



Commission for
Communications Regulation

Wholesale Broadband Access:

Further specification to the price control obligation and an amendment to the transparency obligation

Response to Consultation and Decision

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Chapter 1

1 Introduction

- 1.1 The European Commission has recommended a number of markets as being susceptible to ex ante regulation.¹ These markets have been reviewed in an Irish context, by the Commission for Communications Regulation ("ComReg"), and obligations were imposed on operators which were designated with significant market power ("SMP"). One such market is Wholesale Broadband Access ("WBA") and Eircom Limited ("Eircom") was designated with SMP in that market pursuant to ComReg Decision D06/11.²
- 1.2 This Response to Consultation and Decision (the "Decision") contains ComReg's decisions in relation to the further specification of the existing price control obligations and amendment to the transparency obligations in the WBA market. This Decision considers the responses to Consultation Document No. 10/108, *"Wholesale Broadband Access: Further consultation to Consultation Document No. 10/56 and draft decision in relation to price control and transparency"*, which was published on 22 December 2010 ("Consultation 10/108").
- 1.3 This Decision relates to wholesale products in the regulated WBA market *only* as there is no regulation of the retail broadband market. As set out in Consultation 10/108, the proposals were:
- To further specify the existing price control obligation by setting minimum price floors for a WBA rental product, bitstream, based on a Reasonably Efficient Operator³ ("REO") availing of local loop unbundled ("LLU") Line Share, a product in the Wholesale Physical Network Infrastructure Access ("WPNIA") market. This would minimise the risk of a margin / price squeeze in the WPNIA market, which would be contrary to Eircom's existing regulatory obligation⁴, by it setting its bitstream prices relative to LLU-Line Share too low;

¹ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

² ComReg Decision D06/11 'Market Review: Wholesale Broadband Access (Market 5)' dated 8 July 2011, (hereafter referred to as "WBA Market Review").

³ A Reasonably Efficient Operator has a different basic cost function to Eircom and does not yet enjoy the same economies of scale and scope as Eircom. Therefore, it has a per unit cost higher than Eircom.

⁴ ComReg, WBA Market Review, supra n 2, Remedies: Chapter 7.

- To further specify the existing obligation not to margin / price squeeze in the WBA market, to include the obligation not to cause a margin / price squeeze between the price of the WBA component parts of a resale or end-to-end WBA product(s) and the pricing of the corresponding WBA product(s) sold. This margin squeeze assessment will be based on a Similarly Efficient Operator⁵ ("SEO") consistent with the approach taken in ComReg Decision No. D01/06⁶; and
 - To further specify the existing transparency obligation, to support the further specification relating to the obligation not to margin (price) squeeze between the price of the WBA component part(s) of a resale or end-to-end WBA product(s) and the pricing of the corresponding WBA products.
- 1.4 Eircom's obligations in the WBA market in relation to excessive pricing and not to cause a margin (price) squeeze remains and is specified in the existing price control of ComReg Decision D01/06. The current D01/06 price control sets the maximum price for bitstream. ComReg plans to issue a separate consultation seeking views on a revised method of setting maximum prices for bitstream later in 2012.
- 1.5 The Decision does not address the regulation of WBA services provided over Next Generation Access ("NGA") networks. Regulation of WBA services over NGA networks is the subject of a separate consultation.⁷
- 1.6 There were five responses to Consultation 10/108. In addition, the European Commission provided ComReg with a "no comments" letter. This document considers those responses and sets out the reasons where ComReg either remains with its preliminary view (as set out in Consultation 10/108) or amends its view for the final decision(s) as set out in this document.
- 1.7 This Decision is structured as follows:

Chapter 2: *Executive Summary*: This section summarises the main Decisions made.

Chapter 3: *Summary of the key points*: This section summarises the key points of each non-confidential response to Consultation 10/108. ComReg's response and position on each of the key issues identified by respondents are reasoned and a final position (i.e. Decision) is provided.

⁵ A Similarly Efficient Operator shares the same basic cost function as Eircom but does not yet enjoy the same economies of scale and scope as Eircom. Therefore, it has a per unit cost higher than Eircom.

⁶ ComReg Decision No: D01/06 - Retail Minus Wholesale Price Control for the WBA Market, Document No. 06/01 dated 13th January 2006.

⁷ ComReg Document No. 12/27.

Chapter 4: *Price floor for Bitstream*: This section sets out the resulting price floor for bitstream based on ComReg's Decisions outlined in Chapter 3.

Chapter 5: *Final Decision Instrument*: This section sets out the Decision Instrument resulting from this Decision.

Chapter 6: *Regulatory Impact Assessment*: This section sets out an analysis of the likely effect of the new regulation or regulatory change.

Chapter 2

2 Executive Summary

- 2.1 ComReg is responsible for the regulation of the electronic communications sector in Ireland and this is largely achieved through the regulation of wholesale markets that are deemed not to be effectively competitive.
- 2.2 The most recent market analysis of the WBA Market found that Eircom to continue to have SMP in this market.⁸ As a result of this, remedies were imposed — including the obligation to offer services in a non-discriminatory manner at wholesale prices that allowed sufficient margin to competitors in the provision of retail broadband services when relying on Eircom’s wholesale services. ComReg also imposed a further obligation not to impose a margin squeeze.⁹
- 2.3 This Decision further specifies how Eircom should comply with the obligation not to cause a margin squeeze from the WBA to the WPNIA market. A further consultation will be carried out later this year to determine whether the current retail minus control to a cost-based control should be amended — to guard against excessive wholesale pricing behaviour in areas where competition is less prevalent.
- 2.4 It had been ComReg’s intention, as consulted on in ComReg Document 10/56, to publish a Decision on the Price floors and Price ceilings together. However, due to the significant changes that have occurred over the past two years (as discussed in paragraph 2.6), ComReg considered that the introduction of the price floor decision in the first instance is the more critical price control. In addition, it is important to note that currently there is no minimum price control for WBA prices. As such, while low prices may initially benefit consumers, ComReg considers that such pricing could dis-incentivise efficient investment by other alternative operators “OAOs” and therefore would not be in the long-term interests of consumers — as the market for LLU investment would be foreclosed and consumers would lose the potential benefit of dynamic efficiency and innovation associated with such investments (see paragraph 2.11).

⁸ ComReg, WBA Market Review, supra n 2.

⁹ *ibid*, paragraph 7.78.

- 2.5 The changes, referred to in paragraph 2.4, included the rapid take up of LLU Line Share following a joint venture arrangement between two large OAOs and the rollout of the upgraded core network by Eircom. In that time, ComReg also introduced a further specification to the price control in the Market for terminating Segments to Leased Lines — which is also relevant to this Decision when considering the appropriate costs for backhaul.¹⁰ As a result of this upgrade, Eircom have migrated a significant proportion of its WBA customer base to Bitstream Managed Backhaul. The introduction of this capacity-based product has led to concerns that Eircom could offer WBA services at very low prices and therefore dis-incentivise any further roll out of co-location sites by other OAOs — who may wish to avail of LLU Line Share. This would be contrary to the policy set by ComReg and is also unlikely to be in the best interests of promoting competition at the deepest layer of the network.
- 2.6 To date, competition in fixed retail broadband market has largely depended on operators offering services using the Eircom WBA services as a platform. Only in recent years have OAOs had the ability to purchase a wholesale input provided on another operator's network, albeit on a limited geographic basis. The deepest level of access to another operator's infrastructure is possible in two ways, one is by means of access to the regulated WPNIA services such as LLU and Line Share — where an OAO rents access on a monthly basis to the local loop and provides broadband via its own equipment from the exchange (as discussed in paragraphs 2.10-2.17); or where an alternative unregulated platform offers wholesale services. Currently, only Eircom offer such a wholesale service nationally.
- 2.7 When WBA services were initially launched by the incumbent, OAOs were required to build out some of their own infrastructure and have points of handover for data services to their own network. However, over the past couple of years Eircom wholesale have offered a variant of WBA known as “White label” WBA services, where no infrastructure is required (as discussed in paragraphs 2.18-2.21). The further specification to the margin test, set out in this Decision, includes a control over how the regulated inputs into “White Label” WBA services can be sold without the risk of creating a squeeze against an OAO competing using either LLU Line Share or the traditional WBA service.

¹⁰ ComReg D02/12, “A final decision further specifying the price control obligation in the market for wholesale terminating segments of leased lines”, published 2 February 2012.

2.8 The following is a summary of the key Decisions taken:

2.1 Minimum price floor for bitstream to maintain economic space to LLU Line Share

- 2.9 Bitstream is a regulated WBA rental product and has been identified as a key wholesale requirement for Other Authorised Operators (“OAOs”) to offer retail broadband. Bitstream allows OAOs to replicate the fixed retail broadband offers of the SMP operator across Ireland. Another wholesale input from Eircom that OAOs can use to offer retail broadband are WPNIA inputs, which can either be through full LLU access or LLU Line Share.
- 2.10 As a vertically integrated operator, Eircom is in a strong position to leverage market power between the WPNIA market and the retail broadband market. As noted in the WBA Market Review, ComReg considers that, absent an appropriate price control, it could be in Eircom’s interests to set bitstream prices low enough to act as a disincentive for (or undermine) investment in LLU (as such investment by OAOs could pose a competitive risk to Eircom). ComReg considers that if OAOs remained on bitstream to provide retail broadband products, the potential for market differentiation to the benefit of consumers would be limited — which would be to the detriment of the long-term interests of end-users.
- 2.11 ComReg considers that OAOs availing of LLU have the best potential to offer competition to Eircom to the benefit of retail customers — as OAOs having made their efficient infrastructure investments, can offer differentiated retail products at possibly lower prices.
- 2.12 Consequently, to ensure that appropriate incentives are maintained to encourage investment in LLU, ComReg in this Decision has further specified the price control obligation to include setting minimum price floors for bitstream — to ensure that an appropriate economic space is maintained between Eircom’s relative pricing of bitstream and LLU Line Share.¹¹
- 2.13 As proposed in Consultation 10/108, the minimum price floors for WBA will be set by reference to a Reasonably Efficient Operator (“REO”), which in this instance will be a hypothetical new entrant, availing of LLU Line Share and with a lower retail market share than the incumbent.

¹¹ A principle supported by the Body of European Regulators for Electronic Communications (“BEREC”) in report ERG (09) 21: ‘ERG Report on price consistency in upstream broadband markets’ dated June 2009 – at page 11.

- 2.14 In developing an appropriate cost-plus model to set the minimum price floors for bitstream rentals, ComReg considered a number of LLU Line Share take-up assumptions for the hypothetical entrant. In a change from the proposed approach in Consultation 10/108, ComReg considers that it would be more appropriate to use the weighted-average of the assumed take-up of LLU over the three year price control period in the cost-plus model. The weighted-average approach has the advantage of setting one minimum price floor for the duration of the control period. ComReg considers that this will provide greater certainty and will militate against potential price-shocks — which overall should provide OAOs with greater investment certainty (as the minimum price floors will be set for the duration of the cost-plus model). This is consistent with the approach used in setting the price of LLU. In addition, where empirical evidence shows that a revision may be warranted of the assumed LLU take-up (based on actual out-turns) — ComReg will revise the weighted average numbers as appropriate. ComReg considers that this approach will provide a necessary “sense-check” that the underlying assumptions in the cost-plus model remain appropriate.
- 2.15 ComReg will set the minimum price floor for the ‘per port’ floor and ‘Mbps’¹² floor. As noted in paragraph 2.15, these floors will be subject to review (e.g. LLU lines, kbps throughput¹³ etc. will continue to be monitored by ComReg as part of the quarterly reports) to ensure that they remain reasonable when compared to actual out-turns.
- 2.16 Furthermore, in a change to that proposed in Consultation 10/108, taking into account the views of respondents, the ‘Mbps’ floor is split into two components a fixed floor and a variable floor to reflect the fixed and variable cost components. ComReg considers that this is more appropriate in reflecting the cost structure of WBA. Due to this change, ComReg considers that it would be more appropriate to refer to this as a ‘traffic’ floor as opposed to ‘Mbps’ floor. ComReg believes that this fixed / variable ‘traffic’ floor sets the appropriate floor to match and replicate the likely kbps usage over time.

¹² Mega-bytes-per-second.

¹³ The price floor model relates to copper based bitstream and assumes an upper-end kbps usage of 200 kbps. The price floor model is not applicable to WBA pricing over NGA.

Final price floor for bitstream (subject to ongoing review by ComReg)

| Price floor | Monthly minimum price floor (ex VAT) |
|-------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| Monthly Port cost per user - fixed | €4.55 |
| Monthly Backhaul costs per user - fixed | €1.33 |
| Monthly Backhaul cost per Mbps - variable raised at the 95th percentile of the 5 minute readings in any calendar month | €8.14 |

2.2 Minimum price floor for WBA components when offered in end-to-end WBA

- 2.17 A further wholesale service that OAOs can purchase from Eircom to offer retail broadband services is resale or end-to-end WBA. Resale or end-to-end WBA is a wholesale service (offered by Eircom and known as “White Label”), which allows OAOs to avail of broadband products without the need for investment in network backhaul infrastructure.
- 2.18 Resale or end-to-end WBA contains regulated components from the WBA market. As noted in the supporting WBA market review¹⁴, ComReg considers that Eircom’s provision of resale or end-to-end WBA, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment — by Eircom offering resale or end-to-end WBA below the prices of its regulated WBA components (which could undermine / discourage investment in LLU and lead to discriminatory pricing of WBA services).
- 2.19 Consequently, ComReg in this Decision has further specified the obligation not to margin squeeze in the WBA market to include, *inter alia*: that Eircom in pricing any resale or end-to-end WBA service must, at a minimum, include the full and same prices of the related regulated bitstream product and any other regulated WBA component products offered by Eircom. ComReg will assess this with reference to a WBA component part(s) Margin Squeeze Test.¹⁵

¹⁴ ComReg Consultation Document No. 10/81: ‘Market Review: Wholesale Broadband Access (Market 5)’ dated 1 October 2010.

¹⁵ WBA component part(s) Margin Squeeze Test means the test used by ComReg to identify a potential WBA component part(s) Margin Squeeze. Set by reference to a “Floors End-to-End WBA Margin Squeeze Model”.

- 2.20 Therefore, the regulated WBA component in Eircom's offer of resale or end-to-end WBA cannot be offered below the applicable and regulated prices in effect in the WBA market — plus the relevant SEO costs relating to non-regulated components offered in the managed service. To do otherwise would also be contrary to the obligation of non-discrimination in the WBA market.

2.3 Transparency of the regulated WBA components within Eircom's provision of resale or end-to-end WBA

- 2.21 In recognition of the persistent risk of competition problems which has been identified in the WBA market, ComReg imposed a number of regulatory remedies in the WBA Market Review. One such remedy is the *obligation of transparency*.
- 2.22 Having considered the views of respondents and other relevant evidence, ComReg has decided to amend the existing transparency obligation to no longer require minimum price floors for the WBA components offered by Eircom in resale or end-to-end WBA to be published. Instead the minimum price floors for the WBA components are to be submitted to ComReg — in order to demonstrate compliance with the obligation not to margin / price squeeze.

Chapter 3

3 Summary of key points

3.1 Introduction

3.1 This section summarises the key points of each non-confidential response to Consultation 10/108. Following the summarised position of respondents, ComReg's position in relation to each of the issues is provided.¹⁶ The consequent Decision is set out in Chapter 5. For ease of reference, this chapter is structured under the following headings:

- Principle of setting minimum price floors for bitstream in WBA;
- Minimum price floors for bitstream in WBA based on REO;
- Regulated WBA components in resale or end-to-end WBA based on SEO; and
- Conclusion.

3.2 Submissions to Consultation 10/108 were received from the following interested parties:

1. Alternative Operators in the Communications Market (“ALTO”);
2. BT Communications Ireland Limited (“BT”);
3. Eircom;
4. Vodafone Ireland Limited (“Vodafone”); and
5. Magnet Networks Limited (“Magnet”).

¹⁶ The main points made by respondents to Consultation 10/108 are addressed in the main body of this document. The full non-confidential responses have been published 12/32a.

3.2 Principle of setting minimum price floors for bitstream in WBA

Consultation Issue

- 3.3 Bitstream allows OAOs to replicate the fixed retail broadband offers of the SMP operator across Ireland. OAOs can offer retail broadband based on WPNIA inputs, either through full LLU access or LLU Line Share.
- 3.4 ComReg believes that absent an appropriate price control, it could be argued that, it is in Eircom's interests to set bitstream prices low enough to act as a disincentive for (or undermine) LLU investment. ComReg considers that if OAOs remained on bitstream to provide retail broadband products, the potential for market differentiation to the benefit of consumers would be limited.
- 3.5 Consultation 10/108 sought views on ComReg's proposal to further specify the price control to include the setting of minimum price floors for bitstream rental in the WBA market.

Respondents Views

- 3.6 ALTO, BT and Magnet noted in their respective submissions that they were in favour of ComReg's proposed approach. ALTO noted that: *"it is essentially for ComReg to establish a price floor for eircom's bitstream product and the different forms of product in order to facilitate the maintenance of an economic space for WPNIA products"*.¹⁷ BT noted in their submission that without such measures: *"eircom has the incentive and the ability to price (Margin) squeeze WPNIA LLU towards foreclosure"*.¹⁸
- 3.7 Eircom's submission noted that they were not in favour of ComReg's proposed approach. Eircom's submission made the following main points:
- Difference in competition across the country: Eircom claims that ComReg's proposals do not take into account the state of competition in the WBA market and the marked difference in Eircom's market power in rural and urban areas;
 - Insufficient justification: Eircom claims that insufficient justification has been advanced by ComReg, to explain the importance of LLU Line Share operators in providing broadband access and in particular in those areas where LLU Line Share is uneconomic; and

¹⁷ ALTO, "Response to Further Consultation to Consultation Document No. 10/56 and draft Decision in Relation to Price Control and Transparency Ref: 10/108", 4 February 2011, pg. 3.

¹⁸ BT, "Response to ComReg Further entitled Further consultation to Consultation Document No. 10/56 and draft Decision in Relation to Price Control and Transparency Ref: 10/108", 4 February 2011, pg. 2.

- No justification to maintain an obligation to control excessive prices: Eircom claim that where ComReg is concerned with Eircom setting WBA prices too low, ComReg should not be concerned (at the same time) that Eircom will set excessive prices for WBA. Consequently, Eircom claims that it is difficult to see any justification for the maintenance of an obligation to control excessive prices.

3.8 Vodafone's submission noted that in their view that the price control in the WBA market should be cost orientation at a specific price point at the minimum level as opposed to: *"setting of upper and lower bounds with the freedom for the SMP operator to optimise its position within these constraints"*¹⁹ which Vodafone considers minimises the effect of regulation.

ComReg's position

3.9 WPNIA products and services on the wholesale market (provided by Eircom in accordance with regulatory obligations) are purchased by OAOs to enable them to offer a range of retail narrowband and broadband products and services. WPNIA products allow these OAOs the opportunity to innovate and to differentiate their retail service offerings, both in terms of product characteristics and price and to offer products (and variants of products) which are not necessarily offered by Eircom. As identified in the WPNIA market analysis²⁰, WPNIA access seekers are typically employing WPNIA (unbundling local loops) as a means to offer high speed broadband, and a variety of bundles including narrowband voice and broadband.

3.10 ComReg maintains the view that it is appropriate to set a minimum price for bitstream rentals. As a vertically integrated operator, Eircom is in a strong position to leverage market power between the WPNIA market and the retail broadband market. ComReg considers that absent an appropriate price control, Eircom could set bitstream prices low enough to act as a disincentive for investment in LLU (as recognised in ALTO's and BT's respective submissions) or undermine recent LLU investment by OAOs. The need to set minimum prices for bitstream rentals was noted in the WBA Market Review:

¹⁹ Vodafone, "Response to ComReg Document 108/10, Wholesale Broadband Access Further consultation to Consultation Document No. 10/56 and draft decision in relation to price control and transparency", 4 February 2011, pg. 2.

²⁰ ComReg Decision D05/10 (ComReg Document No. 10/39) "Market Review: Wholesale Physical Network Infrastructure Access (Market 4): Further Response to ComReg Document No. 08/104, Response to ComReg Document No. 09/42 and Decision", 20 May 2010 (hereafter also referred to as "WPNIA Market Review").

*“we [ComReg] also identified scope and incentives for the SMP operator to engage in possible price-related leveraging through pricing its upstream and downstream services in such a way as to give rise to an insufficient wholesale/retail margin which would impede effective downstream competition. On this basis, we consider it appropriate and justified to oblige Eircom not to cause a margin (price) squeeze. This obligation includes Eircom maintaining an appropriate economic space between the relative pricing of different upstream/intermediate inputs, for example, maintaining an appropriate pricing differential between its WBA and WPNIA prices and the price of the WBA component parts of a resale or end-to-end wholesale broadband access products and the pricing of the corresponding WBA products”.*²¹

- 3.11 Furthermore, setting minimum price floors for bitstream rentals would reduce the risk of a margin (price) squeeze to WPNIA — which is consistent with Eircom’s existing regulatory obligation.²² In particular, ComReg Decision D05/10 noted that:

*“ComReg’s objective here is to encourage efficient infrastructure-based competition, and we recognise that this objective could be undermined if the relationship between the WPNIA price and the WBA price distorts incentives to invest and operate in the WPNIA market. At present, the concern is between LLU pricing and bitstream pricing. Therefore, ComReg wishes to establish a principle that will maintain an economic space between WPNIA and WBA pricing.”*²³

- 3.12 ComReg believes that setting minimum price floors for bitstream rentals, is consistent with the report of the ERG (now BEREK) which noted: *“...that the economic space between WBA and LLU prices should be wide enough so as to avoid eviction prices and not hinder LLU competitors’ investments in LLU...by artificially restraining LLU extension”.*²⁴

²¹ ComReg, WBA Market Review, supra n 2, paragraph 7.77, pg. 89.

²² ComReg, WPNIA Market Review, supra n 20, section 12.4.

²³ ComReg Document No. 08/104, paragraph 7.182, which forms part of WPNIA Market Review (supra n 20) and as noted in ComReg, WBA Market Review, supra n 2, paragraph 7.78.

²⁴ ERG (09) 21: "ERG Report on price consistency in upstream broadband markets", June 2009, pg. 11.

- 3.13 ComReg considers that consumers are best served in terms of product pricing and innovation where competition is based on investment in infrastructure by competing operators. As service providers can offer greater differentiation in services and products which are based on their own infrastructure, and where their reliance on the SMP operator's wholesale infrastructure is reduced. As the European Commission ("EC") has noted: *"Competing network infrastructures are essential for achieving sustainable competition in networks and services in the long term"*.²⁵
- 3.14 In addition, ComReg considers that this Decision should also provide the correct incentive for other OAOs to climb the ladder of investment due to the certainty provided — i.e. that the economic space between LLU and WBA will be maintained by an appropriate Wholesale Margin Squeeze between WBA and WPNIA Test²⁶ (this will minimise the risk of Eircom creating a margin/price squeeze to WPNIA — by preventing Eircom from setting its bitstream pricing too low, relative to the replicable product, wholesale or retail, of the unbundled OAO).
- 3.15 Furthermore, ComReg considers that Decision will allow current OAOs (which currently offer WBA products or have invested in LLU) to compete with more certainty as the regulatory framework, as provided for through the proposed remedy provides the lowest price Eircom could charge in the WBA market. While LLU is a component of a cost stack that sets the minimum price floor, the price of LLU is a maximum price and this price can be lowered either for commercial reasons by Eircom or through a further amendment by ComReg. However, if the price for LLU was to reduce below €12.41 (the current LLU price), this should further increase the incentive of OAOs to unbundle. In addition, all OAOs co-located at LLU exchanges can also avail of this reduction.

²⁵ European Commission, "Explanatory Note accompanying Recommendation on relevant Product and Service Markets", C (2007) 5406.

²⁶ Means the test used by ComReg to identify a potential wholesale margin squeeze between WBA and WPNIA.

- 3.16 With respect to Eircom's view that ComReg's proposals do not take into account the state of competition in the WBA market in rural and urban areas — ComReg disagrees. The recent WBA Market Review specifically considered this issue and subsequently identified a national market for WBA.²⁷ However, notwithstanding the national market definition for WBA, ComReg considers that the proposed price control should give Eircom pricing flexibility — such that it could offer its WBA product at different prices within the range of the maximum price ceilings set by the D01/06 retail-minus price control and the minimum price floors set by this Decision. Therefore, Eircom can utilise this pricing flexibility to set its prices e.g. a lower WBA price could be charged by Eircom (should it so choose) in those areas where structural conditions such as higher densities allows a lower WBA price — provided that it does not create a margin squeeze in WPNIA in those areas (consistent with its existing regulatory obligation as provided for by ComReg D05/10).
- 3.17 With respect to Eircom's view that insufficient justification has been advanced by ComReg to explain the importance of competition in broadband except with respect to LLU Line Share operators and in particular in those areas where it is uneconomic — ComReg does not agree. As provided under Section 12 the Communications Regulation Act 2002 (“the Act”), ComReg's statutory objectives are, *inter alia*, to:
- Promote competition;
 - Ensure that there is no distortion or restriction of competition; and
 - Encourage efficient investment in infrastructure.

²⁷ ComReg, WBA Market Review, supra n 2, paragraphs 4.138-4.143.

Consequently, ComReg considers that this Decision ensures that competition and efficient infrastructure investment (e.g. investment in LLU Line Share or full LLU) in the WPNIA market is promoted and protected from possible margin squeeze is required to achieve these statutory objectives. In addition, as noted in paragraph 3.16, the WBA Market Review specifically identified a national market for WBA. However, as noted in paragraph 3.16, Eircom can utilise the pricing flexibility provided by the maximum price ceilings and minimum price floors to reflect the underlying competition in certain areas and to allow Eircom to price (if it so chooses) cost reflectively. ComReg considers that the pricing flexibility offered by this price control should also provide the appropriate “buy” or “build” signals to the market — encouraging efficient investment in infrastructure. As noted in paragraph 3.14, ComReg considers that this Decision should also provide the correct incentive for other OAOs to climb the ladder of investment. Furthermore, ComReg considers that if it did not protect WPNIA from a possible margin squeeze, the following outcomes could occur:

- OAOs would potentially not invest in infrastructure to avail of WPNIA (LLU) wholesale inputs from Eircom, but would continue to avail of the wholesale inputs of WBA or resale end-to-end wholesale broadband access. This would likely re-enforce Eircom’s dominance and SMP in the WBA and retail fixed narrowband access markets; and
- it could lead to a reduced number of infrastructure-based OAOs, which would be to the detriment of retail customers — as OAOs that simply rely on Eircom’s resale wholesale products are not in a strong position to offer differentiated products or lower retail prices generally.

3.18 With respect to Eircom's view that where ComReg is concerned with Eircom setting WBA prices too low, ComReg cannot be concerned at the same time that Eircom will set excessive prices for WBA — ComReg does not agree. A price floor represents the minimum price Eircom could charge. However, Eircom (should it so choose) can price above this level. Consequently, as noted in the recent WBA Market Review²⁸, there is a requirement to control excessive pricing — especially in those areas where WBA is the only available wholesale input available and feasible for OAOs to use. Eircom provides many variants of WBA services and there is a risk that some of these could be used to undermine LLU investment while other services could be priced excessively.

²⁸ ComReg, WBA Market Review, supra n 2, paragraph 7.75.

*“we believe that, absent an appropriate price control obligation, Eircom would have the ability and incentives to set excessive prices in the WBA market which would exploit retail broadband users and potentially harm competition from OAOs relying on Eircom’s WBA inputs. Therefore, we consider it appropriate and justified to continue to impose a price control obligation on Eircom so as to guard against such potential excessive pricing”.*²⁹

ComReg is moving towards a cost-oriented tariff approach (i.e. a maximum price ceiling). ComReg has already requested that Eircom commence gathering the required data. However, ComReg’s immediate concern is that bitstream pricing in certain areas is not reduced (in the interim) as this may result in the market being foreclosed to OAOs. As such, ComReg considered it appropriate to first consider the margin squeeze price control measure — as it will minimise the risk of a margin / price squeeze to WPNIA market. In addition, ComReg considers that even when a cost-oriented approach is implemented, ComReg will continue to require that the appropriate economic space is maintained across all steps of the value chain — due to Eircom having been designated as having SMP. As set out in Consultation 10/108, ComReg intends to consult on maximum price ceilings for WBA later in 2012.

ComReg has gathered significant data on the current exchanges co-located and likely to be co-located when considering this Decision. This data has also been used for related Decisions such as D01/10³⁰ where the underlying LLU price has been set on the basis of likely LLU take-up. However, as WBA services must be purchased with Wholesale Line Rental, and in the absence of any significant take-up of the LLU service, the relevant comparable service for a margin squeeze test is currently Line Share.

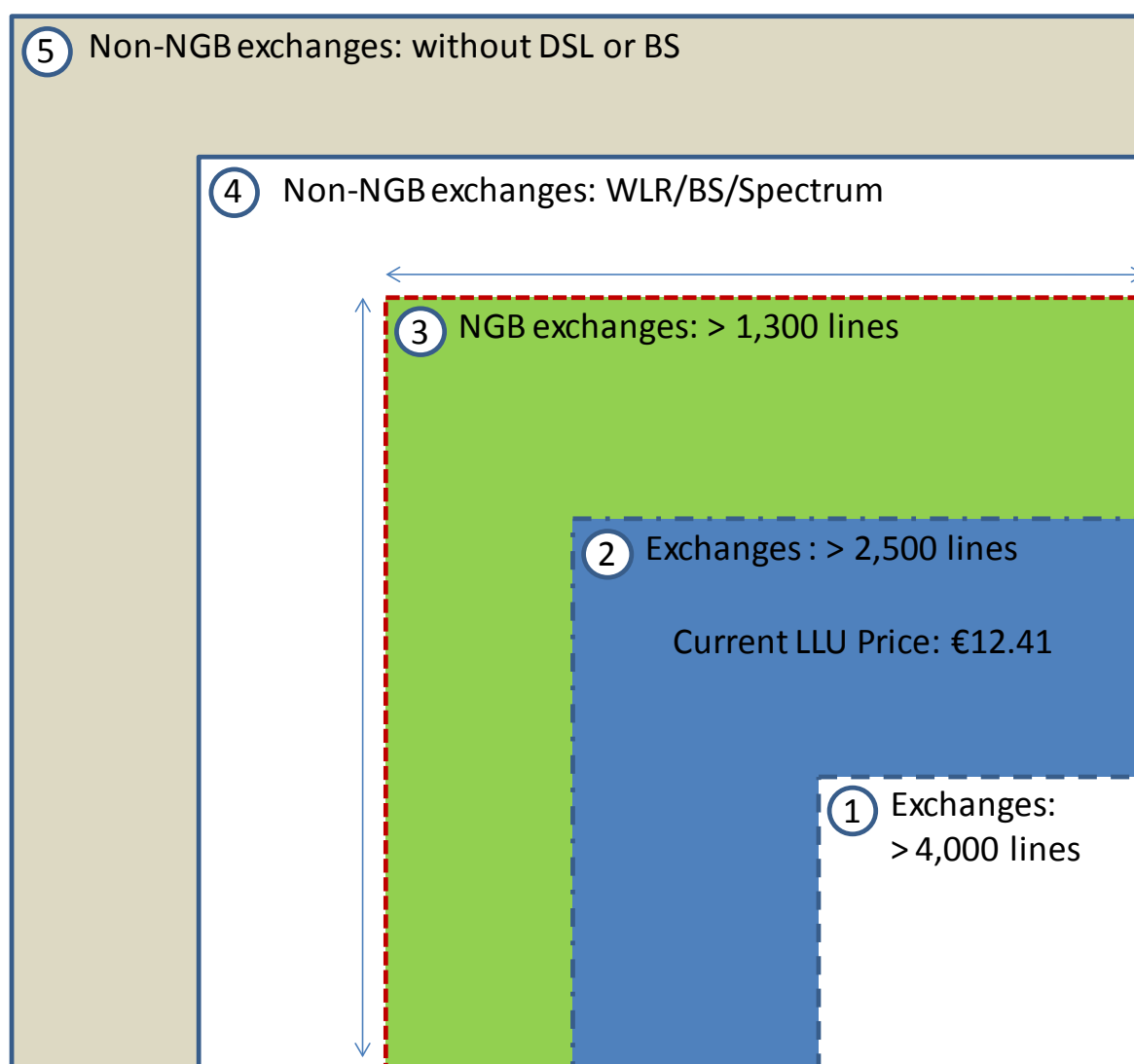
²⁹ ComReg, WBA Market Review, supra n 2, paragraph 7.75.

³⁰ ComReg D01/10, “Response to Consultations & Final Decision: Local Loop Unbundling (LLU) and Sub-Loop Unbundling (SLU) Maximum Monthly Rental Charges”, 9 February 2010.

- 3.19 With respect to Vodafone's view that the WBA market should be cost-oriented at a specific price point at a minimum level — ComReg does not agree. As noted in paragraph 3.16, ComReg considers that the proposed price control should give Eircom pricing flexibility — such that it could offer its WBA product at different prices within the range of the maximum price ceilings set by the D01/06 retail-minus price control and the minimum price floors set by this Decision. Eircom has at present an obligation to ensure that prices charged for bitstream are not excessive³¹; however the current control does not preclude the option to offer lower prices in different geographic areas where the underlying cost profile is different to that nationally. ComReg believes that prices set in this manner more closely reflect underlying costs and should set more accurate price signals to potential entrants on whether to build or buy capacity.

This approach is also consistent with ComReg's Decision No. D02/12: "*A final decision further specifying the price control obligation in the market for wholesale terminating segments of leased lines*", published 2 February 2012. ComReg will, however, consult further in 2012 on an overall cost based control, this will ensure that all prices set, either nationally or in geographic areas, are reflective of cost. Similarly, as set out in Consultation Document No. 11/72, ComReg considers that retail pricing may prospectively differ by geographic area — subject to the underlying structural characteristics and investment incentives/viability. Such possible variations and can be broadly represented graphically as follows:

³¹ As set by ComReg D01/06.

Figure 1: Geographic areas of platform availability

3.20 As set out in both Consultation Document No. 10/56 and 10/108, ComReg believes that the WBA price control should:

- protect against excessive pricing of WBA especially in those areas not served by alternative infrastructure competition. LLU to date has only served Area 1 above. Therefore, excessive pricing could be an issue in Areas 2, however, it is definitely a concern in Areas 3 and 4 — as Eircom provided WBA is predominant or the only wholesale input available in these areas. Consequently, a maximum price control is required to protect against excessive pricing; and

- in those areas served by LLU operators, which as noted above is mainly only Area 1 to date, ComReg considers that it is important to protect this efficient investment and incentivise further investment in infrastructure and ensure WBA is not priced so low that this is undermined (as discussed in paragraph 3.3). Therefore, a minimum price control is required to maintain an appropriate economic space between Eircom's relative pricing of LLU Line Share and Bitstream. As mentioned previously, ComReg will consult on an overall cost-based control later this year which will also look at all prices charged nationally to ensure they are not excessive regardless of the presence of competitors.

3.21 Consequently, ComReg believes a maximum price to minimum price range for WBA is appropriate as the price control is capable of reflecting:

- the higher per unit cost facing Eircom in those areas where there is no alternative infrastructure competition — which are mainly rural areas with fewer customers and longer line lengths; and
- the lower per unit costs facing a LLU Line Share operator in those areas likely to be unbundled — which are mainly urban exchanges with more customers.

3.22 This approach is consistent with that proposed in ComReg Response to Consultation, Further Consultation and draft decision on NGA (ComReg No. 12/27), and the accompanying Oxera report *“eircom’s next generation access products: Pricing principles and methodologies”*.

3.23 Furthermore, ComReg believes that this approach offers Eircom pricing flexibility³² to recover its efficiently incurred costs. ComReg considers that this Decision should allow the regulated market to replicate as far as possible the commercial dynamics of competitive markets. Which ComReg considers should ensure that the correct “buy” or “build” decisions are maintained in all areas throughout Ireland.

³² Within the range between the maximum price ceilings set by the D01/06 retail-minus price control and the minimum price floors set by this Decision.

3.3 Minimum price floors for bitstream in WBA based on REO

Consultation Issue

- 3.24 In Consultation 10/108, ComReg sought views on ComReg's proposed year-on-year indicative price floors for bitstream rentals (derived from an appropriate cost-plus model) together with some of the key underlying assumptions regarding including the LLU Line Share take-up of the hypothetical entrant.
- 3.25 While ComReg has to date used the SEO test in D01/06 when reviewing the retail to wholesale margins available to OAOs, in this instance the REO test is being used. The main difference between the two approaches being that with REO ComReg can use the published prices of Eircom for the relevant cost inputs faced by an OAO when using Line Share, whereas for an SEO test ComReg must rely on Eircom's underlying costs adjusted for market share assumptions for the likely costs faced by an OAO. Both approaches aim to achieve the same goal of ensuring an appropriate economic space from one rung in the ladder to another.
- 3.26 ComReg proposed to set the minimum price floors for bitstream rentals by reference to a hypothetical entrant (based on a REO) availing of LLU Line Share. ComReg outlined three options for setting the minimum price floors for bitstream rentals, namely:
- Option 1: year-by-year minimum price floors set by assumptions in 'cost-plus' model;
 - Option 2: a weighted average³³ of the range of minimum price floors from the cost-plus model; and
 - Option 3: annual minimum price floors set by actual LLU take-up inputted into the 'cost-plus' model.

ComReg was of the preliminary view that Option 1, based on an assumed successful take-up of LLU Line Share, should be used to set the annual minimum price floors for bitstream.

- 3.27 For ease of reference, respondent's views are structured under the following headings:
- Proposed amendments to the cost-plus model: the appropriateness of the inputs (in the cost-plus model) used to derive the minimum price floors; and

³³ Based on assumed LLU Line Share lines of hypothetical entrant.

- Assumed level of LLU Line Share take-up (Options 1-3): the appropriateness of the assumed level of LLU take-up in the hypothetical entrant model in the cost-plus model.

Each of these is discussed in turn separately below:

3.3.1 Proposed amendments to the cost-plus model

Respondent's views

- 3.28 ALTO and BT noted in their respective submissions that the backhaul modelled assumption was incorrect — as LLU Line Share operators require backhaul that is uncontended and assured. Furthermore, both ALTO and BT claim that the backhaul product used in the model is not technically and commercially viable for an LLU Line Share operator. Vodafone noted in its submission that it considered it: *"appropriate to use eircom's cost-oriented transmission prices as a proxy for OAO backhaul costs"*.³⁴
- 3.29 Vodafone's submission re-iterated that in its view the price control in the WBA market should be cost orientation at a specific price point (see paragraph 3.8).
- 3.30 Vodafone noted it considers that: *"it is appropriate that in considering the economic space to leave for investment in WPNIA based services this space is modelled against an efficient operator making efficient investments"*.³⁵ However, Vodafone noted in its view that the correct hypothetical operator (REO) to use in the margin squeeze test is one already on the ladder of investment and moving from WBA to WPNIA — as opposed to an entirely new entrant to the market.
- 3.31 Eircom's submission noted in its view the cost-plus model should not be used as a pricing model. However, if the cost-plus model is used, due consideration should be given to the use of gradients; incremental costing; and an understanding of the underlying demand.

³⁴ Vodafone, supra n 19, pg. 4.

³⁵ *ibid*, pg. 3.

- 3.32 Furthermore, Eircom's submission noted that in its view the 'cost-plus' model is not consistent with the assumptions made in the LLU pricing model used to set LLU prices. Eircom note that: *"In setting the LLU price...[w]hether sites are actually unbundled or not is ignored and all sites within the defined scope are assumed to be already unbundled. Existing unbundled sites, and existing OAO volumes, are ignored"* and *"For the WBA model, ComReg takes into consideration sites which have been unbundled and allows for additional sites to be unbundled in the future. Actual OAO and eircom line volumes are considered"*.³⁶
- 3.33 In addition, Eircom claimed that Eircom's obligation not to margin (price) squeeze in the WPNIA market is only relevant to the setting of WPNIA prices and cannot concern the setting of WBA prices.

ComReg's position

- 3.34 ComReg maintains the view that it is appropriate to use the hypothetical entrant based on an REO. In the WBA market, Eircom, the current SMP operator, was identified as having economies of scale due to its advantage of incumbency. The REO approach recognises that even in the long-run, alternative operators may not be able to compete with the SMP operator due to structural diseconomies of scale and scope, and the nature of the market. However, the level of price floors will change as the operator increases this scale and eventually this cost standard may not be required as competition in the sector increases.
- 3.35 As discussed in paragraph 3.13, ComReg believes that OAOs availing of LLU have the best potential to offer competition to Eircom to the benefit of customers. Such OAOs having made their efficient infrastructure investments, can offer differentiated retail products at possibly lower prices. As discussed in paragraphs 3.9-3.15, ComReg believes that such competition would pose a risk to Eircom, therefore absent an appropriate price control, it could be argued that it is in Eircom's interests to set bitstream prices low enough to dis-incentivise investment in LLU.
- 3.36 Consequently, as set out in paragraph 3.10, ComReg considers that it is appropriate to establish a minimum price floor for bitstream rentals. Furthermore, as discussed in paragraph 3.18, ComReg considers that pricing constraints are not yet sufficient in the legacy market to undermine the rationale to apply 'cost plus' regulation, and hence the rationale for imposing price floors.

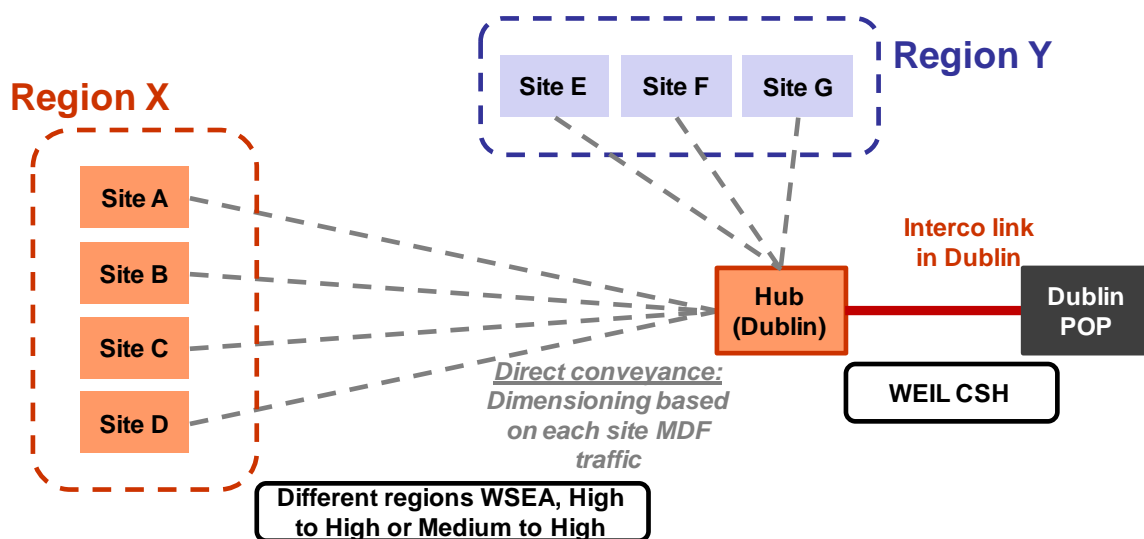
³⁶ Eircom, ""Response to ComReg Document 10/108, Wholesale Broadband Access - Further Consultation to Consultation Document No. 10/56 and Draft Decision in relation to price control and transparency", 4 February 2011, pg. 8.

- 3.37 ComReg considers that it is logical to use an REO as the hypothetical entrant, with a lower market share and therefore lower economies of scale, to set the minimum price floors for bitstream. ComReg considers that to use Eircom's unit costs based on a larger installed customer base would not encourage LLU Line Share based entry and therefore would not encourage appropriate infrastructure competition. This would result in OAOs remaining on bitstream to provide retail broadband products, which would reduce the potential for market differentiation and dynamic efficiency gains to the detriment of consumers.
- 3.38 In addition, it is assumed, similar to the assumptions used for the setting of the LLU price, that the hypothetical entrant will target and gain market share in the larger exchanges (which tend to be in more densely populated locations and therefore tend to have lower unit costs). Therefore, if the hypothetical entrant achieves a reasonable market share and scale, it should have a lower unit cost than Eircom, as Eircom also has a market share in less densely populated locations which have a higher unit cost due to longer lines (e.g. to one-off houses) and lower overall customer numbers in those less densely populated locations. However, the current low level of LLU Line Share has not given rise to such an issue of cost recovery for Eircom for WBA services. The upcoming review of the overall national costs and customer base going forward for WBA services will address this. ComReg considers that this should also provide the correct incentive for other OAOs to climb the ladder of investment due to the certainty provided — i.e. that the economic space between LLU and WBA will be maintained by an appropriate Wholesale Margin Squeeze between WBA and WPNIA Test in the short to medium term.³⁷ The application of the test is to prevent a margin squeeze between WBA and WPNIA and will be subject to annual review and ultimately, in the long term, on whether SMP remains.

Claim that backhaul modelled is not correct

- 3.39 With respect to ALTO's and BT's submission that the backhaul modelled assumption was incorrect — ComReg has considered the issues highlighted and has revised the backhaul modelling to ensure that it is technically and commercially viable for a LLU Line Share operator. Consequently, the model has been updated and the modelled backhaul is now based on an uncontended WSEA backhaul product — applicable for the regions modelled backhauling to a hub in Dublin. This can be represented graphically as follows:

³⁷ For further information see Chapter 5 Decision Instrument.

Figure 2: Graphical representation of backhaul solution modelled

- 3.40 Similarly, in updating the model it has been noted and separately verified by Eircom wholesale that OAOs Mbps usage has been increasing for their retail customers (OAOs use Eircom's wholesale bitstream product, Bitstream Managed Backhaul, which charges for Mbps peak usage).
- 3.41 ComReg considers that this increase in Mbps usage will continue in the future, with increased streaming etc., as is the trend with fixed broadband generally. As the Mbps usage is a very sensitive input into the model, it was realised by ComReg when modelling the impacts of increased per Mbps usage, that expressing the Mbps floor solely as a variable charge is not reflective of the underlying cost structure — which has both a fixed and variable element. ComReg considers that to treat it solely as a variable element could create significant distortions to wholesale prices going forward.
- 3.42 The revised approach now reflects this change, which is more consistent with those outcomes produced by competitive dynamics and promotes the long-term interests of end-users. Furthermore, the revised price floor structure should also ensure that increased usage by OAOs and their end-users is not discouraged by having a linear relationship between usage and charges.³⁸

³⁸ The resulting minimum price floors are discussed in paragraph 4.3.

3.43 However, for the avoidance of doubt, the new structure relates to the price floors that ComReg is going to set. Once the floors are in effect, Eircom in its actual pricing of bitstream may adopt a different pricing structure — once it respects the floors and the maximum price ceiling set by the retail-minus price control. Where OAOs have usage profiles that exceed assumptions they have made for pricing purposes materially, Eircom also has an obligation to ensure any subsequent billing is not excessive.³⁹ For this reason, ComReg considers to have continued with only the per Mbps charge as a variable for the backhaul costs (instead of having a per user charge and a per Mbps charge) could have given rise to a larger wholesale bitstream charges as usage increased, which would not have been consistent with competitive market dynamics (based on the underlining cost base) or have resulted in inappropriate outcomes (for example excessive wholesale prices) inconsistent with the regulatory purpose of this Decision.

Cost-orientation

3.44 With respect to Vodafone's view that the WBA market should be cost-oriented at a specific minimum price point — ComReg does not agree. As set out in paragraphs 3.19-3.23, ComReg considers that the retail competitive pressures may prospectively differ by geographic area subject to the underlying structural characteristics and investment incentives / viability. As such, ComReg believes a maximum price to minimum price range for WBA is appropriate to allow the flexibility of prices. A further review of overall cost recovery will be carried out later this year to ensure prices set by Eircom within the range allowed is not excessive.

3.45 As noted in paragraph 3.18, ComReg plans to consult on a move from the current retail-minus to replace this with a cost-oriented approach and has already requested that Eircom commence gathering the required data. ComReg considered it appropriate to first consider the margin squeeze price control measure as it will minimise the risk of a margin/price squeeze to WPNIA market. In addition, ComReg considers that even when a cost-oriented approach is implemented, ComReg will continue to require that the appropriate economic space is maintained across all steps of the value chain — due to Eircom having been designated as having SMP.

³⁹ ComReg, supra n 31.

Claim that hypothetical operator should not be new entrant

- 3.46 Vodafone believes that the correct hypothetical operator (REO) to use in the margin squeeze test is one already on the ladder of investment and moving from WBA to WPNIA. ComReg, in setting the ex ante margin squeeze, is cognisant of promoting and protecting entry in the WPNIA market. However, in setting the REO, ComReg has considered the nature and size of existing and likely entrant OAOs availing of LLU Line Share. The floors now set (the basis of this Decision) are based on the market as it is today and likely to be over the next three years. However, some of the assumptions are quite volatile, for example volumes of LLU, and these will be kept under review, at least quarterly.
- 3.47 In addition, having moved the start of the price control from 2010/11 to 2011/12 means that it is not a new entrant that is considered in the cost-plus model, but an operator that has already started to be on the ladder of investment. In other words, the model now takes into account an assumed higher level of LLU customers than originally contemplated in Consultation 10/108 (i.e. as the assumed LLU up-take is on a higher base the new entrant is assumed to already be on the ladder of investment).

Cost-plus model as a pricing model

- 3.48 With respect to Eircom's submission that the cost model should not be used as a pricing model — ComReg notes that the model sets minimum price floors for bitstream in the WBA market in order to minimise the risk of Eircom pricing its WBA relatively too low in respect to LLU Line Share in the WPNIA market. As a vertically integrated operator, Eircom is in a strong position to leverage market power between the WPNIA market and the broadband market. Consequently, ComReg considers it appropriate to further specify Eircom's existing obligations to ensure that the WPNIA market is not foreclosed and the floors set merely reflect the basic inputs (including wholesale costs from Eircom) faced by an OAO providing services over a Line Share product.

3.49 As such, the outputs of the model are not price points but rather represent minimum price floors and Eircom's has the flexibility, albeit to a limited extent, to choose what price it sets for its bitstream products — provided it respects the range of the price floors of this Decision and the maximum prices set by ComReg Decision D01/06. Consequently, as noted in paragraph 3.18, a price floor represents the minimum price Eircom could charge. However, Eircom (should it so choose) can price above this level (subject to the maximum prices set by ComReg D01/06). Consequently, as noted in the recent WBA Market Review⁴⁰, there is a requirement to control excessive pricing especially in those areas where WBA is the only available wholesale input available and feasible for OAOs to use.

Consistency between cost-plus model and the LLU pricing model

3.50 ComReg considers that the model is consistent with the model used to set LLU prices. Since publication of Consultation 10/108, the model has been adjusted and the data used is up to date and is now more consistent with the LLU model than previously was the case. As noted in paragraph 3.38, the 'cost-plus' model is similar to the assumptions used for the setting of the LLU price. In that the hypothetical entrant will target and gain market share in the larger exchanges. Furthermore, if the hypothetical entrant achieves a reasonable market share and scale, it should have a lower unit cost than Eircom, as Eircom also has a market share in less densely populated locations which have a higher unit cost due to longer lines (e.g. to one-off houses) and lower overall customer numbers in those less densely populated locations. Consequently, ComReg considers that this 'cost-plus' model is consistent with the "build" or "buy" signals of that in LLU pricing. Should there be any changes to how LLU Line Share is priced in the future ComReg will be mindful to ensure this Decision remains appropriate.

3.51 In addition, in relation to the setting of the minimum price floors, these will now be set for the three year price control period in the cost-plus model which is also consistent with the setting of LLU prices.

3.52 The relevant components of the LLU model (used to set LLU prices) will also be reviewed in 2012.

⁴⁰ ComReg, WBA Market Review, supra n 2, paragraph 7.75.

Margin squeeze in WPNIA is relevant

3.53 With respect to Eircom's view that its obligation not to margin (price) squeeze in the WPNIA market is only relevant to the setting of WPNIA prices and cannot concern the setting of WBA prices — ComReg disagrees. LLU Line Share, a WPNIA product, is an input into the WBA product of bitstream. As Eircom is currently free to price its bitstream product below the maximum prices set by the WBA retail-minus price control, to whatever price it wishes, there is a risk that Eircom's pricing of its WBA product could margin (price) squeeze the WPNIA product of LLU Line Share contrary to its existing regulatory obligation. Consequently, minimum price floors for bitstream rentals in the WBA market will be set by the cost-plus model (i.e. the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model) for a REO availing of LLU Line Share.⁴¹

3.54 This was also supported in the WPNIA market review (ComReg Decision D05/10):

“ComReg’s objective here is to encourage efficient infrastructure-based competition, and we recognise that this objective could be undermined if the relationship between the WPNIA price and the WBA price distorts incentives to invest and operate in the WPNIA market. At present, the concern is between LLU pricing and bitstream pricing. Therefore, ComReg wishes to establish a principle that will maintain an economic space between WPNIA and WBA pricing.”⁴²

3.55 ComReg imposed an obligation not to margin squeeze in both the WPNIA SMP Decision ComReg Decision No. D05/10 and in the WBA SMP Decision ComReg Decision No. D06/11. Furthermore, section 25 (3) the European Communities (Electronic Communications Networks and Services) Framework Regulations 2011⁴³ provides that:

(a) Where an undertaking has significant market power on a relevant market (the first market) it may also be designated as having significant market power on a closely related market (the second market) where the links between those two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking.

⁴¹ “Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model” means the model used by ComReg to assess the Margin Squeeze Test for WBA and WPNIA.

⁴² ComReg Document No. 08/104, paragraph 7.182, which forms part of D05/10.

⁴³ S.I. No. 333 of 2011.

(b) Remedies aimed at preventing the leverage referred to in subparagraph (a) may be applied in the second market under Regulations 9, 10, 11 and 13 of the Access Regulations and where such remedies prove to be insufficient, remedies under Regulation 13 of the Universal Service Regulations may be imposed.

Consequently, ComReg considers that Eircom's obligation not to margin (price) squeeze in the WPNIA market is also relevant to the setting of WBA prices and this is consistent with the principle of Regulation 25 (3) (b), particularly so where Eircom also has an obligation not to margin squeeze in the WBA market.

3.3.2 Assumed take-up of LLU Line Share (Options 1-3)

Respondent's views

- 3.56 ALTO, BT and Magnet noted in their respective submissions that they are concerned by the assumed take-up of LLU in the margin squeeze model.
- 3.57 ALTO and BT noted in their respective submissions that they favoured Option 3. Both ALTO and BT noted that they consider Option 3 to be a more pragmatic approach until a critical mass of LLU lines has been achieved. Similarly, Magnet noted in their submission that an approach based on an assumed take-up of LLU would destroy the WPNIA market — if LLU access seekers are unable to invest as ComReg assumes. Magnet also noted that it would not be in a successful new entrant's interests having entered the market that competitors pricing could reduce their price year-on-year.
- 3.58 Vodafone's submission noted that it favoured Option 1, but suggested that the initial volume in year 1 should be higher (Vodafone proposed that it should be closer to year 2 volumes). Vodafone noted that this approach has the merit in allowing some revision if empirical actual evidence shows that the assumed volumes should be revised. In addition, Vodafone noted that using: *“actual market uptake for modelling purposes will not necessarily yield outcomes which promote efficient investment and therefore Option 3 should be discarded”*.⁴⁴
- 3.59 Eircom's submission noted that it favoured Option 2, which proposes to base the price floor on a weighted average (over time) of assumed LLU take-up of the REO. Eircom claims that the minimum price floors for WBA should set in a manner that is independent of the success or not of LLU Line Share as this will bring regulatory certainty and clarity to industry for “build” or “buy” decisions.

⁴⁴ Vodafone, supra n 19, pg. 4.

ComReg's position

- 3.60 ComReg does not agree that it is inappropriate to adopt an assumed level of LLU take-up. ComReg is assuming a take-up of LLU which, firstly, is consistent with actual LLU take-up to date and, secondly, is consistent to the approach taken for the setting of the LLU prices. See also paragraph 3.67.
- 3.61 Having considered the matter further, in a change to ComReg's preliminary view in Consultation 10/108, ComReg has decided to use Option 2 with a slight amendment to that proposed in Consultation 10/108 — namely an empirical evidence “sense-check” of the underlying assumptions.⁴⁵
- 3.62 ComReg believes that Option 2, the weighted average approach, is more appropriate as it sets one minimum price floor for the duration of the price control (as opposed to Option 1 and Option 3). As such, ComReg considers that this approach provides greater certainty of pricing and militates against potential price-shocks which could undermine current and future investment during the period — which would ultimately be to the detriment of retail end-users (as recognised by Magnet's submission).
- 3.63 ComReg considers that Option 2 is the most optimal approach; it has the advantage of using an assumed level of LLU take-up (similar to Option 1) over the price control period as opposed to using actual LLU take-up. While using actual LLU take-up (Option 3) would reflect the reality of the market it would unfortunately be lagged (i.e. it would not be capable of reflecting a large up-take or decrease in LLU in the particular year until after that year has passed).
- 3.64 Furthermore, ComReg considers that using either Option 1 or Option 3 would reduce the pricing certainty over the price control period — which could impact investment decisions. As noted above, using a weighted approach (i.e. Option 2) provides that the unit costs remain more stable over the price control period compared to the Option 1 and Option 3. Under Option 1 and Option 3, the minimum price floors could fluctuate year-on-year with potential increases followed by potential decreases and vice versa — as such, ComReg considers that this would be inconsistent with replicating competitive market outcomes (where prices are more stable overtime and dependent on the cost structure on a declining trajectory). Consequently, ComReg considers that Option 2 creates the appropriate investment incentives, as OAOs are aware of the minimum price floor for the price control period — while at the same time militating against potential price shocks as a result of a large up-take or decrease in LLU in a particular year (as the weighted average LLU take-up is taken over the price control period and not on a year-on-year basis as proposed by Option 1 and Option 3).

⁴⁵ See also paragraph 3.67.

- 3.65 However, where empirical evidence shows that a revision of the assumed LLU take-up may be warranted — ComReg will revise the weighted average numbers as appropriate.⁴⁶ This empirical evidence "sense-check" is an additional step to the original Option 2 that was proposed in Consultation 10/108, without such a step ComReg considers that the weighted average approach (originally proposed in Consultation 10/108) may not have reflected the reality of the current LLU market and therefore the advantage of setting a minimum price floor for the period would have been undermined.
- 3.66 ComReg understands the concerns raised by ALTO, BT and Magnet. ComReg is endeavouring to balance the objectives of encouraging investment in LLU and replicating the commercial dynamics of competitive markets — by allowing Eircom appropriate pricing flexibility of its bitstream rental products in the WBA market. Consequently, ComReg believes that Option 2 — based on an assumed take-up of LLU (over a three year period) for the hypothetical entrant (on an REO basis) but with a cross-check review against actual LLU take-up achieves this (ComReg will continue to monitor this as part of the quarterly reports). As such, ComReg will still consider **actual** LLU Line Share take-up to ensure that the assumed take-up is reasonable and appropriate given Eircom's existing regulatory obligation not to margin (price) squeeze in the WPNIA market.
- 3.67 Where appropriate, ComReg will revise the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model — following any changes to the LLU up-take. This is similar to the current arrangement for the annual review of the maximum prices for bitstream pursuant to ComReg Decision D01/06. Similarly, where there is evidence that shows a material change to the throughput assumptions, ComReg may lower the floor, in particular the variable element.
- 3.68 ComReg has also reviewed the year-by-year volumes modelled to ensure that they are consistent with volumes to date. In addition, the price floors are now set to start based on Year 2012 assumed volumes.⁴⁷ The average subscriber base assumed in the model is as set out below:

⁴⁶ With such a step Option 2 is similar to Option 3, with the advantage of setting one minimum price floor.

⁴⁷ For clarity 2012 refers to the financial year ending 30 June 2012.

Figure 3: Average subscriber base of the REO on LLU Line Share in the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model

| REO average subscriber based on LLU | 2012 | 2013 | 2014 |
|----------------------------------------------------|---------------|---------------|---------------|
| In Consultation 10/108 | 77,000 | 87,000 | n/a |
| In Final Price floor model | 51,000 | 88,000 | 99,000 |

3.4 Regulated WBA components in resale or end-to-end WBA based on SEO

Consultation Issue

- 3.69 In addition to the purchase of WPNIA inputs (as discussed in paragraphs 3.3-3.68), OAOs can purchase a further wholesale service from Eircom in order to offer retail broadband services, which Eircom markets as “White Label Broadband”. White Label Broadband allows OAOs to avail of wholesale broadband products from Eircom without the need for investment in network backhaul infrastructure — this is also known in industry as resale or end-to-end WBA.
- 3.70 Resale or end-to-end WBA contains regulated components from the WBA market. As noted in the WBA Market Review, ComReg believes that Eircom’s provision of resale or end-to-end WBA, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment by offering resale or end-to-end WBA below the prices of its regulated WBA components.
- 3.71 As noted in Consultation 10/108, the main purpose of the price control is to protect OAOs who have made infrastructure investments to avail of WBA from any possible margin (price) squeeze where Eircom re-sells those regulated WBA components in resale or end-to-end WBA.
- 3.72 Eircom’s White Label Broadband product can offer a number of enhancements / additions over its standard bitstream product. In Consultation 10/108, ComReg proposed that such enhancements / additions be appropriately cost-orientated and included in the minimum price floor for the regulated WBA component(s) in White Label Broadband — to ensure that the risk of any margin (price) squeeze is minimised. Examples of possible enhancements / additions include:
- Despatch of customer premises equipment (e.g. modem);
 - Customer account and billing set-up and provision of billing records to support retail billing;
 - Provision of onward access to the internet/world-wide-web (www);
 - Authentication of the retail customer, upon connection, as having access right and allocation of the appropriate level of bandwidth and customer profile configuration at port level via Radius server and on-line access portals for ordering / managing service;

- Project management and dimensioning of network requirements including aggregation of the customer traffic from all points of presence and service establishment testing.
- Ongoing maintenance and support costs of customer premises equipment (e.g. modem) and associated fault resolution activity.

Respondents' views

- 3.73 ALTO, BT and Magnet noted in their respective submissions that they agreed with the provision of a margin squeeze test for the regulated WBA components in Eircom's provision of resale or end-to-end WBA. BT noted that they strongly agree that: *"the price floors for the regulated components should be clear and enforced in service eircom sell downstream such as end-to-end service"*.⁴⁸ Similarly, Magnet noted that: *"[i]f the price is not included and a retailer tries to provide an equivalent service to eircom then that OAO would be required to pay for those ancillary services"*.⁴⁹
- 3.74 In addition, BT noted that that a "wholesale unreasonable bundle" margin squeeze test should be established so that an entire wholesale bundle is examined to assess margin squeeze.
- 3.75 Vodafone's submission noted that it believes that as the retail-minus model is subject to further consultation (as set out in ComReg Consultation 10/56 to move to cost-oriented) that the retail-minus it is not relevant, necessary or justified.
- 3.76 In addition, Vodafone submitted that the additional elements a WBA operator must purchase in order to offer a competing resale or end-to-end WBA service should not be based on the SEO test from D01/06 — but should be validated in the commercial market.
- 3.77 Eircom's submission noted that in its view ComReg's proposal, to regulate Eircom's provision of resale or end-to-end WBA, is unjustified and without appropriate legal basis. Furthermore, Eircom claims that as there are published prices for the regulated WBA component inputs that competition law obligations should be sufficient.
- 3.78 In addition, Eircom notes that in its view ComReg's proposal to amend the price control obligation must be supported by the conclusion reached in the market review of WBA.

⁴⁸ BT, supra n 18, pg. 8.

⁴⁹ Magnet, " Response to ComReg Further entitled Further consultation to Consultation Document No. 10/56 and draft Decision in Relation to Price Control and Transparency Ref: 10/108", 4 February 2011, pg. 3.

- 3.79 Eircom's submission noted that in the case of "White Label Broadband" and given the presence of upstream regulation, any margin squeeze test should address the competition problem of eviction rather than encouraging entry. Therefore, Eircom claims an EEO test should be used and not an SEO test. Eircom also strongly disagrees that the nationally averaged cost of the SEO⁵⁰ is appropriate as Eircom's main competitor in the provision of resale or end-to-end WBA has a cost akin to those of an EEO. Consequently, Eircom believes that the undoubted result of ComReg's proposal to set the margin squeeze test by an SEO would be that Eircom would be prevented from competing everywhere, but most especially in the larger (cheaper) urban exchanges, which are the areas that would be relevant to the White Label Broadband product. Eircom believes that this would effectively exclude Eircom from the provision of resale or end-to-end WBA and essentially confers the status of a monopolistic supplier to its main competitor, to the detriment of customers, Eircom and the overall market.
- 3.80 Furthermore, Eircom claims that ComReg cannot include enhancement / additions outside the WBA market in the margin squeeze test. However, ALTO and Magnet noted in their respective submissions that in their view enhancements or extra facilities add value to the services offered by Eircom. ALTO noted that: *"alternative operators would have to incur costs if they were to provide the same additions/enhancements, hence this should be reflected in the floor price to maintain the economic space between the WBA and WPNIA market products"*.⁵¹
- 3.81 Eircom also claims that ComReg's statement at paragraph 3.16 of Consultation 10/108: *"a move or connection to 'White label Broadband' must reflect the cost of the regulated ancillary charges components"* is further evidence of a lack of a coherent approach and will impose transfer charges between WBA and White Label Broadband.

ComReg's position

- 3.82 ComReg maintains the view that it is appropriate to further specify the existing obligation not to margin / price squeeze in the WBA market, to include the obligation not to cause a margin / price squeeze between the price of the WBA component parts of a resale or end-to-end WBA product(s) and the pricing of the corresponding WBA product(s) sold. ComReg considers that this Decision should protect OAOs who have made infrastructure investments to avail of WBA from any possible margin (price) squeeze — where Eircom also re-sells those regulated WBA components in resale or end-to-end WBA.

⁵⁰ Eircom refer to an REO in its submission, however, the proposal in Consultation 10/108 is a SEO consistent with D01/06.

⁵¹ ALTO, supra n 17, pg. 6.

- 3.83 Furthermore, Eircom is currently subject to a retail-minus price control in the WBA market and an obligation not to margin squeeze between the price of its retail and matching WBA products. It could be considered that if Eircom offers resale or end-to-end WBA at too low a price it could bypass this obligation, by allowing certain OAOs using Eircom's resale or end-to-end WBA product to compete against other OAOs who may be regarded as more of a competitive threat to Eircom — as they have made infrastructure investments and therefore use less of Eircom's network. ComReg considers that if OAOs have reduced incentives to choose WBA over resale or end-to-end wholesale broadband access then this potentially reduces the scope for long-term infrastructure competition, which would be to the detriment of consumers. In addition, ComReg believes that the Decision will encourage efficient infrastructure investment and therefore promote competition and innovation amongst operators due to the regulatory certainty that the economic space between LLU and WBA will be maintained by an appropriate margin squeeze test.
- 3.84 ComReg believes the Decision will ultimately ensure that retail consumers attain the benefits of price, choice and quality — by ensuring that infrastructure-based operators are not squeezed.

Claim that an unreasonable bundle test should be introduced

- 3.85 With respect to BT's view that a whole wholesale bundle needs to be considered to ensure that a margin / price squeeze has not been created — ComReg has decided to address the issue using the WBA component part(s) Margin Squeeze Test.
- 3.86 The WBA component part(s) Margin Squeeze Test is a test of replication for a hypothetical operator availing of Eircom's WBA components to provide resale or end-to-end WBA. Therefore, if Eircom bundles in certain associated and other facilities, ComReg will consider the cost of those associated and other facilities in the test of replication — to ensure that Eircom is not causing a margin squeeze in respect of the regulated WBA components. It will be clear to Eircom what products / services are outside the scope of the test given its simplicity and as the "Floors End-to-End WBA Margin Squeeze Model"⁵², will be shared with Eircom on the making of this Decision.

⁵² means the model used by ComReg to assess that Eircom have not caused a margin / price squeeze, between the price of the WBA component parts of a resale or end-to-end wholesale broadband access product(s) and the pricing of the corresponding WBA product(s) sold.

Relevance of retail-minus and basis for SEO

- 3.87 With respect to Vodafone's view that the retail-test is not relevant and that the model should be validated by the commercial market and not an SEO basis — ComReg does not agree. The main purpose of the price control is to protect OAOs, who have made infrastructure investments to avail of WBA, from any possible margin (price) squeeze. As a vertically integrated operator, Eircom is in a strong position to leverage market power between the WPNIA market and the retail broadband market. Eircom is currently subject to a retail-minus price control in the WBA market and an obligation not to margin squeeze between the price of its retail and matching WBA products. Without an appropriate price control, Eircom could bypass this margin squeeze obligation by allowing certain OAOs using Eircom's resale or end-to-end WBA product to compete against other OAOs, who may be regarded as more of a competitive threat to Eircom as they have made infrastructure investments and therefore use less of Eircom's network, by offering the resale or end-to-end WBA at too low a price (i.e. causing a margin squeeze).
- 3.88 The basis of this Decision is to establish the minimum price floors of the price control, the maximum price control will be subject to a further consultation in 2012. In the meantime, Decision D01/06 remains in effect for the setting of maximum prices for bitstream.
- 3.89 ComReg maintains the view that the SEO standard is the most appropriate basis to specify the margin (price) squeeze price control test. The SEO is set by reference to Eircom's prices / costs but adjusted for economies of scale differences. The SEO standard recognises that the hypothetical OAO would not benefit from the same economies of scale and scope of Eircom.
- 3.90 The SEO test reflects the costs of those services that Eircom achieved (but adjusted for economies of scale and scope). Consequently, ComReg considers that the SEO is reflective of the price in the wider market but adjusted appropriately (to reflect that not all operators are of the same size and scale) to ensure that an appropriate economic space is maintained to prevent a possible margin squeeze.
- 3.91 Furthermore, as discussed in paragraph 3.99, the aim of the price control is to prevent competitive problems and consequently ComReg considers that Vodafone's proposal may create perverse competitive outcomes.

- 3.92 For clarity, both the REO and SEO standard reflect the fact that OAOs in the WBA market have not achieved the same economies of scope and scale as the SMP operator (Eircom) and this difference in scale and scope needs to be reflected in the margin squeeze test. In principle, ComReg believes that OAOs' costs should be used in the test. In practice, accurate verifiable OAO data is difficult to obtain. Consequently, ComReg has estimated the appropriate costs by taking Eircom's costs as the starting point and has adjusted these to reflect what costs an OAO would incur. ComReg believes that there is no material difference between the value of cost inputs based on REO and SEO (i.e. the REO and SEO are both variants of the same test). However, ComReg uses the terms REO and SEO to simply signal the exact source of the costs used respectively in the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model and the Floors End-to-End WBA Margin Squeeze Model — before these costs are adjusted appropriately for scale and scope for the Wholesale Margin Squeeze between WBA and WPNIA Test and the WBA component part(s) Margin Squeeze Test. The use of the REO signals that the OAO costs are mainly taken — usually from Eircom's wholesale price list charged to OAOs. The use of the term SEO simply means that Eircom's audited costs are used as a starting point for OAO cost estimation in the absence of any robust (and audited) cost data from other operators.
- 3.93 This is also the case for the additional costs relevant to the end-to-end bitstream in WBA component part(s) Margin Squeeze Test. These costs predominantly relate to internet connectivity, which, based on the information received from OAOs, are broadly in line with that of the SMP operator (these costs are then adjusted for likely OAO usage). However, the REO test used for the Wholesale Margin Squeeze between WBA and WPNIA Test between bitstream and Line Share uses less detailed wholesale inputs and is based instead on the inputs an OAO must purchase to replicate the incumbent bitstream product (the information and cost of which are readily available). In this case, ComReg has been able to gather a significant amount of data from competing operators, in particular on their broadband equipment and backhaul costs (modified for scale and scope as appropriate) and this has been reflected in the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model and Floors End-to-End WBA Margin Squeeze Model — subject to this Decision. Both approaches are consistent with the principles being applied by ComReg, ensuring industry has certainty, that investment by OAOs will continue to be incentivised through appropriate price regulation and efficient investment will be fostered and protected going forward.

3.94 As discussed in paragraph 3.104, ComReg does not consider that an EEO standard would be appropriate at this time as it would not be reflective of the current situation and could result in uncompetitive market distortions. ComReg considers an EEO standard would only be appropriate where there is a relatively greater share of WBA and LLU by OAOs and will continue to monitor migrations of full LLU. In addition, as discussed in paragraph 3.106, where appropriate, ComReg will consider amending some of the regulated components of the resale end-to-end broadband access to an EEO cost standard where competitive conditions warrant such a change.

Legal basis

3.95 With respect to Eircom's submission that ComReg's proposal is unjustified and without appropriate legal basis — ComReg does not agree. As noted in paragraph 3.17, one of ComReg's statutory objectives is to encourage efficient investment in infrastructure. ComReg considers that the aim of the price control is to protect efficient infrastructure investment in the WBA market (the requirement of which was recognised by the WBA Market Review).⁵³ The obligation not to cause a margin squeeze was set out both in the WPNIA SMP Decision ComReg Decision No. D05/10 and in the WBA SMP Decision ComReg Decision No. D06/11, pursuant to Regulation 13 of the Access Regulations.⁵⁴ Consequently, ComReg's Decision relates to the obligation not to margin (price) squeeze in the WBA market. ComReg is not regulating Eircom's provision of resale or end-to-end WBA — as Eircom is free to price its provision of such services above the minimum price floors for the regulated WBA components (which will be set by reference to the Wholesale Margin Squeeze between WBA and WPNIA Test).

3.96 In addition, as resale or end-to-end WBA is not regulated, Eircom can also include other services within its provision of resale or end-to-end WBA which are outside the scope of the WBA market. The minimum price floors set by the WBA component part(s) Margin Squeeze Test will ensure that Eircom in its provision of resale or end-to-end WBA does not squeeze against its pricing of its regulated WBA components — which are required by OAOs to offer their own competing resale or end-to-end WBA services.

3.97 Consequently, ComReg considers that it is appropriate to further specify the obligation on Eircom not to cause a margin squeeze between the regulated WBA components in Eircom's provision of resale or end-to-end WBA and the WBA market.

⁵³ ComReg, WBA Market Review, supra n 2, paragraph 7.82.

⁵⁴ S.I. No. 334 of 2011.

- 3.98 ComReg's Decision relates to the WBA market which is subject to ex ante regulation and ComReg identified in the supporting WBA Market Review the competition problems that the proposed WBA component part(s) Margin Squeeze Test based on a SEO aims to address.
- 3.99 The aim of ex ante price controls is to prevent competition problems such as leverage and market foreclosure. ComReg considers that competition law would not be sufficient in this case — as it would require an ex post assessment after any alleged anti-competitive practice has occurred and therefore such an assessment may be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair. Furthermore, as the ex ante WBA component part(s) Margin Squeeze Test is based on a SEO it will ensure that entry and existing competition in the WBA market is encouraged and maintained as the use of SEO:
- includes all the relevant costs that an OAO availing of WBA from Eircom, which is an essential input for the provision of resale or end-to-end WBA, must consider in order to offer a competing provision of resale or end-to-end WBA
 - recognises the lower economy of scales and resulting higher per-unit costs that OAOs have as they do not have Eircom's advantage of incumbency.⁵⁵

Market review

- 3.100 With respect to Eircom's view that ComReg's decision to amend the price control obligation must be supported by the conclusion reached in the market review of WBA — ComReg agrees. This Decision is further specifying the obligation on Eircom not to cause a margin squeeze, the requirement of which is set out in and supported by the recent WBA Market Review — which noted the potential issues of leverage and margin squeeze associated with Eircom's provision of resale or end-to-end WBA.⁵⁶
- 3.101 Consequently, and as supported by the recent WBA Market Review, ComReg considers it appropriate to further specify the obligation on Eircom not to cause a margin squeeze.

EEO versus SEO

⁵⁵ The D01/06 retail-minus price control for WBA assumed that the SEO would achieve 25% of the DSL market. To date, no operator has achieved this market share. Collectively, all OAOs are just over this threshold.

⁵⁶ ComReg, WBA Market Review, supra n 2, see also paragraphs 3.9-3.12 of this paper.

- 3.102 With respect to Eircom's view that an EEO test should be used and not a SEO test — ComReg does not agree. For the avoidance of doubt, ComReg is not regulating resale or end-to-end WBA. The aim of the obligation to not margin squeeze set in the WBA market is to protect efficient investment in that market and to ensure the appropriate incentives for further investment remain.
- 3.103 The Decision is a further specification of the existing ex ante margin squeeze obligations that Eircom must comply with including the existing retail to WBA SEO margin squeeze test that this also utilises. In setting the current SEO WBA component part(s) Margin Squeeze Test, ComReg assumed that the hypothetical entrant would achieve a 25% market share.⁵⁷ To date, no operator has achieved this.
- 3.104 In addition to the conclusion of the WBA Market Review, according to the latest Quarterly Report, Eircom currently accounts for over 70% of the WBA market. As such, ComReg considers that it would not be appropriate to use an EEO standard as it would not be reflective of the current situation and could result in uncompetitive market distortions. ComReg considers an EEO standard would only be appropriate where there is a relatively greater share of WBA and LLU by OAOs.
- 3.105 In summary, the SEO standard reflects the fact that OAOs in the WBA market have not achieved the same economies of scope and scale as the SMP operator and this difference in scale and scope needs to be reflected in the WBA component part(s) Margin Squeeze Test. See also paragraph 3.92.
- 3.106 In general the SEO test is the most appropriate cost base to apply in the context of the retail margin squeeze test and this is consistent with ComReg Decision D01/06. However, ComReg also notes that there may be some retail cost categories where an EEO approach should be considered. Where appropriate, ComReg will consider amending some of the regulated components of the resale end-to-end broadband access to an EEO cost standard.

⁵⁷ This is consistent with the assumptions used in ComReg D01/06.

3.107 With respect to Eircom's view that the national averaged cost of the SEO is not appropriate — ComReg disagrees with this view. ComReg's objective is to promote and sustain infrastructure-based competition. The SEO test ensures that competition by those operators who have made infrastructure investments in the WBA are promoted and protected from possible margin / price squeeze, in this case from another wholesale product that includes those regulated wholesale constituent products. The SEO standard recognises that no OAO has yet achieved the same economies of scale and scope as the incumbent, including Eircom's main competitor in the provision of resale or end-to-end WBA.

Inclusion of enhancement/additions outside the WBA market in the margin squeeze test

- 3.108 With respect to Eircom's claims that ComReg cannot include enhancement / additions outside the WBA market in the margin squeeze test — ComReg does not agree. The aim of the obligation to not margin squeeze (set in the WBA market) is to protect efficient investment in that market and to ensure the appropriate incentives for further investment remain. Therefore, to consider if Eircom's offer of the regulated WBA components in the provision of resale or end-to-end WBA is squeezing those regulated products in the WBA market, the additional costs for a WBA operator to offer a competing provision of resale or end-to-end WBA needs to be taken into account in the WBA component part(s) Margin Squeeze Test (as noted by BT, ALTO and Magnet in their respective submissions).
- 3.109 The Decision is a further specification of the existing ex ante margin squeeze obligations that Eircom must comply with — including the retail-minus price control⁵⁸ that this Decision also utilises.
- 3.110 In using the full price of bitstream in the WBA component part(s) Margin Squeeze Test, ComReg is aware that there may be an issue due to Eircom's current pricing of its WBA products, Bitstream Managed Backhaul (“BMB”) — which Eircom charge for usage based on peak usage. Given Eircom's pricing structure for usage, a WBA operator could offer end-to-end wholesale broadband access at a lower price than the actual price of BMB, where the end-to-end wholesale broadband access customer has a peak usage within the WBA operator's peak usage. For example, if an OAO has customers that have different peak hours (one for residential which is the highest and one for businesses), then the OAO could offer end-to-end wholesale broadband access at a very low price for its business customers compared to Eircom — as the margin squeeze test is carried out separately for each type of customers (i.e. businesses and residential).
- 3.111 However, one of the regulatory objectives of ComReg's Decision is to protect WBA infrastructure investment. As such, ComReg considers that it is logical to take the full price of bitstream in the floor for the regulated bitstream component in end-to-end wholesale broadband access — in particular, as LLU-based competition is limited at this time. Furthermore, this will ensure that there is consistency along all rungs of the value chain for wholesale broadband products and that infrastructure investment is promoted and encouraged.

⁵⁸ Any changes to the cost inputs of the SEO retail-minus price control will be matched in the test for the WBA components in end-to-end WBA.

- 3.112 Consequently, ComReg maintains the view that the full price of bitstream must be used in the cost-plus model that informs the floor for the regulated bitstream component in end-to-end wholesale broadband access. ComReg considers that to not include the full BMB usage charge, in certain cases for the assessment of margin squeeze, would likely encourage certain OAOs to move from WBA bitstream to end-to-end wholesale broadband access. As such, it would not encourage infrastructure based competition — as it could potentially reduce the number of OAOs based on WBA bitstream as they will move to end-to-end wholesale broadband access if they can avoid all or some of the BMB usage charge. Furthermore, OAOs on end-to-end WBA, are further unlikely to move to LLU, whereas WBA based OAOs can potentially move to LLU with required migration processes and procedures in place. This would be contrary to ComReg’s goal of promoting infrastructure-based competition for the long-term benefit of end-users.
- 3.113 ComReg notes that this peak usage issue (as discussed in paragraph 3.110) is based on the Eircom Retail customer base usage as monitored from time-to-time and the Floors End-to-End WBA Margin Squeeze Model has included assumptions on the likely increase of this average over time. As Eircom wholesale has the full details of all customer usage (including OAOs using BMB) profiles on a daily basis, Eircom can, subject to ComReg’s approval, revise the parameters used for both its BMB pricing structure and the assumptions made in the Floors End-to-End WBA Margin Squeeze Model. ComReg will also monitor this data but would not have access to the systems as Eircom does to monitor on the same basis.
- 3.114 Finally, ComReg notes that LLU based products can be used to provide end-to-end WBA. As the purpose of this Decision is to protect WBA infrastructure investment, ComReg considers it appropriate to take the full price of bitstream in the cost-plus model that informs the floor for the regulated bitstream component in end-to-end wholesale broadband access. ComReg considers that this is of particular importance due to the fact that LLU-based competition is limited at this time. ComReg considers that allowing Eircom to use an LLU-based input into an end-to-end WBA product would allow Eircom’s end-to-end WBA customers to benefit from the lower priced LLU input (which is set to encourage infrastructure investment) without actually making that required infrastructure investment. This would also be contrary to ComReg’s goal of promoting infrastructure investment for the benefit of end-users.

Claim that ComReg is proposing transfer charges between “White Label Broadband” and WBA

3.115 With respect to Eircom’s view that ComReg is proposing transfer charges between White Label Broadband and WBA — ComReg disagrees. Eircom has not quoted ComReg correctly. The paragraph solely concerns the fact that Eircom cannot waive regulated WBA connection fees for its resale or end-to-end WBA customers without doing similar for its WBA customer. To do otherwise, that is to waive regulated WBA ancillary charges for one type of customer, would be contrary to Eircom’s non-discrimination obligation.

3.5 Transparency of the regulated WBA components within Eircom's provision of resale or end-to-end WBA

3.116 In Consultation 10/108, ComReg proposed to detail Eircom's transparency obligations in the WBA market to support the margin (price) squeeze obligation. ComReg proposed that Eircom be required to publish the minimum price floors for the regulated components within its resale or end-to-end WBA. In addition, ComReg proposed that Eircom would be required to publish detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of bitstream and other regulated WBA components within the resale or end-to-end WBA services.

3.117 Consultation 10/108 sought views in relation to ComReg's preliminary view in relation to the transparency of the regulated WBA within Eircom's provision of resale or end-to-end WBA.

Respondents' views

3.118 ALTO, BT and Magnet noted in their respective submissions that they agreed with the specification of transparency obligations. ALTO noted that: *"without transparency eircom will have an incentive to revert to confidentiality clauses and internal secrecy to prevent other parties seeing the prices"*.⁵⁹ BT noted that: *"In our view the whole package should be published, however in the absence of such we believe eircom should publish the regulatory components and associated facilities and provide the various wholesale bundle offering to ComReg so that a margin test can be processed to demonstrate compliance"*.⁶⁰

3.119 Eircom's submission notes that there can be no question regarding the transparency of the regulated components within its provision of "White Label Broadband" as it is the bitstream product and that it seems to Eircom that the proposal seeks to impose obligations on Eircom's "White Label Broadband" offer itself.

⁵⁹ ALTO, supra n 17, pg. 7.

⁶⁰ BT, supra n 18, pg. 8.

3.120 Eircom claims that the proposed publication of the minimum price floors would result in competing providers of resale or end-to-end WBA using them as their ceiling maximum price — thereby excluding Eircom from the provision of such services. This issue was also raised in Vodafone's submission, which noted that: *"If eircom's end-to-end wholesale broadband access price and service mix is totally transparent at all times, it is logical that a competing wholesale provider bidding against eircom would only bid marginally below the eircom price with the same service mix in an effort to win new business"* as such in their view *"It is difficult to see how imposing greater transparency for eircom's end-to-end wholesale broadband access price helps the wholesale purchasers of these services and by extension, enhances the welfare of significant numbers of retail customers"*.⁶¹ Consequently, Vodafone considers that remedies (such as notification of agreements) which allow ComReg to monitor such agreements would be *"proportionate, reasonable and justified"*.⁶²

ComReg's position

3.121 With respect to Eircom's view that proposal seeks to impose obligations on Eircom's "White Label Broadband" offer itself, the obligation relates to the regulated WBA components only and is required to demonstrate that there is no margin / price squeeze and no discrimination. In other words, the aim of further specifying Eircom's transparency obligation is to support the margin (price) squeeze test. It also allows Eircom to demonstrate that the same regulated WBA components that are offered stand-alone are the same WBA components that are offered by Eircom within its provision of "White Label Broadband". That is, there is no product superiority associated with WBA components provided within Eircom's provision of resale or end-to-end WBA.

⁶¹ Vodafone, supra n 19, pg. 5.

⁶² *ibid.*

3.122 However, ComReg has further considered the specification of Eircom's transparency obligation. ComReg considers that the further specification of the existing transparency obligation could distort competition (as noted by Eircom and Vodafone). ComReg considers that if the minimum price floors were published it could lead to competitors price-following and in some cases pricing slightly below the published price in order to gain advantage. This would be to the detriment of consumers as competition could focus on price-tracking as opposed to innovative and independent pricing. Consequently, in relation to the publication of the minimum price floor only, ComReg is of the view that the transparency obligation in relation to these should be removed. However, in order to ensure compliance with the margin squeeze obligation, ComReg will instead amend the existing transparency obligation and require Eircom to submit its minimum price (With respect to the regulated WBA end-to-end WBA components only) to ComReg — in order to demonstrate compliance with the obligation not to margin squeeze (as proposed as a potential alternative by BT and Vodafone).

3.6 Conclusion

3.123 In conclusion, ComReg believes that the Decision takes into account the interests of Eircom, industry and consumers and is consistent with ComReg's statutory objectives. It is anticipated that the Decision will promote efficiency, sustainable competition and consumer welfare and minimise the risk of any discriminatory and anti-competitive practices by Eircom.

3.124 The remedies of price control and transparency were imposed on Eircom due to the nature of the competition problems identified by ComReg in the SMP designation⁶³ and this Decision is considered to be proportionate and justified for the following reasons:

3.124.1 It minimises the risk of Eircom setting its bitstream price relatively too low and therefore causing a margin/price squeeze to LLU Line Share contrary to its existing obligation in the WPNIA market;⁶⁴

3.124.2 ComReg believes that OAOs availing of LLU have the best potential to offer competition to Eircom to the benefit of consumers, as such OAOs having made their efficient infrastructure investments, can offer differentiated retail products at possibly lower prices. ComReg believes that such competition would be in the long-term interest of consumers, therefore absent an appropriate price control; it could be argued that it may be in Eircom's interests to set WBA prices low enough to disincentivise investment in LLU. If OAOs remained on WBA to provide retail broadband products, ComReg considers that the potential for market differentiation to the benefit of consumers would be limited;

3.124.3 ComReg believes that Eircom's provision of resale or end-to-end WBA, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment by offering resale or end-to-end WBA in a way that increases uncertainty and could dissuade potential entrants from engaging in efficient infrastructural investments (as recognised by the WBA Market Review).

⁶³ ComReg, WPNIA Market Review, supra n 20.

⁶⁴ *ibid*, section 12.4.

3.124.4 The further specification of the existing obligation not to margin / squeeze in relation to the regulated WBA components offered in resale or end-to-end WBA should not be overly burdensome or onerous on Eircom as the SMP operator in the market for WBA. In addition, the Decision with respect to resale or end-to-end WBA is based on the current retail minus model pursuant to ComReg Decision D01/06 (see also paragraph 3.86).

3.124.5 ComReg considers that the further specification of the existing transparency obligation (to require Eircom to publicly publish its price floors) for the regulated WBA components when offered in resale or end-to-end WBA could have distorted competition. Instead, Eircom will be required to submit these to ComReg in order to demonstrate compliance with its obligation not to margin/price squeeze.

Chapter 4

4 Price floor for bitstream

4.1 This Chapter sets out the resulting price floor for bitstream based on ComReg's Decisions outlined in Chapter 3⁶⁵ and are set with reference to the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model.

4.2 For ease of reference, the minimum price floors by year for bitstream (based on the 'cost-plus' model) **proposed in Consultation 10/108** is set out below:

Figure 4: Draft price floors for bitstream in Consultation 10/108

| Output of current draft 'cost-plus' model - subject to consultation 10/108 | Monthly minimum price floor (ex VAT) | Monthly minimum price floor (ex VAT) | Monthly minimum price floor (ex VAT) | Weighted average if use one price floor |
|----------------------------------------------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|-----------------------------------------|
| | 2011 | 2012 | 2013 | |
| Per Port | €7.65 | €4.82 | €4.50 | €5.22 |
| Monthly per Mbps | €50.00 | €25.08 | €19.53 | €27.42 |

4.3 Based on the changes outlined in Chapter 3, namely:

- Setting price floors based on weighted average cost for the duration of the price control (see paragraphs 3.61-3.67);
- Updated actual LLU volumes (see paragraphs 3.66 and 3.68);
- Updated actual backhaul costs based on Eircom's current prices for WSEA uncontended (see paragraph 3.39); and
- Splitting the 'Mbps' floor into a fixed price floor to cover the fixed costs and a variable price floor to cover the variable costs (see paragraphs 3.40-3.43).

results in the following price floor for bitstream:

⁶⁵ See paragraphs 3.34-3.55 and 3.60-3.68.

Figure 5: Final price floor for bitstream (subject to ongoing review by ComReg)

| Price floor | Monthly minimum price floor (ex VAT) |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|
| Monthly Port cost per user | €4.55 |
| Monthly Backhaul costs per user - fixed | €1.33 |
| Monthly Backhaul cost per Mbps - variable raised at the 95th percentile of the 5 minute readings in any calendar month ⁶⁶ | €8.14 |

- 4.4 For example, using the price floor outputs from Figure 5, for 100kbps at the 95% percentile peak⁶⁷, in accordance with current Bitstream Managed Backhaul pricing, would result in a floor of $€4.55 + €1.33 + (€8.14 * 0.1 \text{ Mbps}) = €6.69$ per month.
- 4.5 A reconciliation between the floors proposed in Consultation 10/108 to the floors of this Decision is provided below:
- 4.5.1 The change in the 'per port' floor from €5.22 in Consultation 10/108 to €4.55 of this Decision; is mainly due to the change in the timeframe used in the model now starting 2012 instead of 2011 — with 2012 reflecting increased actual LLU take-up.
- 4.5.2 The change in the 'Mbps' floor moving from a floor of €2.74 for 100kbps peak usage ($€27.42 * 0.1 \text{ Mbps}$) in Consultation 10/108 to a floor of €2.14 ($€1.33 + (€8.14 * 0.1)$) in this Decision; is mainly a due to an increased kbps usage assumptions offset partially by an increased cost for uncontended backhaul for this Decision (Consultation 10/108 was based on a model using contended backhaul) and the change in the timeframe used in the model starting in the 2012.
- 4.6 As discussed in paragraphs 3.65-3.67, ComReg will continue to monitor as part of the quarterly reports whether the key modelled assumptions (LLU lines, kbps throughput) remain reasonable when compared to actual out-turns.

⁶⁶ See Appendix A

<http://www.eircomwholesale.ie/Products/Access/Bitstream/NGB.aspx?pageid=330&tab=0>. The price floor model relates to copper based bitstream and assumes an upper-end kbps usage of 200 kbps. The price floor model is not applicable to WBA pricing over NGA.

⁶⁷ Consistent with model approach for peak kbps and Eircom's current pricing of Bitstream Managed Backhaul.

- 4.7 To ensure that Eircom is not causing a margin squeeze, by setting a wholesale price for WBA which does not allow an REO relying on LLU Line Share to provide the same or similar wholesale inputs at sufficient margin by reference to the cost-plus model (i.e. the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model) — which will be shared with Eircom on the making of this Decision.
- 4.8 In addition, Eircom is subject to a retail-minus price control for the setting of maximum bitstream prices, therefore, the bitstream price charged to an OAO cannot exceed the maximum price set by the retail-minus price control, therefore, there is a currently a maximum price for bitstream regardless of kbps usage throughput.
- 4.9 Furthermore, the final price floor for bitstream has been tested by ComReg against the incremental of each of the 149 sites targeted for LLU. This analysis has shown that, for the vast majority of the sites and considering conservative assumptions, the incremental cost of each site is lower than the price floor. This illustrates that the Decision is appropriate in maintaining the appropriate economic space between WPNIA and WBA as bitstream should be more expensive than LLU Line Share — as bitstream requires less infrastructure investment than LLU Line Share (thereby ensuring that LLU investment is not undermined or dis-incentivised).

Chapter 5

5 Decision Instrument

1. STATUTORY AND LEGAL POWERS

1.1. This Decision Instrument is made by the Commission for Communications Regulation (“ComReg”):

- (i) Having had regard to sections 10 and 12 of the Communications Regulations Act 2002 (as amended)⁶⁸ and Regulation 16 of the Framework Regulations⁶⁹ and Regulation 6 of the Access Regulations⁷⁰;
- (ii) Having, where appropriate, pursuant to section 13 of the Communications Regulation Act 2002 (as amended) complied with policy directions made by the Minister for Communications, Marine and Natural Resources⁷¹;
- (iii) Having regard to Regulation 25(3) of the Framework Regulations;
- (iv) Having regard to the reasoning and analysis set out in ComReg Document No.10/56⁷² where relevant and the responses thereto;

⁶⁸ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

⁶⁹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011).

⁷¹ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

⁷² Wholesale Broadband Access: Consultation and draft decision on the appropriate price control, dated 15 July 2010.

- (v) Having regard to the reasoning and analysis set out in ComReg Document No. 10/108⁷³ where relevant and the responses thereto;
- (vi) Having regard to the reasoning and analysis set out in ComReg Document No. 12/32 which shall, where appropriate, be construed with this Decision Instrument;
- (vii) Having notified the draft measure and the reasoning upon which the measure is based to the European Commission, further to Regulations 13 and 14 of the Framework Regulations whereby it was also made accessible to the Body of European Regulators for Electronic Communications (BEREC), national regulatory authorities (NRAs) in other EU Member States, and having taken the utmost account of the European Commission's response;
- (viii) Pursuant to the market definition, market analysis and reasoning set out in the Response to Consultation and Decision Document entitled "Market Review: Wholesale Broadband Access (Market 5)", (ComReg Decision No. D06/11), (ComReg Document No. 11/49) and the significant market power designation on Eircom Limited contained in that and in particular, pursuant to sections 10 and 12 of that Decision;
- (ix) Pursuant to the market definition, market analysis and reasoning set out in the Response to Consultation and Decision Document entitled "Wholesale (Physical) Network Infrastructure Access (Market 4)" (Document No.10/39), (Decision No. D05/10)⁷⁴ and the significant market power designation on Eircom Limited contained in that Decision⁷⁵ and in particular section 12 of that Decision; and

⁷³ Wholesale Broadband Access: Further consultation to Consultation Document No. 10/56 and draft decision in relation to price control and transparency dated 22 December 2010.

⁷⁴ Market review, Wholesale physical network infrastructure access. Response to ComReg Document 08/41 and Draft Decision, ComReg Document No. 08/104 dated 23 December, 2008 ("ComReg

- (x) Pursuant to Regulations 8, 9, 13, 18 and 24 of the Access Regulations.

2. DEFINITIONS

2.1. In this Decision Instrument, unless the context otherwise suggests:

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

“Access Reference Offer” or **“ARO”** is the offer of contract by Eircom Limited to other authorised operators in relation to WPNIA (currently Version 2.0 but which may from time to time be amended). For the avoidance of doubt the ARO includes the documents which are expressly referred to as being part of the ARO. To the extent that there is any conflict between the ARO and Eircom’s obligations now set out herein, it is the latter which shall prevail;

“Backhaul” shall have the same meaning as provided for by the WBA SMP Decision in the case of WBA backhaul and shall have the same meaning as provided for by the WPNIA SMP Decision in the case of WPNIA backhaul;

“Bitstream” means a wholesale product provided in the wholesale broadband access market;

“Eircom” means Eircom Limited and its subsidiaries, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited and its successors and assigns;

“end-to-end product” means the provision of WBA services/products in a resale or end-to-end wholesale broadband access product by the SMP operator to allow an operator to sell broadband without the need to have its own network or backhaul infrastructure;

“Floors End-to-End WBA Margin Squeeze Model” means the model used by ComReg to assess the appropriate price floor for the WBA component part(s) in an End-to-End WBA service using the WBA component part(s) Margin Squeeze Test, based on an SEO cost base, as set-out in paragraphs 3.82-3.115 of ComReg Document No. 12/32;

Document No. 08/104”) and Market Review: Wholesale (Physical) Network Infrastructure Access (Market 4) Decision No. D 05/10, Document No. 10/39.

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“**GLUMP**” is the synchronised delivery of ULMP and GNP;

“**GNP**” means geographic number porting;

“**Local Loop**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“**Local Loop Unbundling (LLU)**” means local loop unbundling which is the final section of Eircom’s access network that provides access into homes and businesses. It runs between the local exchange and a home or premises, usually via a street side cabinet. ULMP and GLUMP are forms of LLU;

“**Local Sub-Loop**” shall have the same meaning as in the Schedule to the Access Regulations, as may be amended from time to time;

“**OA**” means Other Authorised Operator;

“**REO**” means a Reasonably Efficient Operator, that is a hypothetical efficient operator which has a different basic cost function to Eircom and does not yet enjoy the same economies of scale and scope as Eircom;

“**Unbundled Local Metallic Path**” or “**ULMP**” is the implementation of Full Unbundled Access to the Local Loop;

“**Shared Access to the local loop**” also known as “**Line Share**” means the product whereby the high frequency capacity of a line is provided to OAOs, as more fully described in the ARO, as may be amended from time to time and refers to the provision to a beneficiary of access to the Local Loop or Local Sub-Loop of the notified operator, authorising the use of the non-voice band frequency spectrum of the twisted metallic pair; the Local Loop continues to be used by the notified operator to provide the telephone service to the public;

“**SEO**” means a Similarly Efficient Operator, that is, a hypothetical efficient operator which shares the same basic cost function as Eircom but which does not yet enjoy the same economies of scale and scope as Eircom;

“**SMP**” means Significant Market Power;

“**SMP obligations**” are those obligations set out in Regulation 9 to 14 of the Access Regulations;

“**Undertaking**” has the meaning set out in Regulation 2 of the Framework Regulations;

“WBA” means wholesale broadband access comprising non-physical or virtual network access including Bitstream access at a fixed location. It includes Current Generation WBA and Next Generation WBA and is synonymous with the Market as set out in the WBA SMP Decision;

“WBA SMP Decision” means the decision in ‘Market Review: Wholesale Broadband Access,’ dated 8 July 2011, Decision No. D06/11, Document No. 11/49 and the SMP obligations imposed therein;

“wholesale product” means any offering in the WBA market;

“Wholesale Margin Squeeze between WBA and WPNIA Test” as set out in section 4 of this Decision Instrument and more particularly described in Chapter 4 of ComReg Document No. 12/32 means a test to prevent Eircom from setting a wholesale price for WBA which does not allow an REO relying on LLU – Line Share to provide the same or similar wholesale inputs at sufficient margin by reference to the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model;

“WBA component part(s) Margin Squeeze Test” as set out in section 5 of this Decision Instrument and more particularly described in paragraphs 3.82-3.115 of ComReg Document No. 12/32 means setting wholesale prices by reference to the Floors End-to-End WBA Margin Squeeze Model;

“Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model” means the model used by ComReg to assess the margin squeeze for Wholesale Margin Squeeze between WBA and WPNIA Test (as set-out in Chapter 4 of ComReg Document No. 12/32);

“WPNIA” means wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. It includes Current Generation WPNIA and Next Generation WPNIA and is synonymous with the Market as set out in the WPNIA SMP Decision;

“WPNIA SMP Decision” means the decision in - ‘Market Review: Wholesale Physical Network Infrastructure Access (Market 4) Further Response to ComReg Document No. 08/104, Response to ComReg Document No. 09/42 and Decision, dated 20 May 2010, Decision No. D05/10, Document No. 10/39 and the SMP obligations imposed therein.

3. SCOPE AND APPLICATION

3.1. This Decision Instrument, comprising a Decision and Directions, applies to Eircom.

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

4. FURTHER SPECIFICATION OF THE PRICE CONTROL OBLIGATION: WHOLESALE MARGIN SQUEEZE BETWEEN WBA AND WPNIA TEST

4.1. The Directions in this section are issued pursuant to Regulations 8, 13 and 18 of the Access Regulations, for the purpose of further specifying requirements to be complied with by Eircom relating to the obligations imposed upon it pursuant to Regulation 13 of the Access Regulations and section 12 of the WBA SMP Decision.

4.2. Eircom is directed not to cause a Wholesale Margin Squeeze between WBA and WPNIA as set out in the Wholesale Margin Squeeze between WBA and WPNIA Test.

4.3. Eircom is directed not to set the prices for bitstream in the WBA market below the minimum price floors as set out in the following table:

| Price Control | Monthly minimum price floor ex Vat |
|------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Monthly Port cost per user | €4.55 |
| Monthly Backhaul costs per user - fixed | €1.33 |
| Monthly Backhaul cost per Mbps - variable raised at the 95th percentile of the 5 minute readings in any calendar month | €8.14 |

4.4. The price floors are set by the Wholesale Margin Squeeze between WBA and WPNIA Margin Squeeze Model which is based on an REO.

4.5. The minimum price floors set out in section 4.3 may be amended from time to time by ComReg.

5. FURTHER SPECIFICATION OF THE PRICE CONTROL OBLIGATION: WBA COMPONENT PART(S) MARGIN SQUEEZE TEST

5.1. The Direction in this section is issued pursuant to Regulations 8, 13 and 18 of the Access Regulations, for the purpose of further specifying requirements to be complied with by Eircom relating to the obligations imposed upon it

pursuant to Regulation 13 of the Access Regulations and section 12 of the WBA SMP Decision,

5.2. Eircom is directed not to cause a margin squeeze between the price for the component part(s) of an end-to-end product and the price of the corresponding wholesale WBA product(s) as set out in the WBA component part(s) Margin Squeeze Test.

5.3. The assessment shall be conducted by reference to the Floors End-to-End WBA Margin Squeeze Model which is based on an SEO.

6. AMENDMENT TO THE TRANSPARENCY OBLIGATION

6.1. In accordance with Regulations 8 and 10 of the Access Regulations and section 10 of the WBA SMP Decision, Eircom has an obligation of transparency.

6.2. Section 10.2 of the WBA SMP Decision with respect to pricing only is hereby amended to require Eircom to provide to ComReg only, following a request by ComReg, Eircom's minimum prices and any other relevant pricing information for the WBA component part(s) of an end-to-end product, rather than to publish this information in the wholesale broadband access reference offer, in order to demonstrate compliance with Eircom's obligations in section 5.

7. STATUTORY POWERS NOT AFFECTED

7.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory functions, powers and duties under any primary or secondary legislation (in force prior to or after the effective date of this decision instrument) from time to time as the occasion may require.

8. MAINTENANCE OF OBLIGATIONS

8.1. If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

9. EFFECTIVE DATE

9.1. This decision instrument shall be effective from the date of the decision.

Kevin O'Brien

Commissioner

The Commission for Communications Regulation

THE 5th DAY OF APRIL 2012

Chapter 6

6 Regulatory Impact Assessment

- 6.1 The Regulatory Impact Assessment (“RIA”) is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy and analyses the impact of regulatory options on different stakeholders.
- 6.2 ComReg’s approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines⁷⁶, adopted under the Government’s Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003⁷⁷ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s “Better Regulation” programme.
- 6.3 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions, e.g. revising obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. ComReg’s ultimate aim in conducting a RIA is to ensure that all proposed measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact; ComReg may carry out a lighter RIA in respect of those decisions.

⁷⁶ Market review, Wholesale physical network infrastructure access. Response to ComReg Document 08/41 and Draft Decision, ComReg Document No. 08/104 dated 23 December, 2008 (“ComReg Document No. 08/104”) and Market Review: Wholesale (Physical) Network Infrastructure Access (Market 4) Decision No. D 05/10, Document No. 10/39.

⁷⁶ See ‘REVISED RIA GUIDELINES: How to conduct a Regulatory Impact Analysis’ dated June 2009 @ http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf

⁷⁷ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

6.1 Steps involved

- 6.4 In relation to the Decisions, a draft RIA was conducted in relation to the price control setting minimum price floors for bitstream rentals in Consultation Document No. 10/56⁷⁸ and in relation to the price control obligation not to margin (price) squeeze between Wholesale Broadband Access (“WBA”) and the regulated WBA components in Eircom’s offer of resale or end-to-end WBA (also known as White Label Broadband⁷⁹) in Consultation Document No. 10/108⁸⁰. Having considered responses to those two consultations and other relevant evidence, ComReg has made the Decisions as set out in Chapter 5. This final RIA is conducted in order to demonstrate that ComReg is making the Decisions has considered and evaluated the regulatory options available, with due regard to ensuring that they are appropriate, proportionate and justified.
- 6.5 In assessing the available regulatory options, ComReg’s approach to RIA follows five steps as follows:
- Step 1: describe the policy issue and identify the objectives
 - Step 2: identify and describe the regulatory options
 - Step 3: determine the impacts on stakeholders
 - Step 4: determine the impacts on competition
 - Step 5: assess the impacts and choose the best option

6.2 Describe the policy issue and identify the objectives

- 6.6 As noted in the supporting WBA Market Review, ComReg Decision D06/11, the policy issue is that it is:

⁷⁸ ‘Wholesale Broadband Access: Consultation and draft decision on the appropriate price control’ dated 15 July, 2010.

⁷⁹ It allows Other Authorised Operators (‘OAOs’) to avail of broadband products from Eircom Wholesale without the need for investment in network backhaul infrastructure.

⁸⁰ ‘Wholesale Broadband Access: Further consultation to Consultation Document No. 10/56 and draft decision in relation to price control and transparency’ dated 22 December, 2010.

“...appropriate and justified to oblige Eircom not to cause a margin (price) squeeze. This obligation includes Eircom maintaining an appropriate economic space between the relative pricing of different upstream/intermediate inputs, for example, maintaining an appropriate pricing differential between its WBA and WPNIA prices and the price of the WBA component parts of a resale or end-to-end wholesale broadband access products and the pricing of the corresponding WBA products.”⁸¹

- 6.7 The setting of minimum price floors for bitstream rentals in the WBA market, in order to avoid a margin/price squeeze to LLU Line Share in the WPNIA market, is also supported in the WPNIA market review, ComReg Decision D05/10:

“ComReg’s objective here is to encourage efficient infrastructure-based competition, and we recognise that this objective could be undermined if the relationship between the WPNIA price and the WBA price distorts incentives to invest and operate in the WPNIA market. At present, the concern is between LLU pricing and bitstream pricing. Therefore, ComReg wishes to establish a principle that will maintain an economic space between WPNIA and WBA pricing.”⁸²

- 6.8 Consequently, without an appropriate price control, ComReg believes that:

- 6.8.1 Eircom’s provision of WBA at too low a price, relative to its price of LLU Line Share may hinder the take-up of LLU Line Share. ComReg considers that infrastructure-based competition from OAOs using LLU (“LLUOs”) has the most potential to offer sustainable competition to Eircom in the provision of broadband to the benefit of customers. In general, LLUOs are better able to offer differentiated retail products and to set prices independently of Eircom as compared to those OAOs using WBA and WLR. Consequently, it could be in Eircom’s interests to set, WBA prices low enough to discourage investment in LLU even where alternative investment is viable. Therefore, ComReg considers that regulation should ensure that LLU based competition is encouraged where it is viable.

⁸¹ ComReg, WBA Market Review, supra n 2, paragraph 7.77.

⁸² ComReg Document No. 08/104, paragraph 7.182, which forms part of ComReg D05/10 and as noted in ComReg, WBA Market Review, supra n 2, paragraph 7.78.

6.8.2 Eircom's provision of resale or end-to-end WBA, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment by offering resale or end-to-end WBA at a price below the prices of its regulated WBA components. ComReg considers that efficient infrastructure investment must remain encouraged in order to promote competition and innovation amongst operators. Furthermore, Eircom is currently subject to a retail-minus price control in the WBA market and an obligation not to margin squeeze between the price of its retail and matching WBA products. It could be considered that Eircom's offer of resale or end-to-end WBA at too low a price could bypass this obligation by allowing certain OAOs, using Eircom's resale or end-to-end WBA product, to compete against other OAOs who may be regarded as more of a competitive threat to Eircom — as they have made infrastructure investments and therefore use less of Eircom's network.

6.9 Furthermore, in relation to the provision of resale or end-to-end WBA, as noted in Consultation Document No. 10/108:

“ComReg is of the view that there is currently insufficient transparency regarding the regulated WBA components within resale or end-to-end wholesale broadband access services provided by Eircom which is contrary to Eircom's existing regulatory obligation. In particular, ComReg believes that it is not demonstrably clear what precisely the nature of the regulated WBA component products included by Eircom in its provision of resale or end-to-end wholesale broadband access services are or that they are clearly provided on a non-discriminatory basis in terms of quality. This is despite the existing transparency obligations which apply to the component parts of the resale or end-to-end wholesale broadband access service which are regulated within the WBA market.”⁸³

6.10 Therefore, this forms the objective relating to the further specification of the transparency obligation for Eircom's provision of regulated WBA components in resale or end-to-end WBA. However, having considered the views of respondents to Consultation 10/108, an amendment to the existing transparency obligation for the minimum price floors for the WBA components in resale or end-to-end WBA will be made. The objective is to minimise the risk of the price floor becoming a focal point for competition and the possibility of asymmetric pricing knowledge which could permit OAOs to respond more quickly when tendering for resale or end-to-end WBA contracts. Instead, Eircom will be required to submit these to ComReg in order to demonstrate compliance with its obligation not to margin/price squeeze.

⁸³ ComReg, Consultation 10/108, paragraph 3.20.

- 6.11 Regulation 8(6) of the Access Regulations⁸⁴ provides that obligations shall:
- (a) be based on the problem identified;
 - (b) be proportionate and justified in light of the objectives laid down in section 12 of the Communication Regulation Act 2002 and Regulation 16 of the Framework Regulations; and
 - (c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.
- 6.12 In making its Decisions, ComReg has considered its statutory objectives, as set out in section 12 of the Communications Regulation Act, 2002, as amended (“the Act”), in particular the objectives in exercising its function in relation to the provision of electronic communications networks, electronic communications services and associated facilities:
- To promote the interests of users within the Community, and
 - To promote competition
- 6.13 In addition, in making its Decisions, ComReg was also minded to its obligation to take all reasonable measures which are aimed at achieving its statutory objectives, including, *inter alia*, in so far as the promotion of competition is concerned.
- Ensuring that there is no distortion or restriction of competition in the electronic communications sector;
 - Encouraging efficient investment in infrastructure and promoting innovation.
- 6.14 ComReg believes that the Decision will be in line with ComReg’s functions and objectives as set out in Sections 10 and 12 respectively of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011 (“the Framework Regulations”) and in particular the objective to promote competition and to promote the interests of users. The Decision is also in accordance with Regulation 13(3) of the Access Regulations, namely to promote efficiency and sustainable competition and maximise consumer benefits as the Margin Squeeze test will protect and encourage efficient infrastructure investment in the Wholesale Broadband Access market. ComReg has also had regard for Regulation 25(3) (b) of the Framework Regulations.

⁸⁴ S.I. No.334 of 2011.

- 6.15 In considering the proposed further specification to the price control obligations ComReg has taken into account investment made by the SMP operator in electronic communications networks or services or associated facilities which ComReg considers relevant and allow the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved, in accordance with Regulation 13(2) of the Access Regulations.

6.3 Identify and describe the regulatory options

- 6.16 The regulatory options in making the Decisions were:

6.16.1 Option 1 – to not further specify the price control obligation of setting minimum price floors for Eircom’s monthly rental charges for bitstream in the WBA market.

6.16.2 Option 2 – to further specify the price control obligation setting minimum price floors for Eircom’s monthly rental charges for bitstream in the WBA market, so that the risk of a margin squeeze to the pricing of LLU Line Share in the WPNIA market is minimised.

This could be set by reference to an Equally Efficient Operator (‘EEO’) availing of LLU Line Share (Option 2a) or by reference to a Reasonably Efficient Operator (‘REO’) availing of LLU Line Share (Option 2b). A REO approach recognises that even in the long-run alternative operators may not be able to compete with the SMP operator due to structural diseconomies of scale and scope, and the nature of the market. An EEO approach recognises, however, that in a competitive situation an effective alternative operator will be able to compete if it is as efficient as the SMP operator and thus encourages efficient investment in infrastructure. Therefore, to the extent that operators do not benefit from the same economies of scale and scope as Eircom and having different unit network costs, a test based on REO may be more appropriate as it recognises that OAOs do not have Eircom’s advantage of incumbency.

6.16.3 Option 3 – to not further specify the existing obligation not to margin/price squeeze in the WBA market to include no margin (price) squeeze between WBA and the regulated WBA components in Eircom’s offer of resale or end-to-end WBA.

- 6.16.4 Option 4 – further specifying the existing obligation not to margin/price squeeze in the WBA market to include no margin/price squeeze between WBA and the regulated WBA components in Eircom's offer of resale or end-to-end WBA.
- 6.16.5 This could be set by reference to an EEO (Option 4a) or by reference to a Similarly Efficient Operator ('SEO') (Option 4b). A SEO approach, which is like a REO, but based on Eircom's own costs adjusted for a lower economy of scale and scope, recognises that even in the long-run alternative operators may not be able to compete with the SMP operator — due to structural diseconomies of scale and scope, and the nature of the market. An EEO approach recognises, however, that in a competitive situation an effective alternative operator will be able to compete if it is as efficient as the SMP operator and thus encourages efficient investment in infrastructure. Therefore, to the extent that operators do not benefit from the same economies of scale and scope as Eircom and having different unit network costs, a test based on SEO may be more appropriate as it recognises that OAOs do not have Eircom's advantage of incumbency.
- 6.16.6 Option 5 – to remove the existing transparency obligations for the regulated WBA components in Eircom's offer of resale or end-to-end WBA.
- 6.16.7 Option 6 – to further specify the existing transparency obligation for the regulated WBA components in Eircom's offer of resale or end-to-end WBA.
- 6.16.8 Option 7 – Transparency obligation is specified to clarify that Eircom is required to publish terms and conditions (but exempted from publishing minimum price floors) for the WBA components when provided in resale or end-to-end WBA services.

6.4 Determine the impacts on stakeholders and competition

6.17 In assessing the merits of each of the individual options explored above, the below table summaries the possible impacts of the options for the incumbent, OAOs and consumers:

Summary of Impacts on Stakeholders and on Competition

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Option 1 – No additional price control obligation to set minimum price floors for bitstream rentals in the WBA | | |
| <p>Eircom, in setting its price of bitstream relatively too low to LLU Line Share may cause a margin/price squeeze in the WPNIA market, contrary to its existing regulatory obligation.</p> <p>Eircom (the incumbent) is still constrained by prohibition of margin squeeze under competition law, when providing WBA inputs to bitstream based OAOs versus its WBA components offered in its provision of resale or end-to-end WBA.</p> | <p>OAOs using LLU Line Share may be squeezed by Eircom's relative pricing of bitstream in the WBA market too low. If the price control is not further specified to include minimum price floors, OAOs may not invest in infrastructure as they may perceive that there could be a margin (price) squeeze by Eircom's future pricing of WBA relative to LLU.</p> <p>Consequently, there is a risk those OAOs who were considering LLU could be forced to remain on a WBA solution from Eircom where this is economically viable.</p> | <p>If OAOs using LLU Line Share are squeezed, this will be to the ultimate detriment of consumers as LLU-based OAOs can offer greater product differentiation and possibly lower pricing generally.</p> |

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Option 2a – To set minimum price floors for bitstream rentals in the WBA market set by reference to an EEO availing of LLU Line Share | | |
| <p>Allows for lower price floors for WBA which Eircom may pass onto their wholesale bitstream customers — which may be then passed onto retail customers.</p> <p>However, based on LLU take-up to date / expected LLU take-up, no LLU Line Share operator is currently expected to achieve the same economies of scale and scope as Eircom.</p> | <p>No OAO, whether LLU based or not, is currently as efficient as Eircom.</p> <p>Therefore, if EEO cost standard was utilised at this time, intra-platform competition would likely be adversely affected with possible market exits over the medium to long term.</p> | <p>Customers may initially benefit from lower prices where reduced WBA pricing is passed on.</p> <p>However, where WBA prices are too low relative to LLU such that LLU is not encouraged, customers may not benefit from the competition that a LLU-based operator could have provided including greater product differentiation.</p> |
| Option 2b – To set minimum price floors for bitstream rentals in the WBA market set by reference to an REO availing of LLU Line Share | | |
| <p>Results in a higher price floor for WBA compared to EEO.</p> <p>However, to the extent that operators do not benefit from the same economies of scale and scope as Eircom and having different unit network costs, a test based on REO may be more appropriate as it recognises that OAOs do not have Eircom's advantage of incumbency.</p> | <p>No current WBA/LLU based OAO has the same scale or scope as efficient as Eircom. Therefore, this option ensures that continued investment in infrastructure is encouraged.</p> | <p>Protects incentives for OAOs to choose LLU/WBA which will benefit consumers in the long-run.</p> <p>Prevents WBA prices being set too low relative to LLU. Such that LLU is not discouraged. This ensures customers benefit from the competition that a LLU-based operator can provide, including greater product differentiation.</p> |

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Option 3 – To not further specify the existing obligation not to margin/price squeeze in the WBA market to include no margin (price) squeeze between WBA and the regulated WBA components in Eircom’s offer of resale or end-to-end WBA.</p> | | |
| <p>Eircom is still constrained by prohibition of margin squeeze under competition law when providing WBA inputs to bitstream based OAOs versus its WBA components offered in its provision of resale or end-to-end WBA.</p> <p>However, this would require an ex post assessment after any alleged anti-competitive practice has occurred, such an assessment may be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair.</p> | <p>WBA/LLU based OAOs who have made infrastructure investments to avail of WBA/LLU may be ‘squeezed’ by Eircom’s relative prices for WBA components in its provision of resale or end-to-end WBA.</p> <p>Similarly, if the price control is not further specified to include minimum price floors, OAOs may not invest in infrastructure as they may perceive that there could be a margin (price) squeeze by Eircom’s future pricing of its WBA components in resale or end-to-end WBA.</p> <p>There is a risk that such OAOs could exit or be forced to move to a resale or end-to-end WBA solution from Eircom where this is economically viable.</p> | <p>‘Squeezing’ of infrastructure-based operators and a significant move towards retail provisioning based largely on Eircom’s resale or end-to-end WBA services would ultimately be to the detriment of end consumers — as there would less scope for price and service innovation compared to Eircom’s offering.</p> <p>Furthermore, a general reduction in the number of OAOs offering wholesale services will likely entrench Eircom’s SMP in the WBA market. This could lead to higher overall prices and less service innovation over the medium to longer term.</p> |

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Option 4a – With reference to Eircom’s obligation not to margin (price) squeeze in WBA to be further specified to include WBA components when offered in resale or end-to-end WBA by reference to EEO | | |
| <p>Allows the incumbent to sell resale or end-to-end WBA at possibly a lower price (if it decides to do so) while minimising the risk of a margin/price squeeze based on an EEO.</p> | <p>No OAO is currently or expected to be as efficient as Eircom.</p> <p>Furthermore, margin/squeeze test based on EEO would not be consistent with existing margin/price squeeze test based on SEO.</p> | <p>If the incumbent passes on lower resale or end-to-end WBA as a result of EEO, retail customers of those OAOs using resale or end-to-end WBA may benefit from lower retail prices where the OAO passes this on.</p> <p>However, LLU/WBA based OAOs, which may never be as efficient as Eircom due to structural conditions, may not invest in infrastructure (due to the lack of incentives to do so) which will be to the ultimate detriment of consumers with less product differentiation.</p> |

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Option 4b – With reference to Eircom’s obligation not to margin (price) squeeze in WBA to be further specified to include WBA components when offered in resale or end-to-end WBA by reference to SEO | | |
| <p>The incumbent can still offer competing resale or end-to-end WBA services.</p> <p>ComReg does not believe SEO will limit the incumbent’s selling of resale or end-to-end WBA as:</p> <ol style="list-style-type: none"> 1. The proposed test will include the prices of the existing regulated WBA components; and 2. The proposed test will be SEO consistent with the current price control margin (price) squeeze test between retail and WBA. | <p>No current WBA/LLU based OAO has the same scale or scope as Eircom. Therefore, this option ensures that continued investment in infrastructure is encouraged.</p> | <p>Allows the promotion of competition by efficient OAOs/entrants regardless of the underlying wholesale product, whether it is through resale or end-to-end WBA or using the regulated WBA components themselves.</p> <p>Protects incentives for OAOs to choose LLU/WBA over resale or end-to-end WBA which will benefit consumers in the long-run.</p> |
| Option 5 - To remove the existing transparency obligations for the regulated WBA components in Eircom’s offer of resale or end-to-end WBA. | | |
| <p>Eircom would not have to publicly publish any details associated with its WBA components offered in resale or end-to-end WBA.</p> | <p>OAOs who purchase WBA have no assurance and visibility to demonstrate that they are not being discriminated against by the WBA components being offered by Eircom in its in resale or end-to-end WBA service.</p> | <p>No visibility of general terms and conditions of resale or end-to-end WBA service — which may lead to inefficient market exit decisions and therefore may adversely impact the number of operators available for consumers to choose from.</p> |

| Impact on incumbent | Impact on OAOs | Impact on consumer |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Option 6 – To further specify the existing transparency obligation for the regulated WBA components in Eircom’s offer of resale or end-to-end WBA. | | |
| <p>No additional impact on incumbent.</p> <p>Further specification is making clear existing transparency obligation on Eircom.</p> | <p>Visibility of general terms and conditions of WBA when provided in resale or end-to-end WBA service demonstrates compliance with non-discrimination obligation thus reassuring OAOs and supporting efficient entry/expansion decisions.</p> | <p>Visibility of general terms and conditions of resale or end-to-end WBA service allows promotion of sustainable competition and helps avoid inefficient market exit decisions.</p> <p>Consequently, consumers should be in a position to have greater choice.</p> |
| Option 7 – Transparency obligation is amended, Eircom is required to publish terms and conditions but exempted from publishing minimum price floors for the WBA components when provided in resale or end-to-end WBA services. | | |
| <p>Amendment to Eircom’s transparency obligation. Eircom must continue to publish the general terms and conditions for the WBA components of the resale or end-to-end WBA service provides a mechanism for incumbent to demonstrate compliance with its existing regulatory obligations.</p> <p>However, Eircom is exempted from publishing minimum price floors reduces the risk of the price floor becoming a focal point for competition for resale or end-to-end WBA.</p> <p>However, Eircom would still be required to demonstrate compliance to ComReg.</p> | <p>Visibility of general terms and conditions of WBA components when provided in resale or end-to-end WBA service demonstrates compliance with non-discrimination obligation thus reassuring OAOs and supporting efficient entry/expansion decisions.</p> <p>Exemption from publishing minimum price floors means OAOs have no visible assurance that incumbent is not margin (price) squeezing but can rely on ComReg to ensure that this is not occurring.</p> | <p>Visibility of general terms and conditions of service allows promotion of sustainable competition and helps avoid inefficient market exit decisions. Consumers should thus be in a position to have greater choice.</p> <p>Exemption from publishing minimum price floors avoids the price floor becoming a focal point for competition.</p> <p>Consumers will benefit from the best available market rates rather than prices tracking or only slightly undercutting Eircom’s prices if they were published.</p> |

6.5 Assess the impacts and choose the best options

6.18 Having assessed the impacts, ComReg believes that the following are the best options:

6.18.1 Option 2b: To further specify Eircom's price control obligation by setting minimum price floors for bitstream rentals in the WBA market are set by reference to a REO availing of LLU Line Share

6.18.2 Option 4b: To further specify Eircom's obligation not to margin squeeze in WBA is further specified to include that WBA components when offered in resale or end-to-end WBA do not squeeze a SEO availing of WBA

6.18.3 Option 7: Transparency obligation is amended to clarify that Eircom is required to publish terms and conditions but exempted from publishing minimum price floors for the WBA components when provided in resale or end-to-end WBA services.

6.19 ComReg is of the view that the best options taken are consistent with ComReg's statutory objectives under section 12 of the Act, as follows:

a. *Promoting the interests of users within the Community*

6.19.1 The options should facilitate greater regulatory certainty for longer-term competitive entry and expansion and greater flexibility for the development of innovative offerings, with positive implications for the price, choice and quality of products ultimately delivered to end-users as OAOs.

b. *Ensuring that there is no distortion or restriction of competition*

6.19.2 By seeking to pre-empt the possibility for anti-competitive practices by the SMP operator to induce strategic barriers to entry in the WBA markets, the proposal would thus ensure that competitors can enter and sustain competition in the broadband market and in adjacent markets.

c. *Encouraging efficient investment in infrastructure and promoting innovation*

6.19.3 The proposal should encourage entry and expansion by competitors wishing to invest in their own infrastructure over time.⁸⁵

6.20 ComReg is moreover of the view that the options taken are appropriate, proportionate and justified as follows:

6.20.1 ComReg has clearly outlined why it is appropriate to undertake this review. ComReg believes that it safeguards alternative operators who have made infrastructure investments from potential anti-competitive behaviour by the SMP operator.

6.20.2 ComReg considers that it has been proportionate in its review. ComReg believes the Decisions should not be overly burdensome or onerous on Eircom as the current SMP operator in the WBA market.

6.20.3 ComReg considers that the best regulatory options taken in the Decisions have been shown to be justified by reference to ComReg's review and that ComReg has provided all of the detail, reasoning and information necessary to demonstrate how the Decisions were reached.

⁸⁵ Subject to fit for purpose processes and prices related to infrastructure investment being in place.

Annex: 1 Legal Basis

ComReg's Obligations and the Obligations of the SMP Operator

A 1.1 Regulations 8, 9, 13, 18 and 24 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (“the Access Regulations”) and section 10 of the Communications Regulation Act 2002 (as amended), together with the market analysis published in 2011 that determined Eircom had SMP in the market of Wholesale Broadband Access⁸⁶ (“the WBA Market Review”) is the applicable legal basis for the proposed further specifications to the price controls and amendment to the transparency obligations.

A 1.2 On 10 February 2012, in accordance with Article 7 of the Framework Directive⁸⁷, Regulations 13 and 14 of the Framework Regulations⁸⁸ and in accordance with Regulation 8(4) of the Access Regulations⁸⁹ ComReg notified the Decision to the European Commission. On 12 March 2012, ComReg received a no comments from the European Commission.

A 1.3 ComReg considers that the Decision is appropriate, in accordance with Regulation 8 of the Access Regulations.

A 1.4 The proposed further specification to the price control obligations will, in ComReg's view, ensure that the SMP operator does not “apply a price squeeze to the detriment of end users”, in accordance with Regulation 13(1) of the Access Regulations.

⁸⁶ ‘Market Review: Wholesale Broadband Access,’ dated 8 July 2011, Decision No. D06/11, ComReg Document No. 11/49.

⁸⁷ Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“Framework Directive), as amended.

⁸⁸ The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, S.I. No. 333 of 2011.

⁸⁹ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, S.I. No. 334 of 2011.