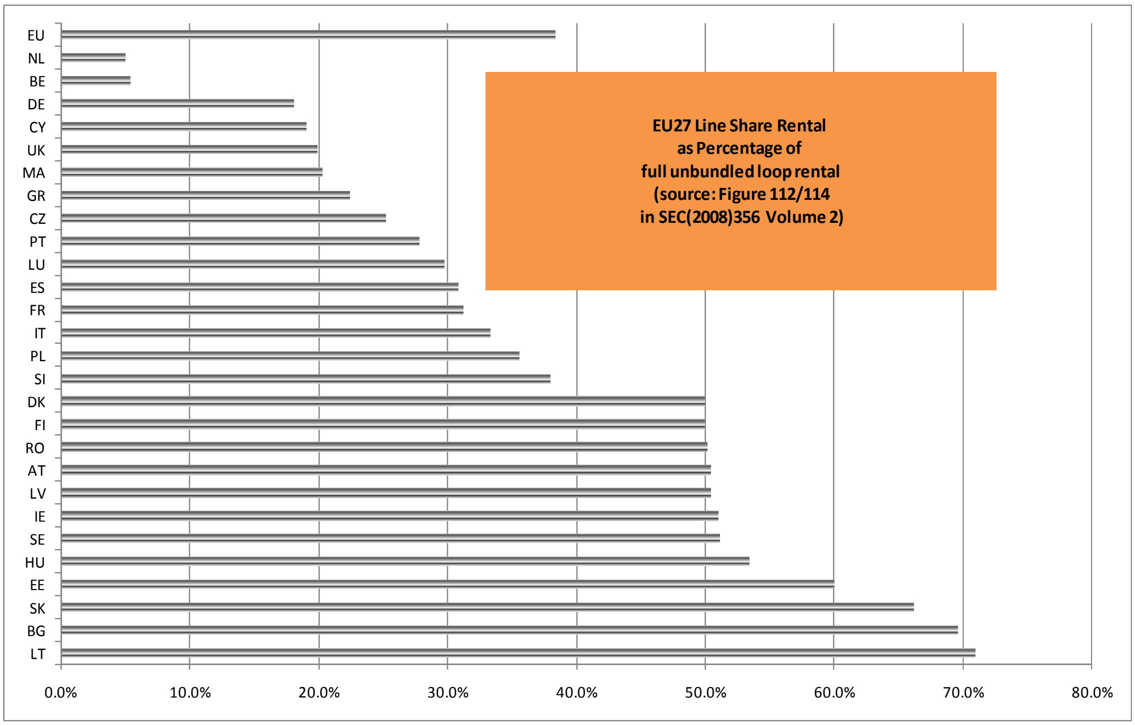
of the Consultation Document. In this case, the resulting price for Line Share in Ireland, given an LLU price of €16.43, would be €5.91(Of course, ComReg has not given any reason which could justify choosing a figure of 36% rather than the current figure of 50%, also used in Denmark, or for that matter any other figure used in any other Member State. We note 12 of the 27 EU countries have Line Share prices which are equal to or greater than 50% of the full loop price).

- Were the percentage method used on the basis of the EU27 (excluding Ireland), the applicable average percentage would be, as indicated above, 37.9%, suggesting yet a different Line Share price of €6.22.

We note that other benchmarks are also possible, and that market players may be more concerned with total cost of loops (taking account of both connection fees and rentals) than with simple rental alone. If total cost is considered, the EU average for Line Share as a percentage of full unbundled loop rises to 47.7%.

Line Rental for LLU and Line Share in the EU 27

	source:	*fig 109 p114*	*Fig 110 p115*	*calculation*	*fig 112 p116*	*Fig 114 p117*	*calculation*
Code	Country	LLU ("Total" Cost)	Line Share ("Total" Cost)	Total Cost LS as % of LLU	LLU Rental (Monthly Rental)	Line Share Rental (Monthly Rental)	LS as % of LLU
		€	€		€	€	
LT	Lithuania	11.64	9.36	80.4%	7.75	5.5	71.0%
BG	Bulgaria	14.35	10.97	76.4%	13.51	9.4	69.6%
SK	Slovakia	12.44	8.67	69.7%	10.58	7.0	66.2%
EE	Estonia	7.92	6.61	83.5%	6.33	3.8	60.0%
HU	Hungary	10.58	6.16	58.2%	9.54	5.1	53.5%
SE	Sweden	10.73	6.10	56.8%	8.81	4.5	51.1%
IE	Ireland	17.21	9.56	55.5%	15.68	8.0	51.0%
LV	Latvia	9.70	5.54	57.1%	8.32	4.2	50.5%
AT	Austria	11.58	6.23	53.8%	10.70	5.4	50.5%
RO	Romania	10.51	5.84	55.6%	8.37	4.2	50.2%
FI	Finland	14.64	8.27	56.5%	11.21	5.6	50.0%
DK	Denmark	9.88	5.38	54.5%	8.61	4.3	49.9%
SI	Slovenia	10.23	4.93	48.2%	8.70	3.3	37.9%
PL	Poland	12.02	6.08	50.6%	9.55	3.4	35.6%
IT	Italy	8.81	3.63	41.2%	7.81	2.6	33.3%
FR	France	10.68	4.57	42.8%	9.29	2.9	31.2%
ES	Spain	11.43	5.83	51.0%	9.72	3.0	30.9%
LU	Luxembourg	13.28	7.57	57.0%	10.75	3.2	29.8%
PT	Portugal	10.05	3.57	35.5%	8.99	2.5	27.8%
CZ	Czech Republic	15.42	5.80	37.6%	13.07	3.3	25.2%
EL	Greece	9.63	3.13	32.5%	8.48	1.9	22.4%
MT	Malta	11.03	3.03	27.5%	9.36	1.9	20.3%
UK	UK	13.55	3.25	24.0%	9.56	1.9	19.9%
CY	Cyprus	10.34	2.79	27.0%	9.45	1.8	19.0%
DE	Germany	11.51	3.15	27.4%	10.50	1.9	18.1%
BE	Belgium	11.34	2.14	18.9%	9.29	0.5	5.4%
NL	Netherlands	8.39	0.79	9.4%	8.00	0.4	5.0%
EU	average (EU 27)	11.44	5.52	47.7%	9.70	3.76	38.3%
	average (EU 26, excl. IRL)	11.22	5.36	47.4%	9.47	3.60	37.9%



(iii) There is no urgency such that the review of LS price cannot await completion of the LLU review

ComReg itself appears to recognise (at p. 20 of the Consultation Document) that it is not appropriate to set the price for Line Share "*without considering the impact of the price of full unbundling and without a view as to how the cost of the access network should be recovered over the medium term".* eircom understands that ComReg is currently reviewing this issue and that it will publish its conclusion in autumn 2008. Six months' time is not a long period of time to wait for in the context of a price which has been in place for over seven years! ComReg has provided no satisfactory explanation of the reasons why a change of Line Share price was so urgent that an arbitrary price absolutely disconnected from relevant costs was likely to give more appropriate market signals than a price set on the basis of costs according to economic analysis principles. ComReg's proposal is in this regard unjustified, biased and arbitrary.

Finally, from a practical point of view, the proposed price reduction of €5.47 per line per month would have little impact at current Line Share volumes of 2,500 (about €165k p.a. impact on eircom but much less saving for any one operator in the market currently using Line Share). Migration from Bitstream and connection of new Line Share customers both involve real costs for the access seeker and for eircom. eircom's costs are legitimately recovered in migration charges and Line Share connection charges. The existence of such transaction costs results in a break-even period for any operator wishing to change access product to Line Share and the breakeven period is possibly in excess of one year. Within that period, all ULMP prices will have been reviewed and it is probable that Bitstream prices will be set on a cost basis rather than retail minus. The relative attractiveness of the various options – Full unbundling, Line Share, Bitstream, Wireless, Cable, Fibre and others may be radically altered. A temporary solution for one option could send seriously misleading signals to the market.

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

We disagree that option 1 can be an appropriate alternative.

This question refers to four options in section 5.3 of the consultation. These are

- Option 1: Incremental carrier billing and administration costs only
- Option 2: No Charge
- Option 3: Attribution of fixed costs between user services using economic principles
- Option 4: Benchmarking

As explained in our response to Question 7, eircom's view is that benchmarking is arbitrary and unlawful; such methodology must be rejected outright.

Option 1 and Option 2 can be considered together. ComReg claims Option 2 (not making any charge) should be considered because the cost of charging for carrier billing may exceed, or come close to, the incremental revenues. In fact, if ComReg rejects any allocation of common costs, and asserts there are no incremental costs, then the cost of billing and administration must be exactly the amount collected. However, ComReg alleges that this would distort the market due to "the lack of cost recovery". Since the only difference in option 1 and 2 is the cost of billing, this lack of cost recovery must also apply to option 1. We therefore reject both option 1 and option 2 on the grounds of lack of cost recovery.

eircom does not accept ComReg's assertion that the proportion of costs allocated to each service does not matter, as long as all costs are recovered. However, price setting in a regulatory context should be based on economic principles, not on simple accounting. It matters *how* costs are recovered. Users of different services may respond differently to pricing signals and externalities may exist. Therefore, a proper economic analysis of short term and long term dynamics of different pricing options is essential in setting the correct price. We note ComReg has frequently used a set of principles (including cost orientation, cost minimisation, distribution of benefits, and practicality) to help inform price setting for CPS and LLU but has made little attempt to do so here.

Option 3 is not sufficiently developed in the current consultation, as it only considers three of the five economic approaches considered in the appendix to D8/01. It warrants more serious consideration. eircom expects that in the context of the LLU market review ComReg will consult on Option 3 taking account of the five alternatives in D8/01, and any others that may be suggested by industry or other respondents, to decide the basis of an allocation mechanism for common costs.

We note that Ramsey Pricing is dismissed partly because ComReg claims a full LLU review would be needed simultaneously. As indicated in our response to previous questions, it is eircom's view that ComReg cannot make the economy of such review if it is to change the price for Line Share. In addition, as suggested in our response to Question 6, Ramsey prices may not be possible to calculate exactly but the underlying economic principle can help inform policy decisions in relation to the allocation of common costs. It is probable that Broadband services are becoming more price inelastic, while fixed telephony services are becoming more price elastic. This would suggest a reducing allocation of copper costs to PSTN, rather than Line Share

Finally, ComReg is silent on the expected outcome of applying Shapley-Shubik pricing. In 01/27R, the ODTR examined Shapley pricing and concluded:

> *…and hence the costs are split 50:50*"

The remaining methods, Co-operative bargaining theory and “Share of Stand-Alone Costs”, get no mention. In ODTR01/27R, the ODTR concluded that each of these methods supported a 50% allocation of common copper cost to Line Share.

Insofar as the recovery of incremental costs is concerned, eircom disagrees with ComReg’s approach and initial conclusion that the only incremental costs associated with Line Share are the costs of billing and administration activities specific to the service.

It is eircom’s experience that levels of faults reported on unbundled loops are greater than those reported on the equivalent loops used solely to provide PSTN service. eircom has protected itself against these additional costs for fully unbundled lines by charging separately for line testing and fault clearance. However when an access seeker takes both SB-WLR and Line Share on the same pair they can avoid the fault charges simply be reporting all faults against the SB-WLR service. eircom may now choose to recover the incremental costs of clearing the additional faults from the rental revenues for Line Sharing.

When eircom receives an order for Bitstream on a PSTN line where service is provided over a pair gain system, eircom will attempt to re-route the PSTN service over a clear copper pair to allow the Bitstream service to be delivered. Given that Line Sharing is intended to allow the access seeker to provide their own Bitstream service, equivalent treatment might reasonably be expected. In any event, bitstream lines can be migrated to Line Share. Therefore, the cost of the pair gain removal is an incremental cost of the Line Sharing service.

Product development costs were incurred for development of, and arise for the ongoing maintenance of, the Line Share product. These should be recovered from the operators availing of shared lines.

The full price for Line Share should therefore have regard to economic theory, and take into account billing and administration costs, direct incremental costs, and allocation of common costs.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail you response and where possible supported with evidence.

eircom does not believe it is possible to determine whether a price is reasonable without relying on an appropriate methodology and a cost analysis. Accordingly, the only reasonable price that can be imposed pending the completion of the LLU market review is the current price, determined accordingly to a methodology adopted eight years ago.

eircom insists that the review must duly consider the adoption of a consistent approach to price regulation of all access products as well as include a thorough analysis of the expected impact of any pricing approach on market development in the period at least to 2012.

Q. 10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence

eircom considers that the draft decision should not be made. We explain below the reasons why eircom considers that the Proposed Decision Instrument is ultra vires the legal basis upon which ComReg seeks to rely (in other words, the exercise by ComReg of its powers in the circumstances would be unlawful). In addition and in any event, eircom does not agree, for many reasons, that the draft decision is clear or unambiguous or practical.

Legal basis

ComReg seeks to rely on, principally, Regulation 14 and Regulation 17 of the Access Regulations.

Insofar as Regulation 14 is concerned, Regulation 14 (1) provides that ComReg may in accordance with Regulation 9 impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze to the detriment of end-users. Regulation 9(1) in turn provides that where an operator is designated as having SMP on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, ComReg must impose such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate.

It follows from the above that ComReg may only impose obligations following a market analysis and the framework clearly envisages that market analysis, designation of SMP and imposition of obligations are part of one and the same procedures carried over a limited timeframe: see Regulation 27 of the Framework Regulations. In this regard, it is notable that the regulatory framework provides for the imposition of obligations only where the conditions on the market so warrant and accordingly requests that regular reviews of the markets concerned be conducted. This means that it is not open to ComReg to rely upon the market analysis conducted in 2003/2004 for the imposition of obligations pursuant to Regulation 14, especially not in circumstances where ComReg justifies its intervention by changes in the “market dynamic” as compared to the situation in 2001 or 2004.

Also of note in this regard is the fact that NRAs are requested to conduct analysis of relevant markets as soon as possible after the adoption of a Recommendation on relevant markets by the Commission. Such a Recommendation was adopted by the Commission on 17 December 2007 and ComReg is now obliged to review the markets subject to ex ante regulation.

To the extent that ComReg alleges that there is such urgency that it cannot wait for completion of the market analysis, Regulation 20(8) of the Framework Regulations is the appropriate legal basis. Regulation 20(8) requires however that there are “exceptional circumstances justifying an urgent need to act” in which case it allows that the Regulator “immediately adopt a proportionate measure on a provisional basis”. eircom notes that ComReg has not done so.

Insofar as Regulation 17 is concerned, it is relevant only for the purpose of “specifying requirements to be complied with relating to an obligation by or under [the Access] Regulations”. It is, accordingly, inapplicable in the circumstances: in particular, the decision instrument proposed by ComReg would not specify any existing obligation of eircom: it would rather substantially modify eircom’s obligation in relation to Line Share pricing. In addition, even if it could be considered that the proposed decision instrument amounts to specifying existing obligations (which eircom rejects), the method for price determination which it includes, namely benchmarking, is unlawful, for the reasons set out in our response to Question 7.

eircom notes in this context that the Draft Decision Instrument makes no reference to notification to the European Commission. ComReg's proposal to amend eircom's existing obligation clearly falls within the scope of the measures subject to pre-notification requirement and eircom refers in this regard to the comments of the European Commission in Case DK2005/0204, cited in our Response to Question 7, where the European Commission observed as follows:

> "*Moreover, the Commission invites NITA to consider whether, based on the results of the current discussion with the industry, implementing other price control methods, directly related to costs, would be more appropriate in the view of the problems identified. Should NITA decide to modify the price control method imposed, the draft measure proposing to impose such a cost accounting methodology must be notified under Article 7(3) of the Framework Directive."*

Other issues

Without prejudice to any right of eircom in respect of any Decision Instrument adopted by ComReg, eircom would like to point to the following issues arising with the proposed text (for the sake of clarity, none of eircom's comments below should be seen to support in any way the adoption of the decision proposed by ComReg.)

- The meaning of "relevant year" is not clear. The price of Line Share after the expiry of the relevant year is particularly unclear and the current drafting suggests that the regulated price would only apply for 12 months.

- ComReg should clarify the meaning of "interim"; in particular that the term does not apply to the charge itself and that there would accordingly be no retrospective price adjustment at some later date.

- Implementing wholesale price changes requires adequate notice within eircom's billing systems and it may not be possible to implement such changes on arbitrary dates with only 30 working days' notice. Typically billing changes can be effective only at weekends, or from the first day of a month.

- To avoid disputes, and having regard to the practice of billing recurring charges monthly in advance, the decision should clearly specify whether revised prices apply to services provided from the effective date, or to services billed on or after that date.

- The decision does not consider the implications for eircom's regulatory accounts, which may lead to ambiguity or confusion when accounts are produced. This will be particularly acute within any financial year where the practice changes.

2 BT Communications Ireland Ltd.

BT Ireland Response to ComReg Consultation

Rental Price for Shared Access to the Unbundled Local Loop

Reference: Submission Document No: 08/23

1. Introduction Section

BT Ireland welcomes the opportunity to respond to this consultation document which addresses the issue of how the price of shared access to the local loop (referred to in this document as “LLU Line Share”) for alternative operators, is to be determined. We note that the consultation suggests a number of methodologies which can be adopted for LLU Line Share pricing and proposes that the price of LLU Line Share could be based on an average of comparable prices across the EU 15 for an interim period, in the event that an alternative approach cannot be adopted in a timely manner. The revised price based on this benchmark would be €2.94[1] and would represent a reduction of 65% from the current level.

We agree that LLU has been a significant driver of broadband penetration in countries such as the UK and France. It is regrettable that this has not been the case in Ireland and price, service and process reasons are in our view the reason for this difference in competitive outcome.

We agree that the Eircom charge for monthly LLU Line Share rental is expensive when compared to other member states. The monthly charge is €8.41, compared to a low in the Netherlands of €0.37 per month and an EU 15 average (excluding Ireland) of €2.94 per month. We agree that the charge is also somewhat anomalous in that the cost of the local loop is already fully recovered by voice services.

BT Ireland has and continues to argue that the current level of price appears to create a margin squeeze. We are pleased to note that ComReg is also concerned that current circumstances could be alleged to be conducive to the creation of a margin squeeze.

We agree with ComReg that because voice and broadband services must in total recover the cost of the loop in aggregate, it would be better to conduct a final review of these prices simultaneously; and also agree that because there appears to be a manifest over recovery of the cost of a loop and in view of the potential for the distortion of competition referred to above, that it must take action.

It is our opinion this review should have been conducted much earlier and ComReg should not have permitted eircom to modify its broadband prices to give rise to the alleged margin squeeze above; but rather should have sequenced events so as not to give rise to such a margin squeeze.

The rest of this paper provides our responses to consultation questions. Business Secrets are marked.

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

A.1. BT agrees with ComReg's reasoning. We agree that the current LLU Line Share price represents an over recovery of cost by eircom and makes it extremely difficult if not impossible for LLU Line Share users to compete against eircom's wholesale broadband product.

Bitstream versus Line share charges are set out in the table below. The monthly difference between the two prices is extremely low and could represent a margin squeeze and most certainly implies over recovery of cost by eircom.

Given that the high price of Line Share since the introduction of LLU in the market has discouraged market entry and encouraged the purchase of Bitstream, should the price now fall, then the question of migration from one product to another arises. The low current margin, coupled with the unacceptably high price of migrations means that migration is simply out of the question thus denying competitive development and consumer choice.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

A.2. We agree that ComReg should now revoke the previous Decision Notice D8/01. The high price of Line Share has acted as a barrier to entry as can be seen from ComReg's statistics of take up. The high price also represents over recovery by eircom and a potential margin squeeze exists between Line Share and Bitstream.

2. International Benchmarking

Q. 3. Do you agree of disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

A.3. BT agrees that based on the comparisons provided that LLU Line Share in Ireland is extremely expensive. The evidence is as per the data supplied by ComReg which we do not dispute.

3. Investment Ladder approach

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

A.4. We agree with ComReg's policy to encourage investment in LLU products where viable.

As noted by ComReg LLU has provided a real spur for competition and innovation in many countries in Europe with the notable exception of Ireland. The behaviour of the SMP operator, product, process, service and price has all played their part in what some would describe as a "market failure".

4. Inter Platform Issues Irish broadband market dynamics

Q. 5. Do you agree or dis-agree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

A.5. We agree that it is highly unlikely that distortion of inter-platform competition would take place if the price of LLU Line Share was reduced.

We agree with ComReg that there are a range of factors which lead to competitive outcomes in other countries. Of these price is an important factor. If pricing encourages market entry then a greater weight of momementum is placed in breaking down incumbent behavioural, service, product and process issues, which in the opinion of the industry represent a significant barrier to progress in Ireland.

5. Cost Recovery

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

A.6. BT agrees with ComReg's proposed approach.

6. Determining the price of LLU Line Share rental

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark
price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

A.7. We agree with ComReg's proposal to apply a benchmark price of €2.94 until a full review of LLU pricing has been completed by ComReg.

As mentioned throughout the consultation eircom is over recovering at the current price level and is possibly engaged in a margin squeeze. LLU has, to date, failed to achieve any traction in Ireland. As a consequence it would be of great concern and unacceptable to the competitive industry if there were to be any uncertainty that the benchmark price could increase following the full review. New entrants require regulatory certainty if they are to invest.

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

A.8. If Benchmarking were to be rejected outright then Option 1 (incremental pricing) should be adopted as it is impossible to forsee any other approach that would lead to a relatively prompt outcome. Option 1 has already been consulted on.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into
account the concerns and principles outlined in this consultation? Please detail you response and where possible supported with evidence.

A.9. We believe that a reasonable price for LLU Line Share should be under €2. Given the extraordinary competitive advantage given to eircom (as can be seen in ComReg's statistics of eircom DSL penetration at and eircom's some 70% market share of the retail DSL market) by virtue of behavioural, price, process and service issues with LLU, a vital boost to the competitive industry is much needed.

7. Proposed Decision Instrument

Q.10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence.

A.10. We have some concerns that confusion might arise should the LLU price review not be conducted and implemented in the "Relevant Year". This would result in a lack of regulatory certainty for access seekers.

End

3 Magnet Networks Ltd.

Magnet Networks Response to Consultation Paper 08/23
Submitted on 15th April, 2008

Rental Price for Shared Access to the Unbundled Local Loop

Introduction

Magnet Network's welcomes this opportunity to respond to this ComReg consultation into the price of LLU Line Share. Magnet Network's believes that this consultation is timely as LLU Access Seekers seek to become more innovative in terms of products and services provided on LLU platforms.

Magnet Network's feels that price reductions will encourage more investment by LLU Access Seekers by developing products that they can sell to customers, some of which are Line Share based.

Magnet Network's believes that the current pricing for Line Share is expensive compared to other similar markets. As the price stands, it facilitates an over recovery of costs to eircom and gives rise to the condition of margin squeeze when compared to eircom's Bitstream Products.

Magnet Network's also recognizes that ComReg are in the process of developing a model which focuses on all aspects of LLU Pricing and Full ULMP which will be presented in autumn 2008. With this in mind, Magnet Network's believes that the proposed price reduction in Line Share will address the current issues that prevail and as an interim solution is certainly most welcome.

Consultation Questions

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

Magnet Network's agrees with ComReg's reasoning, as set out in the ComReg document 08/23. Magnet Network's contends that the current LLU Rental price is excessive and expensive compared to other EU/OECD states. Magnet Network's believes it represents an over cost recovery of the Local Loop. As outlined in this ComReg document 08/23, when applying the existing methodology it would seem to be out of date and not reflective of current market trends and comparisons. It is quite clear that eircom's own broadband products are cheaper than the LLU Line Share Product (eircom Bitstream Connect = €9.48 vs LLU Line Share = €8.41), thus making it uneconomic to provide a Line Share service. Whilst the introduction on Migrations to the LLU Market is welcomed, the cost of migrating from Bitstream to Line Share is also prohibitive, thus margin squeeze evident.

Magnet Network's would be of the opinion that as the connection charge should address the physical work to set up a connection and the order handling to process the order, the rental charge is for the use of the asset and maintenance. As the asset deployed by eircom to support line share is a simple tie circuit across the exchange floor (in simple terms a pair of wires) the costs associated with this should be very low. As the circuit is within the exchange and is not the subject of movement or hostile conditions it does not go faulty very often (exceptions to this of course are ELFs) and the cost of the asset is very small. Where operators have unbundled, they will wish to sell LLU services such as Line Share before having to revert to an eircom Wholesale Bitstream service. They should be allowed make that choice so as to make a return on that investment.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

Magnet Network's believes that ComReg should immediately revoke the previous Decision Notice D8/01. It is no longer appropriate for the calculation of LLU Line Share given the current market conditions. There is still an over recovery of costs by eircom. Broadband Uptake has significantly increased in the period between 2001 and 2007, there were 500,000 broadband subscribers according to the last ComReg Quarterly Report, Q4 2007. The current methodology used to calculate the Line Share Price is outdated to say the least.

Q. 3. Do you agree or disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

Magnet Network's believes that the current price for Line Share is excessive and should be reduced immediately. It is quite clear from the statistics quoted in the consultation document taken from Cullen International - €8.41 compared to a price of €0.37 in Holland, €0.85 in Belgium would certainly seem excessive. If you also consider the fact that there is low broadband penetration in Ireland, compared to Belgium and Holland (see graph Fig 3 quoted in consultation), then it is likely that one of the main reasons preventing a quicker up take in Line Share products by LLU Access seekers, has got to be price. Demand for Line Share is likely to increase if there was a corresponding reduction in wholesale rental cost.

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

Magnet Network's agrees with ComReg's view that the difference in price between Bitstream and Line Share does affect the decision making of an Access Seeker to whether it unbundle's an exchange or not. Magnet Network's would certainly welcome the opportunity to unbundle more lines and sell Line Share products as a result of a price reduction. Magnet Network's believes that ComReg has a responsibility to encourage innovation in the market place. In its Strategy document 07/104, ComReg outlined one of its High Level Goals as promoting *"innovation in converging platforms and technologies by creating a supportive and predictable* *regulatory environment which enables industry and other stakeholders to make informed decisions on future investment, roll-out and deployment of new technologies".* Applying this desire, to the 'Ladder of Investment' approach suggested in this consultation, ComReg should indeed look to reduce the Line Share Rental Price in order to encourage innovation and further investment by Access seekers to offer competitive Broadband products in the Irish market.

Q. 5. Do you agree or disagree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

Magnet Network's agrees with ComReg's assertion, for the reasons outlined in the consultation, that Inter Platform competition should not be negatively impacted by a price reduction in Line Share. There are other factors other than price which effect competition in the market e.g. service levels.

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

Magnet Network's agrees with ComReg's proposed approach and preliminary conclusion as outlined in the consultation. Again it should not allow an over recovery of cost.

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

It would seem reasonable and fair to take the above approach outlined by ComReg to address the current anomalies. As an interim price, benchmarking is probably the best way to come up with a price which reflects the current situation in the wider EU market. In the absence of a detailed model, which is currently being undertaken by ComReg, as part of its Full LLU review, then the proposed €2.94 would seem to be fair.

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

If Benchmarking is rejected, then maybe using the "Incremental Pricing" methodology would address any anomalies that would exist in the current market.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail you response and where possible supported with evidence.

Magnet Network’s believes that a price anywhere between €1.50 and €2.50 would be sufficient to attract investment by LLU Operators, encourage product innovation and stimulate competition in the market place. LLU Operators would be able to offer competitive and attractive offerings and services to its customers.

Q. 10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence.

Yes, Magnet Network’s is happy that the proposed Decision Instrument is clear and unambiguous.

4 Meteor Communications Ltd.

16 April 2008

Mr Tom McCormack
Commission for Communications Regulation
Irish Life Centre
Abbey Street
Freepost
Dublin 1
Ireland

Reference: Submission re ComReg 08/23 – LLU Shared Access Rental

Dear Tom,

Meteor welcomes this opportunity to comment on ComReg's proposal to reduce the price of LLU line share from €8.41 to €2.94. We do not support ComReg's approach on the grounds that it has no clear justification and is supported by limited analysis. Furthermore, the necessity of this proposal is called into question by the fact that a more comprehensive review of LLU and associated prices is due within 6 months. Of particular concern to Meteor is the impact that this proposal will have on competing broadband offerings in the downstream retail market, not least mobile broadband.

Analysis and Justification

Meteor does not believe that sufficient information has been provided by ComReg in the consultation document to establish whether over or indeed under recover of costs arises as a result of the pricing methodology prescribed in D8/01. In any case, with the exception of eircom, few if any respondents would have sufficient information to comment either way. For this reason Meteor considers it premature to raise this question. We believe that this question should be raised following the publication of ComReg's detailed pricing review which will be completed in October. Similarly, given the imminent results of this review ComReg should await these results before drawing its own conclusions.

We question the urgency with which ComReg is now attempting to amend the LLU Line Share price given that the current methodology has prevailed for approximately 7 years and the fact that no change was made following the consultation on pricing principles in 2004[1]. The urgency of this requirement has been expressed in very limited terms, namely the demand for LLU Line Share as demonstrated by "at least one operator". These could equally apply to the circumstances under which a standard market review would be warranted.

With regard to the imposition or amendment of an Access obligation ComReg is obliged under Regulation 9 of the Access regulations to ensure that it is proportionate,

[1] ComReg 04/111 Local Loop Unbundling Line Sharing - Consultation on Pricing Principles (12 Nov '04)

justified and imposed following consultation in accordance with Regulation 19 and 20 of the Framework Regulations. Regulation 27(6) of the Framework Regulations obliges ComReg to take account of market developments by carrying out further analysis of the relevant market after such periods as it considers appropriate. Clearly ComReg is of the view that significant changes have taken place within the market for wholesale unbundled access that require an alteration to eircom obligations. Such changes form the basis for another market review which in turn should form the basis for any imposition or revision of obligations on eircom. Meteor acknowledges that that this market has not been reviewed since 2004 and has been included in the revised list of Relevant markets. Therefore we would agree that closer analysis of the wholesale broadband access market may indeed be warranted. However we do not believe that the immediate move to revise eircom's obligations has been justified or that the approach to doing so is consistent with the EU Framework.

Implications for the Down Stream Market

A reduction of the magnitude proposed will have a significant impact not only on the supply and demand of LLU Line Share but also for competitors in the downstream market for retail broadband. If pursued, it is bound to have a disruptive effect both for the immediate LLU offerings and across the downstream retail markets. Cable, wireless and mobile broadband providers are likely to be negatively impacted. If the proposed rate of €2.94 proves to be too low, it would make it unduly difficult for alternative methods of supply of broadband to complete against broadband services offered over LLU Line Share. Under recovery of costs by eircom would also result in inefficient platform decisions whereby broadband providers would favour LLU Line Share over the alternatives.

ComReg's drive to promote market entry through LLU Line Share and investment in LLU should not detract from potentially more efficient entry using other platforms. Meteor notes ComReg seeks to promote "viable" offerings with respect to encouraging investment in LLU products. While this is an entirely laudable policy, the approach to setting the LLU Line Share price offers no guarantees that inefficient entry will not be facilitated by the resulting price. Therefore there is a significant risk that a price of €2.94 for LLU Line Share would detract from potentially more efficient entry using other technologies.

Economic Assumptions

We also call into questions some of the implicit assumptions in the consultation document. If the price charge by eircom for LLU Line Share does not capture a sufficient apportionment of the common costs, distortion of inter-platform competition is inevitable. However, ComReg has stated the view that, in principle, no distortion in inter-platform competition should arise as long as the cost of a fixed loop is recovered in aggregate. This only holds true across those broadband offerings that depend on a local loop connection. For all other competing broadband offerings including mobile, the degree to which the local loop cost is recovered by the broadband offering has a significant impact on the ability of efficient mobile and other platforms operators to compete against those availing of LLU Line Share.

ComReg goes on to say that its preliminary conclusion is that there can not be any distortion to platform competition if the cost of the access network is recovered on costing principles such as BU LRIC. However ComReg proposes a simplistic benchmarking solution that can not be shown to replicate this in advance of the detailed analysis which ComReg has undertaken, the results of which will be available in October.

Benchmarking

When benchmarking, provision must be made for varying economic, demographic, infrastructural and topological conditions. When benchmarking LLU Line Share equivalents across the 14 EU countries, a vital economic consideration is the relative cost of operating in each country. This can easily be accounted for through Purchasing Power Parity (PPP) adjustments however no adjustment has been made for this in the calculation of the proposed simple average. In the case of local loop costs, allowance must also be made for population density which will impact on the average cost per copper pair. For instance the geographic area of Ireland is 70,000 sq. km with a population of 4.2 million. In contrast the Netherlands has an area of 42,000 sq. km and a population of 16.3 million.

In summary Meteor considers this consultation to be premature. We believe that questions relating to the appropriateness of the current methodology for calculating LLU Line Share and the optimum Line Share price should not be posed at lest until ComReg can provide the results of its ongoing review. We believe that ComReg has not given sufficient consideration to the impact of this proposal on competing platforms in the downstream market and we consider some of the economic assumptions to be flawed. In conclusion we urge ComReg to review its approach to the issue of LLU Line Share pricing, taking into consideration the concerns raised here.

Yours Sincerely,

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David Humphreys
Regulatory Operations Manager

5 O2 Communications (Ireland) Ltd.

O2

Comments on Document 08/23

LLU Line Share Rental

16th April 2008

Introduction

O2 agrees that ComReg should carry out a review of the method of setting a cost-based price for rental of shared access to the local loop. There would seem to be a *prima facia* anomaly in the current price for line-share, and O2 believes it is now time for a full and proper analysis of the method of deriving this price. O2 does have serious concerns about the approach taken by ComReg in this current consultation document, and in particular the proposal to set an interim price based on the average of EU-15 prices. This benchmarking approach is a wholly inappropriate means to set cost-based pricing as it takes no account whatsoever of the actual costs involved in the provision of service. O2 believes it would be contrary to ComReg's obligations under the Access Regulations[1] to ensure price controls are objective and proportionate if this method of price-setting was adopted.

The anomaly in the price for line-share rental was also present in 2004 when ComReg last consulted on this subject, however no decision was implemented at that time, and ComReg has not explained why. If it has now become urgent that the line-share price be reviewed, then ComReg should pick-up the process from Draft Decision Notice 05/22, taking account of comments received at that time, and developments in the markets since then.

Further comments are given below in the specific responses to the questions asked.

Response to Specific Questions

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

O2 agrees that the current line-share price and the method of deriving it warrants review by ComReg. The evidence produced indicates that there could be an over-recovery of cost by eircom, however any price determination should be on the basis of a proper and comprehensive analysis. ComReg does not appear to have carried out this analysis yet.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as

[1] European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, SI 305 2003

it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

O2 agrees that the formula for determining line-share rental does not seem appropriate, and that it should be replaced following a proper review and consultation on the appropriate methodology for determining the price.

Q. 3. Do you agree of disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

ComReg has chosen to compare the line-share rental price in Ireland to those in the other EU-15 countries. The comparison shows that Ireland has the highest price, and this is fine as an indicator that ComReg should carry out further work. It is not possible however to make a judgement on whether the price is too high simply based on benchmark data – this requires a full analysis.

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

Regulation 6 of the Access Regulations sets out certain requirements on ComReg when carrying out its functions regarding Access and Interconnection. These include:

(a) promote efficiency,
(b) promote sustainable competition, and
(c) give the maximum benefit to end-users.

It is generally accepted that platform based competition is of greatest long-term benefit to consumers, and promotes investment. ComReg needs to be cognisant of this in setting terms for access, and must ensure that regulated pricing does not act as a dis-incentive to investment.

Q. 5. Do you agree or dis-agree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

Please see the response to Q. 4 above.

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

O2 agrees with the principle that there should not be over-recovery of costs, this requirement is quite clear from the KPN – OPTA case. It is very difficult to see how this can be properly achieved as a result of a benchmarking exercise – a cross country comparison does not reveal any information about the actual costs in the Irish market.

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

O2 disagrees strongly with the principle proposed by ComReg on this point. It is not possible to determine a cost-based price using a benchmarking exercise as it takes no account of country-specific factors such as geography, population density, different scale economies, different network size, using different technologies, offering different service quality and with different underlying general costs in the economy.

It is difficult to see how a benchmark-set price complies with ComReg's obligation under the Access Regulations to set prices that are objective and proportionate. Regulated prices should be set following complete and comprehensive analysis, and following consultation. This has not yet been carried out in this case.

ComReg has proposed to set interim pricing based on the benchmarking approach, however it is not clear whether these prices will be actual prices set for an interim period, or interim prices that will be retrospectively adjusted when ComReg has carried out its full analysis. There is a very important difference between the two, which would effect an operator's investment decisions.

Taking into account that the line-share price has been already consulted on in 2004 but not implemented, O2 does not understand the urgency that would require a new and unsound approach to be taken on an interim basis.

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

O2 agrees that there should not be over-recovery of the costs of providing line share access. It does seem that there may be over-recovery in the current line-share and line rental prices. If the cost of providing a line is fully recovered in providing voice access then the total cost of providing voice access plus broadband through line-share is just the incremental carrier billing and administration cost. However in this case, two separate services are provided by two different operators who both derive benefit from the use of the line. In this case, it may not be appropriate to allocate all of the cost of providing the line to just one service/provider. O2 believes further analysis is required on this point.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail you response and where possible supported with evidence.

It is not possible for O2 to determine the correct line-share price. Only ComReg having obtained the necessary supporting data from eircom can make this determination.

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6 Smart Telecom

Consultation Questions and Answers

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence

Smart Telecom generally agree with the reasoning above.

It is hard to see how any cost above that of billing and administration is justified for line share but equally it must take the cost of full LLU into account. However, as this is an interim document and in the interests of speed we would accept the logic of an EU averaged price point until a full review on LLU is complete. (also see Question 9 reply)

Finally we do not believe that we should ultimately settle for an EU averaged price and equally we do not believe that the price has to be set to low – the ICT sector in Ireland is vital for the economy and there is no reason why we can not lead Europe in this regard.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring
Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

Yes, as per answer "1" above.

Q. 3. Do you agree or disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

Smart Telecom agree that line share is too expensive based on comparisons and more so, based on the cost of providing the service and the over recovery aspect

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

There is no question that Comreg should encourage investment in LLU. With only 17,900 unbundled loops, it is fair to say that LLU in Ireland has failed to date.

LLU is the only mechanism currently available to drive mass market innovation based competition and partial infrastructure based competition.

It is important to remember that Bitstream services fall below LLU on the ladder of investment, do not bring innovation competition, maintain higher revenue streams for the dominant player, are difficult to profitably retain long term, do not yield the margin to incentivise infrastructure investment and are rigid in their application.

The logic applied by the ladder of investment (LLU having higher "status" than Bitstream) is correct and it leads to innovation based competition.

Q. 5. Do you agree or dis-agree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to
amend the anomaly in price of LLU Line Share that exists with previous decision
D8/01? Please detail your response and where possible supported with evidence.

As the full cost of line rental is still payable at the retail level, Smart can see no evidence to support the view that true inter-platform or true infrastructure competition could possibly be impacted by low line share costs. We therefore agree with Comreg's conclusion. Also no other infrastructure provider offers a wholesale version of services at this level.

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

Smart Telecom fully supports this view.

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has
been completed by ComReg, failing an appropriate alternative being proposed by
industry? Please detail your response and where possible supported with evidence.

Smart Telecom supports this view for the purposes of speed and expediency within the interim review process.

We find it very hard to justify any charge other than that of administration and bill production in the charge levied for shared line access, however we equally accept that the price should not be so low as to inappropriately influence investment decisions (see Question 8 answer)

We do however appreciate that Comreg are working on a full LLU review and that the current solution is proposed only as an interim solution and therefore are happy to agree with same. (see Question 9 answer)

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

Again, Smart Telecom is answering this in the context of an interim solution.

Yes, in principle option 1 is the most likely workable solution, although as Comreg have pointed out, it is hard to see how this "cost" would be much more than one euro, i.e. very low.

Comreg should be mindful that while the current price is far to high, there needs to be an incentive in the value chain and the ladder of investment for operators to invest in full LLU to drive innovation competition, therefore the differential between full LLU and line share should not be so great as to influence one choice over the other. This is why a full review of the entire LLU market is required.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail you response and where possible supported with evidence

As already outlined, it is difficult to justify a cost much greater than the billing and administration overhead of the service as the full line rental cost is already recovered.

We also believe that the Line share cost must (and we assume will) form part of the overall LLU consultation.

In the interim we believe that the price suggested by Comreg is acceptable but we would favour a slightly more favourable position to just the EU average, put simply and unscientifically, "Ireland deserves it". Therefore we would prefer an interim price of approximately 2.60 per month to be reviewed at the time of the full consultation.

Q. 10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence

Yes.

Regards,

John Quinn

7 Vodafone Ireland Ltd.

Vodafone Response to the ComReg Consultation on the Rental Price for Shared Access to the Unbundled Local Loop

Introduction

Vodafone welcomes the opportunity to respond to this consultation on the proposed benchmarking approach to the setting of the rental price for shared access to the unbundled local loop. Our views in relation to the details of ComReg's proposals are set out fully in response to the consultation questions below.

Response to Consultation Questions

Q.1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU line share pricing may represent an over recovery of cost by Eircom and make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

Vodafone considers that the optimal approach would be to adjust the price of LLU Line Share following a comprehensive review of the full ULMP price and all associated prices. Vodafone considers that this approach, if carried out correctly, would set the LLU line share price and the price of ULMP on the basis of revealed efficient costs and would have due regard for striking the appropriate balance between efficient services based competition and efficient infrastructure based competition.

However Vodafone accepts in principle that a benchmarking approach, as currently proposed by ComReg, may be appropriate to impose for an interim period until a full review is completed where the benefits of this approach outweigh the costs. Strong justification should be provided for this proposed action. It is not clear that sufficient justification has been provided by ComReg as a large DSL broadband subscriber base and strong growth in broadband connections have been characteristics of the market for an extended period. These characteristics are not a new element requiring emergency action on ComReg's part. Furthermore if ComReg's review is completed by early autumn as proposed, then any interim prices may only be in force for a relatively short period of 6-8 months, which would appear to call into question the proportionality of the proposed action by ComReg on the LLU Line Share price at this time.

Vodafone agrees that the current LLU Line share pricing may represent an over-recovery of cost by Eircom, but this will only be confirmed following the conclusion of a comprehensive analysis of the relevant costs and their appropriate allocation across voice and broadband access services.

Q2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU line share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

Vodafone considers that ComReg should revoke ComReg decision notice D8/01, and set the price of LLU Line Share based on an average of prices in comparable EU countries, where an assessment of the associated costs and benefits clearly demonstrates that there is a net benefit from doing so. It is not clear to Vodafone at present that there is sufficient basis for implementing the proposed adjustment to the price of LLU line share for a relatively short interim period.

Q3. Do you agree or disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

Q4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

Vodafone agrees that ComReg's policy should be to encourage investment in LLU products where this is economically viable. We must emphasise that where regulation of access prices by ComReg is required, these prices must reflect the real underlying economic costs of providing access. It must not be the function of ComReg to encourage take-up of LLU products by market entrants without regard to setting prices that create the incentives for efficient investment.

Inefficient over-investment or under-investment in forms of access further along the value chain would not only be undesirable in terms of causing a misallocation of resources, but would also distort the basis of competition in the market. The decision of operators to compete in the market at any point along the DSL value chain should be based on access prices that reflect the real underlying costs together with considerations around functionality and ability to differentiate the service offering. The decision should not be influenced by regulated access prices that are set below costs for LLU products or any other form of access.

There are sufficient incentives for operators to move up the ladder of investment in the context of efficient relative pricing of wholesale products that strikes the appropriate balance between services based competition and infrastructure based competition. Any proposed regulator assisted access for operators in the form of artificially low prices for LLU line share or ULMP would be neither desirable nor necessary.

Q5. Do you agree or dis-agree with ComReg's conclusion which states inter-platform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

Q6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

Vodafone agrees with ComReg's preliminary conclusion that any decision it makes arising from the consultation should reflect the principle of non over-recovery. However, where two or more services are provided over the same infrastructure, it is efficient not only that the overall costs are recovered, but that each service is priced so as to make at least some contribution to the common costs.

Economic theory indicates that Ramsey pricing is the optimal methodology that can be adopted consistent with all services using a common infrastructure making an appropriate contribution to the recovery of common costs. Vodafone recognises the practical difficulties of implementing this approach in many instances, and in particular where, as in the current consultation, the speedy implementation of an interim regulated price is being proposed. The choice of approach will depend on an assessment of the relevant costs and benefits associated with each option. Vodafone is not opposed in principle to the use of benchmarking, subject to sufficient justification being provided.

Q7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

Vodafone does not have sufficient information to determine whether a benchmark price of €2.94 is appropriate. It may be the case that a narrower group of reference countries would be more appropriate to use than the broader group of 15 EU countries used by ComReg in calculating the proposed LLU Line Share price of €2.94. The basis for Vodafone's view is the wide variation in observed Line Share rental prices across the reference group, going from €6.25 in the case of Finland, to €0.37 in the case of the Netherlands. In this context it may be beneficial to undertake further analysis to determine whether a smaller group, say 5 or 6 countries, with the greatest similarities to Ireland in terms of the conditions in their telecoms markets would not be more appropriate to use in determining an average to be used in setting the interim maximum price for LLLU Line Share rental.

Q8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

Vodafone does not agree that if Benchmarking is rejected outright then Option 1 would necessarily be the next appropriate alternative. As set out in the response to question 6, Vodafone considers that the Ramsey pricing methodology (Option 3(a)) is the optimal approach to use in determining an appropriate maximum price for LLU Line Share. This methodology should also ideally inform the level of other associated access prices so that an efficient price structure for the recovery of local loop costs is ensured. This should occur in the context of a wider review.

Practical considerations in the context of setting an interim maximum price for LLU Line share may favour the use of an alternative approach to the determination of the maximum price if the necessary information for application of the Ramsey pricing methodology is not available.

Q9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail your response and where possible supported with evidence.

A reasonable price for LLU Line Share is that price which accurately reflects the real underlying economic costs of service provision using this form of wholesale access while allowing efficient operators to earn a reasonable rate of return.

Vodafone does not have sufficient information to determine this price, which can only be determined through an appropriately conducted overall review of the prices for ULMP and LLU Line Share.

Q10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence.

Vodafone agrees that the above proposed Decision Instrument is clear, unambiguous and practical.

8 Alternative Operators in the Communications Market ('ALTO')

alto

alternative operators in the communications market

Response to Consultation on Rental price for Shared Access to the Unbundled Local Loop

ComReg 08/23

Date: 16th April 2008

ALTO response to ComReg consultation on Rental Price for LLU Line Share

1. ALTO welcomes the opportunity to respond to the above consultation as LLU Line Share is a very important component of competition in the Irish Broadband Market

2. ALTO believes that the current price charged for this access service is

    a. Too expensive given the prices prevailing in other comparable markets

    b. Represents an over recovery of costs by eircom

    c. Give an in-built advantage to the eircom Bitstream products contributing to a margin squeeze

    d. When coupled with migration costs make it prohibitive for customers to exercise choice

3. An unattractive Line share price has the effect of inhibiting OAOs who offer products that differentiate on product attributes as well as price. This restricts

    a. Broadband penetration

    b. Market growth

    c. Investment by OAOs

4. The proposal by ComReg to introduce an interim price pending full review of LLU pricing is a prompt response to a problem in the market and is welcomed by ALTO

Q. 1. Do you agree or disagree with the reasoning set out above? In particular do you agree or disagree that current LLU Line Share pricing may represent an over recovery of cost by Eircom and may make it unduly difficult for LLU Line Share users to compete against Eircom's wholesale broadband product? Please detail your response and where possible supported with evidence.

A1 ALTO agrees with the reasoning above. The LLU Line Share pricing represents an over recovery of costs. Further the differential between Bitstream and Line Share rental costs makes it uneconomic for an OAO to provide a line share service. In addition the costs of migrating from a Bitstream to a line share product are also prohibitive. This is effectively a margin squeeze.

Q. 2. Do you agree or disagree that ComReg should now revoke previous ComReg Decision Notice D8/01, insofar as it relates to LLU Line Share Recurring Charges and the methodology for the calculation of LLU Line Share Recurring Charges, as it is no longer appropriate, given the changes in the broadband market and the demand for LLU Line Share and the over recovery of cost that this decision gives rise to? Please detail your response and where possible supported with evidence.

A2 Continuation of the current pricing for line share in the current dynamic market would continue an over recovery of eircom costs as the market continues to grow. Furthermore, the inherent cost advantage of Bitstream distorts competition in the market which will not be reversible given the high costs of migration. Thus ALTO agrees that the ComReg Decision Notice D8/01 should be revoked as it applies to line share recurring charges.

Q. 3. Do you agree of disagree that based on the above comparison to other countries that LLU Line Share in Ireland is expensive? Please detail your response and where possible supported with evidence.

A3 ALTO agrees with the analysis presented that LLU Line Share in Ireland is expensive compared with other countries.

Q. 4. In the context of the 'Ladder of Investment' approach, do you agree or disagree that ComReg's policy should be to encourage investment in LLU products where viable? Please detail your response and where possible supported with evidence.

A4. Encouraging investment by OAOs in LLU enables intense competition. LLU allows for differentiation of products as well as price and is compatible with the Ladder of Investment approach.

Q. 5. Do you agree or dis-agree with ComReg's conclusion which states interplatform competition should not be negatively impacted by ComReg decision to amend the anomaly in price of LLU Line Share that exists with previous decision D8/01? Please detail your response and where possible supported with evidence.

A5 ALTO agrees that it is unlikely that platform competition will be negatively impacted by reducing the price of LLU LS. Price is only one factor, service and product specifications also contribute to a competitive market.

Q. 6. Do you agree or disagree with ComReg's proposed approach and preliminary conclusion? Please detail your response and where possible supported with evidence.

A6 ALTO agrees with ComReg's proposed approach and the preliminary conclusion that any decision should reflect the principle that costs should not be over recovered.

Q. 7. Do you agree or disagree with ComReg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until a full review of LLU pricing has been completed by ComReg, failing an appropriate alternative being proposed by industry? Please detail your response and where possible supported with evidence.

A7 ALTO agrees with Comreg's proposal to apply a benchmark price of €2.94 per month to LLU Line Share until the full review of LLU pricing has been completed.

It addresses the current problem of LLU price levels expeditiously and being interim in nature will allow for appropriate adjustments later when considered with full LLU process.

Q. 8. Do you agree or disagree that if Benchmarking is rejected outright that Option 1 would still be the next appropriate alternative? Please detail your response and where possible supported with evidence.

A8 If benchmarking is rejected outright then Option 1 (incremental pricing) would be the best option for prompt implementation to remove existing distortion.

Q. 9. What do you believe is a reasonable price for LLU Line Share, taking into account the concerns and principles outlined in this consultation? Please detail your response and where possible supported with evidence

A9 A price of €2 would recover costs and at the same time boost competition by the provision of differentiated products at attractive prices, increase broadband penetration and attract investment.

Q. 10. Do you agree or disagree that the above proposed Decision Instrument is clear, unambiguous and practical? Please detail your response and where possible supported with evidence.

A10 The proposed Decision Instrument is clear, unambiguous and practical in the opinion of ALTO.