Commission for
Communications Regulation

Wholesale Broadband Access:

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

Submissions to Consultation 10/108

Reference: ComReg 12/32a

Date: 05/04/2012

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 *Fax* +353 1 804 9680 *Email* info@comreg.ie *Web* www.comreg.ie

Submissions Received from Respondents

Document No:	12/32a
Date:	5 April 2012

Consultation:	10/56
Response to Consultation:	10/108

Content

Section **Page**

1: ALTO

alto

alternative operators in the communications market

Response to Further Consultation to Consultation Document No. 10/56 and draft Decision in Relation to Price Control and Transparency Ref: 10/108

Submission By ALTO

Date: February 4th 2011

ALTO is pleased to respond to the further Consultation on Consultation Document No. 10/56 and Draft Decision in Relation to Price Control and Transparency for relating to the market for Wholesale Broadband Access (“WBA) in Ireland.

ALTO thanks ComReg for taking the time to meet with members in advance of the submission of responses to this written Consultation. The face-to-face meeting allowed us to inform our responses to the degree necessary to comprehend the precise gravity and potential effect of changes in terms of those proposed in this consultation.

General Observations:

ALTO welcomes the additional time ComReg has taken in order to consider robustly the setting of the eircom WBA pricing floors. Evidence of growth in the Wholesale Physical Network Infrastructure Access – WPNIA, LLU market in Ireland means that it is critically important that the incumbent is not given any incentive to inhibit or restrict competition in the group of WPNIA LLU products.

Issues:

Volume growth factors

ALTO members are concerned and do not agree with the ComReg proposals to reduce LLU prices not withstanding the overall growth of LLU. Members still face huge competitive barriers in competing with eircom bitstream and fear that reducing eircom’s pricing floor in the absence of significant volume growth will have the effect of restricting or further inhibiting take-up / development / competition in WPNIA LLU products. In terms of ComReg’s options, we consider that the application of Option 3 is more appropriate than the other options and specifically Option 1.

Migration Costs

ALTO believes that driving the market towards a hypothetical Relatively Efficient Operator – REO, models to the GLUMP/ULMP model through the forced reduction of WBA price floors must factor in the or any migration overheads, timing and costs which will be [excluded?] apparent if not dealt with at this stage in the process.

NGN and Backhaul

ALTO remarks that NGN bandwidths in the current eircom Wholesale offering are not fit for purpose in terms of scalability or ease of use. Industry-wide development will be required in order to manage connectivity between the current flavour of NGN and LLU equipment at the Wholesale Ethernet Access – WSEA, connection side.

In terms of backhaul, ALTO is of the view that the assumptions ComReg has been using in terms of hypothetical REO are incorrect and invalid in the circumstances. Most of the viable backhaul in the Irish market is already in place and in use by members and is not in most instances provided by eircom due to past behaviours and pricing issues.

Response to Consultation Questions:

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response.

A. 1. ALTO agrees that it is essential 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. Without this we believe eircom has the incentive and the ability to price (Margin) squeeze WPNIA LLU towards foreclosure.

We agree with the principle of allowing eircom, in a controlled and monitored way to reduce their WBA prices where the WPNIA providers significantly grow their market. However to reduce prices where the market is static risks foreclosing the WPNIA market to the LLU product; as such it is a highly inappropriate action for a regulator and contradicts with its objectives to promote competition and encourage investment. Market perception is that ComReg are trying to incentivise line share providers to move to fully unbundled services. Even if this were in the best interests of providers, this should not be attempted by way of regulation, as it is a purely commercial decision for those operators concerned.

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the ‘cost-plus’ model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream.

A. 2. ALTO note that ComReg raise a number of issues in establishing a hypothetical entrant model, however there are some incorrect assumptions – See below.

BackHaul

The general assumption that the REO will purchase eircom backhaul appears flawed. This is generally incorrect for two reasons in practice:

1. Most backhaul is already built and the high cost market offerings from eircom historically and to date mean that most of the backhaul is not supplied by eircom; hence the REO has to recover considerable costs incurred by sourcing an alternative supply;
2. As mentioned above, the NGN offer from eircom is not fit for purpose and therefore not satisfactory for LLU backhaul. Our requirement is for an unrestricted 1Gigabit backhaul not two or three hundred Mbit/s which eircom

for some reason have limited their network to. Hence a hypothetical REO requires at least 3 eircom backhauls, which imposes an additional cost to join up the capacity.

Full Unbundling and Migrations

ALTO comment that this is an area that ComReg should reassess. It is almost impossible to submit detailed commentary on these areas without assessing a business model (and associated figures) of a given operator and apply that model to the myriad of potential issues that could be faced in terms of migration to Full unbundling.

Fault Rate

It is very unclear to ALTO what eircom or ComReg have measured to establish the fault rates quoted. Where line share is concerned we would expect the number of line share faults to be very small as operators report faults as Wholesale Line Rental – WLR, as in most cases the fault is with the underlying copper service. Therefore the REO sees the cost of these faults through its customer service and faults desks. For fully unbundled LLU the REO has to invest in expensive test equipment per DSLAM to avoid the eircom initial inspection call out. It's not clear this area has been properly considered.

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response.

A. 3. ALTO agrees with the principle of reducing the price floors to an appropriate level subject to the measured and proven existence of competition. We remark however that in relation to option 1 that appears that ComReg is engineering the market to incentivise a move to fully unbundled services. We consider option 3 is a more pragmatic way i.e., measure the actual take up and set the floor based on real figures that are reviewed annually.

It appears that ComReg may have underestimated the barriers and costs that an operator would face were it to migrate from Line Share to Full LLU.

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data.

A. 4. ALTO strongly agree with ComReg that the bitstream prices cannot be reduced by eircom through being available in eircom White Label Broadband or other wholesale or down stream solutions. We also agree that additions / enhancements or extra facilities provided in White Label services or wholesale solutions have value and thus should be considered in setting the floor price. The reason is that additions/enhancements add value to the services offered by eircom and 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.

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail.

A. 5. We agree with ComReg's preliminary view in relation to the transparency of the regulated components within eircom's resale and end-to-end WBA product. The reason is that without transparency eircom will have an incentive to revert to confidentiality clauses and internal secrecy to prevent other parties seeing the prices. Further it will be in the downstream switchless provider's interest to establish confidentiality in the belief they have negotiated a good deal.

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A. 6. In terms of clause 4.3, other operators should also be allowed to supply robust supporting evidence as well as eircom. Additionally we are of the view that the other parties should be notified if any party is engaged in supplying data to alter the prices so they can supply their own view in a timely way.

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A. 7. ALTO views the Regulatory Impact Assessment as not very onerous on the incumbent and also serves to protect operators that have made network investment from incumbent price and/or margin squeeze and thus maintain and stimulate competition. Competition is good for the market and consumer.

ALTO

4th February 2011

2: BT Communications Ireland Ltd

BT Communications Ireland Ltd ("BT")

Response to ComReg Further Consultation entitled

Further consultation to Consultation Document No. 10/56 and draft Decision in Relation to Price Control and Transparency.

Issue 1 – 4th February 2011

Non Confidential Version

1. Introduction

We welcome this very important consultation to further consider the setting of the eircom WBA price floors and the very major impact such can have on both the WPNIA and WBA markets in Ireland.

We agree that there are early signs of growth in the LLU Line Share market although it has taken a fairly radical approach of the access seekers to make this happen and this consultation will influence whether LLU is a failure or success. I.e. to drive the industry to move to Full Unbundling contains risk.

We welcome the direct approach of ComReg in this consultation and agree with the proposal with a few important modifications.

We have the following key concerns with the proposals made by ComReg.

1. The ComReg proposal to push the LLU access seekers from Line Share to Full Unbundling by effectively allowing a price squeeze on line share is a risky piece of regulation, particularly if the LLU access seekers cannot obtain investment or meet the ComReg assumptions.

2. We believe the ComReg proposal will effectively foreclose the WPNIA Line Share Market which potentially contravenes the European Directives mandating Line Share as a viable product. However, if ComReg were to modify its approach not to ramp down the price floor until significant volumes 'a critical mass' are demonstrated on full unbundling this would ease some of our concerns, however, consideration will still have to be given to customers that remain on line share for various reasons and a check made that other providers will not become squeezed.

3. Our view is that ComReg should apply an annual review of the price floor (i.e. ComReg option 3) until 'a critical mass' of full unbundling is achieved and then the longer term view (ComReg option 1) could be adopted.

4. We don't believe ComReg have fully considered the considerable cost of migrating services to fully unbundled LLU from the existing Line Share solution and the time to make it happen. We believe the migration costs should be factored into the WBA price floor as they are a cost the REO will face to compete with eircom.

5. We consider that the assumptions for a hypothetical REO to use eircom backhaul are incorrect as firstly most of the backhaul in the market has already been installed through self provide and other parties due to the difficulties obtaining a fairly priced

fit for purpose backhaul product from eircom. Even today the eircom NGN solution in its current form is not suitable for LLU backhaul as the usable bandwidths (300Mbit/s) are too small and further product developments are required such as a connection between NGN and the LLU kit at the WSEA end (currently not in the product).

6. We welcome the other aspects of the consultation.

Response to the Questions

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response.

A. 1.

The need for a price floor.
We agree that it is essential for ComReg to establish a price floor between eircom's bitstream product (including the different forms of the bitstream product, e.g. traditional bitstream and the Bitstream Managed Backhaul (BMB)) to enable the maintenance of an economic space for WPNIA products. Without such we believe eircom has the incentive and the ability to price (Margin) squeeze WPNIA LLU towards foreclosure. We consider the risk of a margin/price squeeze is real as demonstrated by the pricing pressure eircom brought on the Line Share price prior to the Line Share price reductions early in 2010 and also more recently with the introduction of the eircom BMB product. Please see our confidential submission to the WBA Market Review reference 10/81.

Setting a price floor
We believe there are two possible approaches to setting the price floor.

A. Do Nothing
B. ComReg's proposal to move the prices to the LLU full unbundling price.

Here are our views on each.

A. The **'Do nothing'** approach has been proven not to work as eircom has continually applied pricing pressure on LLU, particularly Line Share and the recent introduction of BMB suggests this will continue. Hence eircom's behaviour is forcing the need for a WBA price floor. Please see our earlier confidential submissions.

B. The ComReg **'Proposed full Unbundling approach'.** ComReg's approach is to set an eircom national WBA price floor for 2011 and to pressure the industry to move to Full Unbundling in 2012 by mandating a significantly reduced price floor for 2012 onwards. I.e. effectively squeezing the line share margin from 2012 onwards. We have a number of concerns.

   i. It is not in the remit of the regulator to mandate the creation of a margin squeeze and in our view eircom would still be subject to Competition Law margin squeeze obligations from operators providing Line Share as highlighted by a competition case brought in Spain during 2007 where it is the responsibility of the operator not to cause a squeeze.

ii. The ComReg proposal appears to fix the gradient of the price reductions irrespective of whether the migration to full unbundling will happen in the timeframe envisaged. [Confidential Text Removed]

Although we have investigated scenarios for migrating customers from Line Share to full unbundling, we are unable to commit if and when such a migration will happen and we simply cannot accept the WBA price floor falling automatically, **i.e. the price gradient should only start in response to the volumes of full unbundled services hitting a 'critical mass' and growing significantly.**

iii. The ComReg consultation does not consider the cost of migration from Line Share to Full Unbundling. [Confidential text removed.]

iv. The costs assumed by ComReg for LLU backhaul are not correct as we will discuss later in our response.

Other Costs

We consider there is scope to significantly reduce the prices eircom charge for LLU associated facilities. For example why does it cost circa 45 euro to transfer a line from eircom bitstream to LLU and only 30 euro in the opposite direction. Both prices are supposed to be cost orientated and both activities involve the same work. We consider ComReg should review these pricing anomalies and the LLU associated facility prices as these impact the economic space and hence the model.

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the 'cost-plus' model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream.

A. 2. ComReg raise a number of issues in establishing a hypothetical entrant model and the proposed amendments. We discuss in detail the following issues:

1. Setting the price floor – eircom backhaul costing
2. Backhaul availability
3. Migration to Full Unbundling
4. Eircom Bulk Migration Process
5. Fault Rate
6. Fault Testing

1. Setting the price floor – eircom backhaul costing

ComReg propose WBA floor prices which are heavily dependent on the NGN backhaul prices published by eircom. We address the actual availability of fit for purpose backhaul in item two below, however we would like to focus on the costing element first.

Traffic Profile

The NGN is a multi-service platform serving both the business and consumer markets. We observe that the 'busy hour' demand from business (NGN Ethernet Services) is during the day whilst the consumer broadband usage (DSLAM bitstream) is during the evening meaning that one or other of the services has a zero or small incremental backhaul cost. Given business customers pay a premium we consider that eircom consumer backhaul is a small incremental cost to eircom.

A Reasonably Efficient Operator (REO) will not have the economies of scale and importantly scope that eircom enjoy and will have to purchase LLU backhaul dedicated for consumer use, i.e. REOs have to pay the 'eircom backhaul published price' to avail of the service and this price will be significantly higher than the incremental cost to eircom.

Contention
eircom no longer publish contention figures for its consumer broadband service, merely saying the service is uncongested – a term which is poorly defined and gives little away as to the quality of service. However we are aware from the NGN Wholesale Ethernet industry discussions that the NGN carries three basic traffic types, Expedited, Assured and best effort which is contended 5 to 1. Given the traffic profile discussion above we conclude that virtually the whole eircom backhaul capacity is available to their consumer customers in the evenings and is thus more likely to be operating at a contention up to say 3 to 1 given the full circuit availability with Expedited and Assured traffic free riding.

Valuing eircom self supply backhaul
linking to the above discussion it is therefore critical that if NGN pricing principles are applied, the backhaul service to the DSLAMS should be valued based on the true average rather than the quoted maximum contention ratio across the eircom core. The Best Effort service class valuation should therefore be something (significantly) higher than 20% of bandwidth cost. This helps to more correctly assess the costs that eircom experience for comparison purposes, however this does not establish the REO cost.

Cost to the REO
A REO purchasing backhaul has to pay the price that eircom sell backhaul and cannot obtain the same service as eircom self supply unless it pays the eircom product price for the equivalent service. I.e. Expedited and Assured and best effort quotas. The difference is that the REO has to pay for the service whereas eircom effectively does not.

Engineering control and planning rules
Operators have an obligation to their customers, be they downstream providers or retail customers to define what it is they are offering. The market is increasingly moving to the 'uncongested' approach to compete with the incumbent eircom. This means operators must have control of their service to limit the service variables. A key variable is backhaul bandwidth and to manage the service quality, the operator must know the guaranteed bandwidth available to it.

For example, if an operator were to purchase best effort traffic with no committed information rate, there is possibility of no throughput which is unacceptable. i.e. the operator is dependent on the congestion in the suppliers' network. (i.e. outsourcing their customer service). Our view is that to provide an uncongested service to compete on an equivalent basis with eircom, the only viable bandwidth is assured bandwidth which guarantees the bandwidth will be available. In this respect we consider that LLU operators have to purchase assured backhaul bandwidth.

[Confidential text removed.]

We therefore consider the WBA price floor model should be dependent on the 'Assured' traffic class rather than best effort and this has a considerable impact on the cost as highlighted in the example below:

Table 1. Example costs for 200Mb backhaul

Traffic Type	Best Effort	AF	EF	Real
Backhaul high density	4981.4	19441.3	23572.7	€21,507
Backhaul medium density	6142	25241.5	30698.5	€27,970

Conclusions

- The calculation of the contention rate for eircom bitstream backhaul should be a much higher value than the 5:1 rate on the eircom NGN network and we believe it could be as high as 3:1 given the full availability of the eircom backhaul capacity.
- A REO will have to purchase 'assured backhaul bandwidth' to manage its service offerings rather than best effort to be able to manage their service offering and to compete on an equivalent basis with eircom. This should be factored into the WBA price floor cost.

eircom Standalone, Incremental and allocated costs.

Standalone Costs- The standalone cost of the service is the price in the absence of sharing and will set the highest price floor. We believe that ComReg must evaluate this price to understand the max. level for the backhaul element of the price floor and the gain a view of the cost range for REO backhaul. The price should consider the service available to eircom, I.e. include Expedite etc.

Incremental Costs- The incremental cost is the additional cost eircom endures to provide consumer backhaul over the existing business service backhaul and will set the minimum backhaul price for the WBA price floor.

Allocated Costs - We consider that the setting of the allocated cost, i.e. what proportion of the backhaul cost is allocated to consumer broadband backhaul and what is allocated to business services is very important. We have no visibility of this figure and consider that it is being set in an arbitrary way as there is no evidence to suggest otherwise. We would like to have transparency as to the allocation methodology to ensure fairness as we assume this is being used to establish the current backhaul prices and is thus very important.

Conclusion
Our view is that in the absence of transparency of the allocations methodology the backhaul contribution to the WBA price floor should be set at the Standalone cost level as this is the cost the REO is facing.

2. Backhaul Availability

ComReg make the assumption that the REO will purchase eircom backhaul. This is incorrect for three reasons in practice. Backhaul resilience will also impact the price floor over time and this is discussed in item d.

a. In our opinion eircom have not sought to offer commercially viable LLU backhaul to date and it is not possible to use eircom leased lines for LLU backhaul as eircom don't allow them to be connected to an exchange, hence a lot of the existing LLU backhaul has been achieved through self supply at very high cost to the access seeker or through purchasing fibre services from other providers such as Enet where they have network close to eircom's exchanges. I.e. Each exchange has to be evaluated on its own merits for backhaul and eircom's past behaviour has forced us to seek alternative supply at higher costs. The consultation does not appear to consider this.

b. Secondly, the current eircom NGN offer from eircom is not fit for purpose for LLU backhaul. Our requirement is for an unrestricted 1G backhaul not a 'Heath Robinson' approach of joining up three times three hundred Mbit/s circuits and a 100 Mbit/s circuit to get to 1Gbit/s assured (congestionless) traffic. We cannot understand why eircom has limited their network this way but they have. Hence a hypothetical REO requires at least 4 eircom backhauls and additional cost to join up the capacity to achieve a fit for purpose backhaul. BT UK offer a straight through 1Gbit/s for LLU backhaul hence it is technically and commercially viable.

c. The backhaul offering from eircom is technically not what we are looking for. We require:

    i. Hub and Spoke - the various LLU sites would be the spokes connecting to a large capacity hub.

    However, the eircom NGN Ethernet Service is designed the wrong way round for LLU. An NGN Ethernet service can support a hub and spoke approach however, the hub (Wholesale Ethernet Interconnect Link (WEIL) which is capable of aggregation has to be located in the eircom exchange and the other ends are not allowed by eircom to terminate in their exchanges.

    As LLU is located in the eircom exchange it can only avail of the WEIL (aggregation) end of the circuit and eircom supply singe fibre services that can't be aggregated to the access seekers hub site. It's completely the wrong way round and unfit for purpose.

    [Confidential Text Removed]

Resilience

d. As broadband becomes more important to society we will increasingly be looking for backhaul resilience and thus the backhaul costs will increase. An access seeker request to share backhaul between providers, particularly for resilience, was refused by eircom at the industry LLU meetings.

3. Migration to Full Unbundling

ComReg assume in the table on page 9 a significant growth in full unbundled services, [Confidential text removed].

We consider that any such pricing model should consider the migration costs from Line Share to Glump/Ulmp as there are considerable costs when viewed against the small margin for consumer broadband. As indicated in the introduction a migration to offer a full unbundled [Confidential text removed.]

[Confidential text removed]

4 eircom Bulk Migration Process

We have recently experienced the migration of customers from Bitstream to Line Share and were disappointed with the rate of migrations achievable and the management cost that eircom applied. We note that the rate of migrations in a UK exchange is of the order of [Confidential text removed] per day and eircom is circa [Confidential text removed] per day which although the eircom exchange is smaller appears inefficient. Additionally when we originally tested the eircom migration process we observed that the eircom engineer could get through the jumper swaps more quickly as they had no travelling costs, there was no finding the BT block after the first jumper and the action was repetitive. Our view is the cost of a 'bulk' jumper activity should be around 15 Euro and not the circa 32 Euro ex Vat currently charged. This rate should be factored into the price floor.

5 Fault Rate

It's not clear to us what eircom or ComReg have measured to establish the fault rates quoted. For line share we would expect the number of line share faults to appear small as operators report faults as WLR; in most cases the fault is the underlying copper service. Therefore the REO sees the cost of these faults through its customer service and faults desks and it's not clear this has been factored into the model.

6 Fault Testing

For fully unbundled LLU the REO has to invest in expensive test equipment per DSLAM to avoid the eircom initial inspection call out costing 117 Euro per event. Additional to this eircom charge another 117 Euro to fix the fault. This does not consider the cost of managing the customer relationship and the fault progress by the Access Provider. It's not clear this area has been properly considered in the model.

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response.

A. 3. We agree with the principle of reducing the price floors to an appropriate level in the existence of competition (i.e. full unbundling volume) however given the uncertainty of when operators will invest in full unbundling, we consider that until such a time 'critical mass' of full unbundled circuits have been deployed, ComReg should review the LLU price floor annually (option 3). Once it becomes clear bulk migrations are underway we believe a longer term view (option 1) can then be taken.

We consider the proposed ComReg approach will destroy the WPNIA LLU market in Ireland if the access seekers are unable to invest as Comreg assume. As we have described earlier we believe ComReg have under estimated the barriers and costs to migrate from Line Share to Full LLU.

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the

cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data.

A. 4. We strongly agree the price floors for the regulated components should be clear and enforced in services eircom sell downstream such as end-to-end services; white label products; wholesale products and retail products.

We have serious concerns that eircom have both the ability and the motive to offer additions / enhancements (whether classed as associated facilities or something different) below cost so as to cross subsidise their regulated component charges, i.e. circumventing the price floor regulation.

Our view is that it is essential to establish a 'wholesale unreasonable bundle' margin squeeze test based on the whole bundle offered, akin to the work ComReg and Oxera published in 2008 (ComReg doc 0805a) and also the same issues addressed in the eircom vs. Comreg unreasonable bundles case in 2009 (ComReg doc 09/79). Only when the whole bundle is considered will it be evident that a margin/price squeeze has been created.

Additionally, we are of the view that the margin test should be conducted annually to both check compliance and to create an environment in eircom of compliance. Otherwise we consider non-compliance will quickly leak undetected into the system.

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail.

A. 5. We agree with ComReg's preliminary view in relation to the transparency of the regulated components within eircom's resale and end-to-end WBA product. The reason is that without transparency eircom will revert to confidentiality clauses and internal secrecy to prevent other parties seeing the prices; it will also be in the interest of eircom's wholesale customers to maintain confidentiality in the belief they have negotiated a good deal. The motives and ability of eircom and its potential customer's incentivise both to agree a discriminatory arrangement which is a compliance concern.

As discussed in our response to question 4, additions and enhancements can be used to circumvent the regulatory floor prices and thus we believe that not mandating transparency for the other components of the bundled wholesale service is an issue.

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.

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A. 6. For clause 4.3 other operators should also be allowed to supply robust supporting evidence as well as eircom. Additionally we are of the view that the other parties should be notified if any party is engaged in supplying data to alter the prices so they can supply their own view in a timely way.

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A. 7. We agree with the ComReg Regulatory Impact Assessment as such is not onerous on the incumbent and also protects the operators that have made network investment from incumbent price/margin squeeze and thus maintains and stimulates competition. Competition is good for the consumer.

End.

3: Eircom Group

eircom Group

Response to ComReg Consultation Doc. No. 10/108 of 22nd December 2010

“Wholesale Broadband Access - Further Consultation to Consultation Document No. 10/56 and Draft Decision in relation to price control and transparency”

4th February 2011

DOCUMENT CONTROL

Document Name	eircom Group Response to ComReg Consultation 10/108 [Wholesale Broadband Access - Further consultation to Consultation Document No. 10/56 and Draft Decision in relation to price control and transparency]
Document Owner	eircom
Last Updated	4th February 2011
Version	Final
Status	Non-Confidential

EXECUTIVE SUMMARY

ComReg Consultation Doc. No. 10/108 sets out ComReg's proposals in relation to two distinct issues: first, it considers the features of a price control for WBA in the form of a price floor; second, it proposes the regulation of the provision by eircom of "White Label" Broadband services.

Price Control for WBA

Consultation Doc. No. 10/108 revisits ComReg's proposal for the setting of a price floor for WBA made in ComReg Doc. No. 10/56. Eircom welcomes this new Consultation and new proposals from ComReg on the important matter of the price control of WBA in Ireland. Eircom, in particular, welcomes ComReg's clarification that the imposition of a price floor in relation to WBA would be on the basis of ComReg's ongoing market review for WBA and not on the basis of eircom's 6 year old designation of SMP in Decision D03/05.[1] Eircom also welcomes the disentanglement in this Consultation of price floor and price ceiling issues.

Eircom, however, regrets that it must disagree with the substance of ComReg's proposals, for the following reasons:

- ComReg's proposals for the setting of a price floor for Bitstream 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. This difference clearly requires that any price control remedy in relation to WBA be, at the very least, varied on a geographical basis and recognise the relative importance of WBA in ensuring retail competition according to the geographic areas concerned.

- Price floors designed to protect the entry of LS operators into the market have no justification in areas which have been defined by ComReg as unlikely to be unbundled. Any price floor must be based on an appraisal of the costs faced in relation to relevant areas, <u>not</u> nationally averaged costs.

- The cost plus model is not a pricing model and cannot be used as proposed by ComReg.

- Any price control should provide for a price floor based on a weighted average of the relevant costs over the time of the Direction, which should not exceed the time spanned by the cost model.

White Label Broadband

ComReg takes the opportunity provided by the Consultation on revised proposals for the Bitstream cost floors to propose the introduction of regulation of White Label Broadband services. Eircom fundamentally disagrees with ComReg's proposals. Eircom is of the view that ComReg is, in fact, not legally entitled to regulate the market for White Label Broadband because that market is not susceptible to ex ante regulation. To the extent that the provision of White Label Broadband services relies on upstream Bitstream inputs, these inputs are subject to regulation and, as such, their prices and terms and conditions are already published. ComReg's proposals are accordingly unwarranted and unjustifiable.

[1] As explained in eircom's submission to ComReg Consultation 10/56, the market analysis that supports eircom's designation of SMP in D03/05 provides no basis for the imposition of a price control on WBA in the form of a price floor.

EIRCOM GROUP RESPONSES TO COMREG QUESTIONS

MINIMUM PRICE FLOORS FOR BITSTREAM

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response.

Eircom does not agree with ComReg's proposed price control to set the minimum price floors for Bitstream. In essence, this is because 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. Eircom, in this respect, refers to its submission to ComReg's Consultation on its proposed outcome of its market review (Doc. 10/81).

The proposed price control does not reflect the differences in competition throughout Ireland which ComReg has acknowledged in Consultation Doc. 10/81,[2] even if one accepts to consider only fixed broadband access. Indeed, the proposed control addresses a single national market for WBA where eircom would hold ubiquitous market power allowing it to control retail competition in broadband access. This clearly is not the reality of competition in the provision of broadband access in Ireland. Rather competitive conditions on the WBA market(s) reflect the existence or not of alternative infrastructure operated by Ireland's only cable network operator UPC and/or LLU operators in urban and suburban areas, while competition in very rural areas is being redefined by the National Broadband Scheme providing subsidised wireless broadband access at both the retail and wholesale levels. Remedies that would be imposed on eircom in relation to WBA following a finding of SMP on the basis of the exclusion of self-supply (other than eircom's) as proposed by ComReg in 10/81 must recognise the variations in the conditions for competition throughout Ireland and the varying importance of WBA in ensuring retail competition depending on the geographic areas concerned.

In other words, the conditions of competition at both retail and wholesale levels for broadband access differ so significantly throughout Ireland that they justify the definition of separate geographic areas. Short of this, it is, at the very least, necessary to vary any price control remedies on a geographical basis so as to account for the different dynamics in the competitive process in different geographical areas.

Eircom believes that insufficient justification has been advanced by ComReg to explain the importance it gives to LS operators to ensure competition in broadband access, in particular in the light of its own finding that LS and LLU would not be rolled out in a very significant part of the country which ComReg has deemed to be uneconomic. In addition, very little consideration, if any, appears to have been given by ComReg to the potential impact of any wholesale price control on the ability of eircom to compete with alternative infrastructure operators, for the benefit of the retail customers. Eircom submits in this regard that ComReg's view that "*OAOs availing of LLU have the best potential to offer competition to eircom to the benefit of customers, as such OAOs having made their efficient infrastructure investments, can offer differentiated retail products at possibly lower prices*" (¶2.4) is not grounded in the reality of the Irish market.[3] The fact of the matter is that other operators, including fibre-based operators, Wi-Max operators and, most importantly, UPC offer competitive differentiated broadband offerings to their customers independently of accessing eircom's network.

These issues are particularly important in view of the rationale proposed for ComReg's price control under consultation, namely, it would appear, to maintain and encourage competition on the WBA market by Line

[2] See e.g., ¶ 4.165 of ComReg Doc. 10/81.

[3] Such a view begs the question of whether ComReg's proposal to maintain an obligation on eircom to provide access by way of WBA is at all justified.

Share operators, which would otherwise be discouraged if eircom's prices for Bitstream were too low, as compared to the costs faced by those operators. Once Line Share has taken off, Bitstream prices could be allowed to lower further in order to provide "*the correct signal for operators to invest further in infrastructure to avail of the full unbundled product".* According to ComReg, "*allowing the floor to reduce over time will set the correct "build" or "buy" signals to any operator who wishes to use full unbundling."* (¶ 2.17). However, it is not clear to eircom that ComReg's regulatory strategy in this matter is sound. Once a Line Share operator has sunk its capital costs (in particular by acquiring DSLAMs), then LS will remain economic even if the price for Bitstream lowers. The price for Bitstream clearly is only one aspect of the equation and other factors will inform any decision to unbundle sites via LS and/or LLU, including, for example, the relative levels of LLU and WLR rentals.

Eircom also notes that, obviously, ComReg's justification for the price control cannot be advanced in relation to those areas which ComReg itself has considered were uneconomic[4] and would not accordingly be served by a rational LS operator. In other words, in those areas which will not be unbundled, a remedy designed to protect competition from LS operators is entirely unjustified and unjustifiable. Eircom also notes that the (vague) obligation imposed on eircom in section 12.4 of Decision D05/10 cannot be invoked by ComReg to justify the imposition of a price control for the purpose of addressing a competition problem identified on another market.

In addition, where ComReg is concerned that eircom exercises its market power in WBA by setting prices too low, it cannot be concerned at the same time that eircom will impose excessive prices. In this regard, eircom submits that a price control designed to prevent excessive prices can only be justified where there is no alternative for broadband access to eircom's network, either in the form of LLU/LS operators, cable operators or the NBS operator. So, while price floors may be justified and apply in certain areas, in other areas, price ceilings may be the appropriate remedy.

It is regrettable that ComReg did not, contrary to the recommendation of the European Commission, conduct its analysis of Market 4 and Market 5 together, especially in the light of the very strong linkage that ComReg now seeks to establish between the remedies applied in the two markets. The absence of an analysis that considers the structure and competition on both markets, however, significantly undermines ComReg's proposed approach to the setting of price floors in WBA.

This has a number of implications for the price control proposed by ComReg. In particular, it means that the price control cannot be based on eircom's costs for its national network. Any price control should promote efficient investment and fair competition and this will not be achieved by a price control based on nationally averaged costs because it will distort investment decisions by setting too high a price floor in urban areas and too low a price in other more rural areas. Eircom submits, in this regard, that it is apparent from the price points at which broadband is offered on the retail market by other operators that the levels that ComReg propose as the appropriate floor for eircom Bitstream prices in 2011 are too high.

Eircom also notes that ComReg's proposal to maintain the retail-minus price control set out in D01/06, designed on the basis of a market review which is over six years old, is not tenable in the context of a market which has changed very significantly, and is accordingly disproportionate and unjustifiable. Eircom further notes that in the context of ComReg's sole focus on the risks of LS operators suffering from a margin squeeze, it is difficult to see any justification for the maintenance of an obligation to control excessive prices.

[4] "economic" in this context in fact means that the OAO will build because it is cheaper than buying from eircom. There is a circularity to the argument which could result in regulation, rather than operators and competition, determining where investments should take place. What is economic is determined by setting limits on the WBA price, which investments are then protected by adjustments to the WBA price.

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the 'cost-plus' model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream.

Eircom continues to have fundamental issues with ComReg's cost-plus model and with the manner in which ComReg proposes to use it for the purpose of setting price floors for Bitstream. Eircom refers to its submission to ComReg Doc. 10/56, in particular its responses to Question 4 (that any "floor price could be based on LRIC, or LRIC+, and the ceiling on standalone costs") and Question 7 (regarding the use of cost data to determine price controls), which should be read in conjunction with this response. It does not appear that ComReg has incorporated eircom's views in its proposed approach for the purpose of setting price floors for WBA, and these are accordingly restated below in the context of the specific matters raised in 10/108.

From Cost to Price Floors

One fundamental issue that arises is the fact that ComReg treats what is a costing model as a pricing model. A cost model cannot, and should not, be used as a pricing model, and doing so leads to a series of difficulties, distortions and inefficiencies. In order for the cost model to produce prices, a number of additional steps must be taken, so as to ensure that the price, while reflective of costs, also gives appropriate signals in terms of efficient investment (supply) and use of the network (demand). As explained in eircom's submission to 10/56, pricing at the average cost does not necessarily achieve the most efficient outcome. Pricing might require an understanding of cost, but it also requires an understanding of demand, which variations may well be independent of underlying network costs. As previously explained, average total cost is not the appropriate cost standard for a price floor, which should be informed by incremental cost.

In particular, before arriving at prices on the basis of costs, due consideration must be had to the structure of the costs (and not only the levels) and, in particular, to the use of gradients. Gradients arise where the cost is averaged over elements that are allowed or required to have different prices. This is relevant to the treatment of both backhaul costs and per port costs.

For instance, current prices for 1/3/7MB, in fact, reflect the use of gradients which addresses the use of a single network to address different usages and demand patterns. The proposed price control for wholesale products does not so much reflect actual wholesale costs, as eircom's retail users' experience of the corresponding retail product. The actual backhaul costs are set based on the overall size of the backhaul circuit required at each site, or on an engineering practice that uses "chunks" of capacity (e.g. an STM-1 or a 1GB Ethernet link). The total national cost is then divided by the national capacity utilised, to get a cost per MB of capacity. An extra 7MB wholesale customer genuinely causes an extra port, but not an upgrade in backhaul capacity. Similarly, an extra 1MB customer does not cause extra backhaul costs. However, the allocation of the total backhaul cost to different products can be based on observed usage patterns, which, by coincidence, broadly align with observed perceptions of retail values. That is, customers expect 7MB to be more expensive than 1MB, and for the price of a 3MB offering to be in between. As it happens, the average throughput at peak times is currently higher for 7MB than for 1Mb, but even if it were not, it would still make sense that customers, whether retail or wholesale, are charged higher prices for 7MB than for 3MB or 1MB.

Charging a higher price for a 24MB product than for an 8 MB product can be similarly justified. Today, a 24MB port costs less to buy than an 8MB port cost in the past: but there is an installed base of 8MB ports, with a directed asset life of 8 years. ComReg however appears to propose the same cost floor for both 8MB and 24MB ports. The proposed cost floor is aligned with the current 24MB price, but is over 20% higher than the current 8MB port price. In its current form, the control would require a significant price increase. While the 8MB price could be increased to match the 24MB price, which would be consistent with a strict cost oriented price control based on a 24MB port as the modern equivalent asset (MEA), charging the same price for both products would incentiveise Bitstream users to seek upgrades of all 8MB ports to 24MB ports, imposing a cost on eircom, regardless of their actual requirements. In the alternative, the 8MB port could remain at the current price, and the 24MB port price could increase, such that the weighted average revenue of the two is sufficient to cover the weighted average cost of the MEA. This would require that the WBA cost control be recast as a net revenue control or charge control (i.e. eircom could charge a price less than x for 8MB, and a price more than x for 24MB, such that the weighted average revenue covers the weighted average cost of x).

Backhaul prices could also have a gradient, or tiered prices, based on the real cost drivers. The actual transmission costs are determined by throughput at the busy hour. A site with demand requiring only an STM-1 link has certain fixed costs. As peak hour throughput increases, the requirement may increase to multiple STM-1, or to 1Gbps or more. The upgrade may be less costly per Mbps of capacity than the initial requirement.

✂

eircom accordingly submits that before price floors can be set, ComReg must take a view on the appropriate cost standard, as well as gradients to use and then define price floors based on forward looking projected unit costs (as indeed has been done in the past for other interconnect services such as call termination).

Sensitivity Issues

✂

These issues must be explained and adequately addressed before any price floor can be directed by ComReg. Only then can future scenarios be modelled, and a range of values proposed. The control should be set, rather than at a mid-point, at the extreme of the range that minimises market distortion. Eircom submits, in particular, that if ComReg's objective is to encourage Line Share operators to unbundle sites allowing them to self-provide and/or provide to others Bitstream access, then an appropriate price control should consider, on a site by site basis, relevant costs over the 8 years of a DSLAM useful life.

General Assumptions

In terms of the general assumptions underpinning ComReg's proposed price floors, eircom notes a number of striking inconsistencies in the approach followed by ComReg in relation to WBA, as compared with LLU:

- In setting the LLU price, ComReg assumed that all MDFs with more than 2,500 working lines are likely to be unbundled, assigning 95% probability to these larger MDFs, and 5% to the remaining sites, as well as to longer lines in larger sites. Whether 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. Existing eircom volumes are incorporated.
- ✂

Eircom submits, as explained in further detail below, that the approach adopted for WBA, and the fact that it is not consistent with that taken for LLU, is not conducive of the appropriate "build" or "buy" signal being provided to operators.

In this regard, the issues identified above regarding the sensitivity of the model to certain factors are related to the general assumptions made by ComReg in terms of volumes/market shares, as set out at p. 9 of Doc. 10/108. It is absolutely indispensable that, in the general assumptions underpinning the model, account is taken of the fact that the purpose of the price floor is only relevant to those areas that are likely to be unbundled and that those areas, at least to some degree, overlap with the cable operator's footprint. This means that the relevant total fixed broadband market is not the national broadband market, and that the take-up of LLU/LS must be apprehended within the overall context of retail broadband competition, and the relative importance of Bitstream in this context, and thus eircom's market power. In this regard, the table on p. 9 of 10/108 does not form an adequate basis for the price control. In particular, it is not sufficiently granular. Eircom, in this regard, intends to provide further information to ComReg ✂. Any success or failure in LS take-up must be considered having regard to overall competition and not simply Bitstream. It would make no sense that the price for Bitstream increases, or does not reduce, as a result of mediocre results for Line Share take-up, where the explanation is cable network success, or competition from mobile operators (eircom would point again that the Irish government considers the "3" National Broadband Scheme (NBS) using 3G mobile to be an adequate substitute for DSL).The linkage that ComReg creates between the success of Line Share take up before it is willing to accept a reduction of Bitstream is difficult to justify, having regard to the structure of the market and the presence of a strong competitor in the form of UPC. An increase of Bitstream prices in the event that Line Share does not take up in accordance with ComReg's expectations could reduce the competitiveness of eircom and Bitstream operators, as against UPC, and reduce retail broadband competition.

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response.

eircom does not agree that Option 1 – "year by year minimum price floors set by assumptions in a cost-plus model" is the most appropriate manner in which to set the price floors. Eircom is of the view that Option 2, which proposes to base the price floor on a weighted average (over time) of the costs is more appropriate, having regard to the cost plus model that ComReg intends to use.

In particular, the costs of the Bitstream inputs have either been set for a term of several years in the case of LLU prices, or are well understood by LLU investors in the context of placing DSLAMs in eircom exchanges. When building a business case for a particular investment, the LLU purchaser will look at the average return available over the entire life of the investment. In the first year of such an investment the investor does not look solely at the unit costs that can be achieved by dividing the annual charge on the long term investment by the volumes projected for the first year. Any investor setting their own prices on this basis would find that they could not compete in a mature Broadband market characterised by price sensitive customers choosing between the competing offerings of multiple infrastructures and service providers.

✂

While eircom would favour, in principle, the use of a weighted average of the appropriate and relevant costs, eircom, does not agree as explained in Questions 1-2 above and in its submission to ComReg Doc. 10/56 with the cost levels currently included in the model.

In addition, it is not entirely clear what it is that ComReg proposes. It is not clear, in particular, what ComReg's reference in ¶ 2.52 to "*an assumed successful take-up of LLU Line Share"* entails. For the avoidance of doubt, eircom believes that Bitstream prices should be set in a manner that is independent of any success or not of Line Share take-up as perceived by ComReg. Regulated prices will not send any appropriate signals to "build" or "buy" if they can be second-guessed and influenced by operators. Legal certainty and regulatory clarity are paramount to the development and maintaining of healthy infrastructure-based competition. Eircom notes, further in this regard, that in its current form, the Draft Decision fosters uncertainty by only, on the face of it, providing for one price, rather than annual prices for the period of time that the Decision is to apply. Clearly, it would be unacceptable to apply the "cost" for 2010/11 to an indefinite period commencing in April 2011. The best way to avoid this is to set the price on the basis of a weighted average of three years or, possibly, to provide for prices for each of the years of the Decision.

Finally, in relation to ComReg's reference at ¶ 2.55 to eircom's obligation not to margin squeeze against WPNIA, eircom would point out that, in terms of price control, this obligation is relevant to the setting of Line Share and LLU prices. However, any powers that ComReg may have in terms of setting the Bitstream prices would arise from a finding of SMP on the WBA market, not the WPNIA market. Similarly, it is entirely inappropriate that ComReg's assessment of eircom's compliance with its obligation on one market could result in ComReg taking, what in ¶ 2.53 appears to amount to, retaliatory measures in the market for WBA. Eircom does not believe that the approach set out by ComReg is consistent with ComReg's powers and duties under the regulatory framework.

WHITE LABEL BROADBAND

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data.

It is apparent from ComReg's justification for its proposals at ¶¶ 3.1 – 3.11 that ComReg wishes to regulate the provision by eircom of end-to-end wholesale broadband access services, otherwise known as "White Label Broadband". Eircom is of the view that these proposals are entirely unjustified and without any appropriate legal basis. In particular, eircom notes that in ¶ 3.13, ComReg accepts that "…*the resale or end-to-end wholesale broadband access product is between the retail and WBA markets*....". This eircom agrees with. However the consequence that flows from it is that unless that separate market is listed by the European Commission amongst the markets susceptible to ex ante regulation, ComReg, before imposing any obligations in relation to that market, must first demonstrate that the three conditions for ex ante regulation are met, namely:

(i) There are high and non-transitory barriers to entry; <u>and</u>

(ii) The market does not tend towards effective competition; <u>and</u>

(iii) Competition law will not be sufficient to deal with the competition problems arising.

The fact that ComReg has found in its Consultation Doc. 10/81 that market power in the upstream market for Wholesale Broadband Access gives a potential for "horizontal leverage and margin (price) squeeze by eircom offering resale or end-to-end wholesale broadband access" does not give ComReg the right, contrary to what ComReg appears to suggest in ¶ 3.1, to regulate eircom's behaviour on those other markets. It simply informs the type of remedies that should be imposed on the market where SMP has been found.

In other words, as White Label Broadband is outside of Market 5, it cannot be subject to the remedies applicable to that market, or to any remedies unless ComReg demonstrates that the three criteria for ex ante regulation are met and that an operator has SMP on that market.

ComReg has not conducted any analysis whatsoever of the intermediary market for White Label Broadband. In fact, ComReg does not even mention White Label Broadband in its current market review of WBA as set out in Consultation Doc. No. 10/81.

It is, in this context, entirely insufficient that ComReg believes (see ¶ 3.6 and Section A8 of the Appendix), that eircom's White Label Broadband, "*if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment*". Any such belief, if it is to give rise to regulatory obligations, must be supported by the conclusions reached in the context of a market review analysis as required under the Framework and the Access Regulations.

For the avoidance of doubt, eircom does not believe that a conclusion could reasonably be reached that the market for White Label Broadband is susceptible to regulation. There are two obvious reasons for this. The first is that eircom's obligation to provide Wholesale Broadband Access removes any high and non-transitory barriers to entry in the market. The second is that competition law is entirely adequate to apprehend any competition issues that could arise on that market. Eircom also believes that this market is competitive. On that market, eircom competes with OAOs who can avail of Bitstream products from eircom as inputs to end-to-end broadband products, but also rely on their own infrastructure to produce an end-to-end product.

eircom refers in this context to its position expressed in its submission to ComReg Doc. No. 10/76 concerning the regulation by ComReg of White Label Voice. White Label Broadband is no different than White Label Voice, except that the relative position of eircom's and OAOs' is easier to understand because Bitstream, as a wholesale input to White Label Broadband, has none of the complications arising in relation to interconnection, including the fact that OAOs can interconnect at different levels in the network, while eircom itself does not require to interconnect with itself. In White Label Broadband, eircom avails of Bitstream products in the same manner as OAOs are entitled to, and this is included in the price charged for White Label Broadband. ✂ Eircom finds it very difficult to understand why, in these circumstances, where there are published prices for the regulated inputs, competition law would not suffice to control and prevent margin squeezes from arising.

For these reasons, eircom is of the view that ComReg's proposals in terms of the regulatory control of eircom's offering of White Label Broadband is entirely unwarranted, unjustifiable and accordingly unlawful.

eircom also observes as follows:

- It is not correct that only one type of White Label Broadband service is available and it is accordingly incorrect to state as ComReg does in ¶ 3.5 that "….. *all 4 points* [identified in the diagram are] *included in a resale or end-to-end wholesale broadband access product*". This is a misunderstanding of the offerings in the market. There is a whole range of White Label Broadband services, which stretches from simple re-sale of a retail Broadband service through to the most basic service that simply collects various Bitstream inputs and delivers them bundled to an ISP without any national network who provides their own content, branding and customer contact. Eircom offers stand-alone Bitstream and stand-alone backhaul (BECs); Bitstream with backhaul and Bitstream with backhaul and with transit and peering. Eircom has, in the past, responded to pricing requests for transit and peering but the OAO in question chose not to progress the request. There are several competing offerings across a range of services.

- In ¶ 3.14, ComReg provides a list of "*enhancements/additions*" and proposes in ¶ 3.15 how the costs of these "*enhancements/additions*" could be set. There is no discussion or indication from ComReg as to whether or not these "*enhancements/additions*" are within the regulated market. ComReg just simplistically assumes that every one of the "*enhancements/additions*" that are listed is subject to regulation. Eircom does not believe that this is a reasonable assumption to make. On the contrary, the evidence is that these enhancements and additions are features of products offered on markets downstream from WBA, not on the WBA market.

- It is not clear to eircom how the proposed mechanism for the price control in ¶ 3.15 would operate.

- ComReg's statement in ¶ 3.16 that "*a move or connection to 'White label Broadband' must reflect the cost of the regulated ancillary charges components*" further evidences the lack of a coherent approach from ComReg to regulation in this area. It is eircom's position that the White Label Broadband product lies outside the regulated WBA market and is therefore not subject to the regulations imposed on Market 5. Furthermore, the proposal to impose transfer charges further underlines the fact that WBA and White Label Broadband are different products.

- ComReg ought to think in terms of a "block" of customers ✂ rather than in terms of one end-user at a time because a White Label Broadband product will be used in that way. An operator will purchase White Label Broadband to accommodate a significant body of customers, rather than to serve a few end users. This has significant implications in terms of pricing.

- For the reasons explained below, eircom strongly disagrees with the proposed regulation of White Label Broadband. However, even if a price control was justified – and it is not – the cost standard proposed by ComReg (SEO) is inappropriate in the context of an intermediary market such as White Label Broadband. As eircom understands it, SEO provides for substantial allowances for diseconomies of scale to support new entry. In the case of White Label Broadband, in particular having regard to the presence of upstream regulation, any margin test ought to address eviction rather than encourage entry. For this reason the correct standard is EEO.

- Within this context, it is clear that the outputs of the D1/06 DCF model that ComReg proposes to use are not the correct inputs to any margin test on the market for White Label Broadband because the DCF-model is based on an SEO approach. For instance, it would be entirely inappropriate to use the output of the D1/06 DCF model in relation to the cost of "onward access to the Internet/ world wide web". All potential WLB providers have built a capability to connect their network to the Internet/ world wide web. The costs of providing this service are part fixed (a large international transmission network that does not vary in cost with the volume of traffic to the Internet) and part variable. ✂

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail

For the reasons explained above, eircom believes that the regulation of eircom's offerings in the market for White Label Broadband is clearly and entirely unjustifiable and unwarranted. Moreover, it is not clear to eircom why ComReg in the case of White Label Broadband believes that "*there is currently insufficient transparency regarding the regulated WBA components within resale or end-to-end wholesale broadband access services".* In particular, contrary to what ComReg appears to believe, there is no question regarding the nature of the regulated WBA component included in its White Label Broadband offering: it is the Bitstream product as available and published under ComReg Decision D03/05 and there is no reason to distinguish Bitstream when used for White Label Broadband purposes.

It does not appear to eircom, however, that ComReg is seeking to require eircom to publish the terms and conditions including prices associated with Bitstream. Rather ComReg is seeking to impose on eircom an obligation to publish information, including prices, concerning its White Label Broadband offers. For the reasons set out in response to Question 4, the conditions for the regulation of eircom on this market are not met and any such obligation would be unlawful.

Eircom notes further that the imposition of the proposed transparency obligation/remedies on eircom would cause eircom significant damage because it would result in the exclusion of eircom from the White Label Broadband market. Indeed, the proposed publication of eircom price floors would result in these eircom price floors being used as price ceilings by the OAOs. If the published price floors were set at the level proposed by eircom, then OAOs would price below these prices. As a result, the market will be less competitive, to the detriment of the end-users, in terms of both prices and lower quality. The key costs of this proposed price floor publication remedy, whether it is lower quality offerings or whether it is increased prices to the consumer, have not been considered by ComReg including in its RIA.

Eircom also strongly disagrees that the nationally averaged cost of a REO is the appropriate benchmark against which to assess prices. ComReg will be fully aware that eircom's main competitor in the White Label Broadband market ✂ cost will be significantly less than those of a theoretical REO and akin to those of an EEO. Consequently, the undoubted result of ComReg's proposal to set the price floor as outlined above 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. This would effectively exclude eircom from the market, and essentially confer ✂ the status of a monopolistic supplier, to the detriment of customers, eircom and the overall market. It would be impossible to reconcile such a Decision on the part of ComReg with its statutory duty to promote competition.

DRAFT DECISION

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required

Significant issues arise with the draft text of the proposed Decision. The comments below are without prejudice to eircom's view that ComReg does not have the legal powers to impose a cost-oriented price for Bitstream without first conducting a market review in accordance with Regulations 27 of the Framework Regulations. This review is currently ongoing[5], and we believe it must be completed by ComReg before ComReg publishes its final Decision.

1. *Statutory and legal powers*

- Sections 1.1.3 and 1.2: ComReg Decision D05/10 provides no basis for the imposition on eircom of a price control in relation to WBA. In particular this Decision is not based on an analysis of the market for WBA and cannot accordingly be used for the purpose of imposing remedies on that market. This reference should accordingly be removed.

2. Definitions

- A definition of Equally Efficient Operator (EEO) is required**.**

3. Minimum Floors

- Eircom notes that sections 4.2 to 4.4 do not appear to be entirely consistent with ComReg's proposals as set out in the Consultation document. In particular, ComReg proposes an annual price control. Eircom believes that the section should provide for one price based on a weighted average of the relevant costs, or, in the alternative, set the price for each year of the control. Eircom believes that the requirement for an annual review, where the price control provided for different prices over the lifetime of the price control, is not sufficiently clear and precise. In addition, the process for amending the price floor, set out at section 4.3 of the Draft Decision instrument, is not clear. In particular it is not clear whether eircom's submission of robust evidence would be sufficient, of itself, to allow the floor to be amended or if a review by ComReg would be necessary prior to the amendment of the floor. It is also not clear what, in this context, would constitute "robust supporting evidence". It is necessary that the information which must be provided by eircom which would justify a review of the price floor be defined so as to ensure that this right in practice can be exercised.

4. Margin Squeeze - WLB

- For the reasons outlined above, the assessment, if any, should be based on an Equally Efficient Operator test.

5. Effective date

- eircom does not believe that the Decision should be allowed to continue "until further notice". If the Decision uses costs for a particular finite period of time, the price control should apply only for that finite period of time, reflective of the projections over time supporting the price control. The Decision could be renewed following an update of the model, if so required and justified. Eircom notes that this is consistent with the provisions of the Better Regulation Directive which imposes a ***maximum*** of a three

[5] ComReg Consultation 10/81 refers

year duration for SMP obligations, which can then only be maintained with the approval of the Commission.

REGULATORY IMPACT ASSESSMENT

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

ComReg proposes no reassessment of the Regulatory Impact of its proposals in terms of setting price floors for Bitstream although the WBA price control proposals in ComReg Doc. No. 10/56 are significantly different from those contained in the current Draft Decision 10/108. In particular, a very significant aspect of 10/56 was the twinning of price ceilings and price floors, which has now (seemingly) been removed. Eircom believes that a reassessment of the regulatory impact, in the light of the differences in proposals, should be conducted in these circumstances. Such reassessment would also be the opportunity to take into account the concerns expressed by eircom in its response to 10/56 which identified significant shortcomings in ComReg's purported RIA.

The RIA appendix in 10/108 is limited to ComReg's price control proposal not to margin (price) squeeze between WBA and the regulated WBA components in eircom's White Label Broadband product. We agree that the chosen options must be "*appropriate, proportionate and justified*". In this context, we refer to our response to Q.5 above. Clearly, any proposal which would lead inexorably to eircom's inevitable exclusion from the supply of White Label Broadband is neither appropriate, proportionate nor justified.

eircom also believes that ComReg's apparent aim of protecting OAO infrastructure investment through intervention in the White Label Broadband market is misguided and misinformed by the belief that all infrastructure investment undertaken by OAOs is efficient. Where such investments, and the consequential protective actions of ComReg, lead to reduced overall competition, and the exclusion of one of the two main suppliers from the White Label Broadband market (i.e. eircom), it is extremely questionable if such investment on the part of an OAO can be considered efficient. In this regard, eircom is of the view that ComReg's proposals in relation to White Label Broadband are diametrically opposed to ComReg's statutory objectives as outlined in section A12, namely "*to promote the interests of users within the Community*" and "*to promote competition*". It is also striking that ComReg's RIA only considers a single option (as outlined in the table on page 33) thereby making any comparative assessment impossible and accordingly significantly reducing any useful purpose of the RIA.

In section A16, ComReg lists, in passing, some other potentially viable options around EEO, SEO and REO. However, no effort is made by ComReg to examine the effects of any particular option on the various stakeholders, or if indeed ComReg considers any alternative options as a realistic alternative to its actual proposal in the Draft Decision. This eircom believes is a significant shortcoming of ComReg's proposals and their transparency.

It is, in particular, surprising that no assessment of the impact on prices for consumers is made, in the light of the impact of the elimination of eircom as a competitor. In fact, the RIA does not explicitly refer to the impact on competition of ComReg's proposal.

------------------------ END ------------------------

4: Vodafone Ireland Ltd

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

Ref. ComReg Document 108/10 Response Date 04/02/2011:

Introduction

Vodafone welcomes the opportunity to comment on this further consultation on the issue of WBA price control. As set out in our response to the previous consultation (ComReg Document 10/56), we are supportive of a move to cost oriented price controls in this market however for the reasons set out in our previous response, we are strong of the view that this should be on the basis of a single specified price point set at the minimum level necessary to meet regulatory objectives. This approach is not the same as supporting a minimum price floor where the SMP operator has freedom to price above this level. This position is reflected in our detailed responses below.

Response to Consultation Questions

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response.

ComReg's proposals to set "minimum price floors" for Bitstream rental have embedded within them the prospect that actual rentals could be higher than this. As set out comprehensively in its response to Consultation 10/56 Vodafone fundamentally disagrees with a price control which gives the SMP operator wide discretion to set WBA input prices above the minimum level. necessary to meet regulatory objectives... This previous response should be considered as being incorporated within this document by reference.

For the avoidance of doubt Vodafone does not agree with setting a "minimum price floor". It remains Vodafone's position that price controls in the WBA market should be by way of specification of specific wholesale price points at the minimum level to meet regulatory objectives rather than by the setting of upper and lower bounds with freedom for the SMP operator to optimise its position within these constraints so as to minimise the effect of regulation. It is clear that optimisation which favours the SMP operator is likely to be sub-optimal for OAOs consuming regulated WBA inputs.

✂

Based on this actual manifestation in the market of commercially agreed WPNIA based WBA prices Vodafone urges ComReg to ensure that modelled cost assumptions which yield a theoretical OAO cost base at variance with this empirical market evidence be regarded with extreme caution.

For the reasons set out elsewhere in this and our previous response, price controls which set a price floor above a cost oriented level have significant scope for market harm and any inputs which yield such a result must be rigorously validated and justified.

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the 'cost-plus' model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream.

Notwithstanding Vodafone's views as to the appropriateness of a price floor (with the attendant scope for pricing above this) rather than a mandated single specified price Vodafone would make the following observations:

The proposed measure appears to be aimed at leaving sufficient space between the various "rungs" on the "ladder of investment" to allow OAOs to stand on the Line Share rung without being squeezed. The overall ladder model is based on a move towards more infrastructure investment by OAOs as the ladder is climbed. By its very nature infrastructure investment requires a long term business plan and customer base scale to achieve a low unit cost. ComReg has set up a series of Regulatory remedies which allow OAOs enter the market with low investment thresholds and low scale requirements. ComReg has also specified migration obligations which mean that once OAOs have achieve a sufficiently predictable market presence and a sufficient market share they can migrate up the ladder of investment at moderate commercial risk..

Building the retail market share which justifies moving to the next rung requires time and a properly executed retail business plan. ✂. Therefore in the context of the overall regulatory environment the correct lens for consideration of ComReg's proposal is not of an OAO entirely new to the market with no market share and no market presence. (to use the ladder of investment analogy this equates to someone trying to jump directly to the next but top rung of the ladder). The correct consideration is that of an OAO already on the ladder of investment and who is incrementally climbing it. Care must be exercised that, in determining the appropriate spacing between the rungs, ComReg does not create so large a space as to allow inefficient OAOs with low utilisation of their infrastructure (due either to failure to execute retail business cases and failed retail market penetration OR a desire to bypass the ladder and jump directly to the top) to be viable. In the normal course low utilisation of infrastructure does not equate to efficient investment and an approach which allowed this would be contrary to ComReg's statutory objectives.

Vodafone therefore believes 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. The low level of utilisation of LLU by existing operators prior to Vodafone's activity in the WPNIA based WBA market indicates an investment strategy by the former which is unlikely to have been efficient (either through too rapid a climb of the investment ladder, entry at too high a level of the ladder while still sub-scale in terms of customer numbers, or failure to execute a retail business plan). Therefore using empirical information on current market conditions for modelling purpose will not necessarily yield outcomes which promote efficient investment. On this basis ComReg's approach of using a hypothetical entrant onto the WPNIA investment rung is appropriate and justified.

As set out previously the correct context in which to view this issue is that of an existing retail service provider incrementally climbing the wholesale ladder of investment by moving from eircom WBA to WPNIA based WBA rather than a new retail market entrant with little or no market share, simultaneously trying to jump to the next but top rung of the wholesale ladder and organically growing its retail business to achieve the scale necessary to justify the wholesale infrastructure investment.. When analysed on this basis, the initial volumes for the model should be the embedded base which is to be migrated to WPNIA based WBA.

Based on a consideration of the modularity of components of WPNIA based WBA (MDF block sizes, number of connections capable of being supported in a co-location footprint, DSLAM modularity etc.) together with the current pricing for co-location on a per exchange basis Vodafone is of the view that any credible OAO business case must be predicated upon a high level of utilisation on a per exchange basis in order to justify the investment. The use of customer volumes of the order proposed by ComReg in its model is therefore not unreasonable. However it should be noted that prior to Vodafone's activity to migrate customers to WPNIA based WBA ComReg's quarterly report showed only approximately 20,000 LLU lines (fully unbundled and Line Share). ✂ On this basis ComReg's assumptions regarding LLU volumes appear to be on the low side in the initial portion of the model.

At these levels of customer numbers the OAO will be likely to be consuming significant quantities of SB-WLR in all exchange areas and legacy Bitstream and BMB in non-LLU exchanges in order to have the ubiquitous retail offering necessary to achieve these customer numbers. At the scale of customer numbers the OAO will have associated voice volumes for origination and termination at a level that would in themselves justify direct voice interconnects into eircom together with backhaul and handover for the Bitstream/BMB services. These elements will also allow the OAO scope for further efficiency gains. (e.g. ISH could be used for both interconnection and LLU backhaul). In this regard Vodafone notes ComReg's proposal to use the costs of eircom's NGN Wholesale Symmetric Ethernet Access services to model the OAO costs of backhaul. In light of the OAO scale and scope and the synergies with other network connectivity with eircom Vodafone believes that it is appropriate to use eircom's cost-oriented transmission prices as a proxy for OAO backhaul costs.

✂ In this regard it is likely that the ComReg modelling which is based on a generic Ethernet Wholesale product will yield a high end estimate for OAO backhaul costs.

Vodafone believes that it is appropriate to use actual data in relation to fault index rather than an estimate as this will yield more realistic outcomes. However Vodafone notes that eircom is currently engaged in a Performance Improvement Programme in relation to its Fault Index targets in respect of USO. This is also likely to be reflected in the Line Share fault index with the prospect that this will reduce over the period of the model.

In relation to the per port installation charge it is not possible for Vodafone to comment definitively on whether the level of this cost is appropriate. However Vodafone would make the observation that this seems high when the number of ports per DSLAM card are considered (which Vodafone understands could be of the order of 30 per card). Vodafone believes that there are up to 12 cards per shelf. Based on ComReg's figure of €31.25 this equates to some €10,000 of labour costs for installation of a single shelf of DSL cards.

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response.

Vodafone has considered the 3 options outlined by ComReg. For the reasons set out in its response to Question 2 Vodafone believes that using actual market uptake for modelling purposes will not necessarily yield outcomes which promote efficient investment and therefore Option 3 should be discarded.

Based on its response to Question 2 Vodafone believes that the initial volume input to year 1 of the model should be higher than proposed by ComReg and should be much closer to the year 2 volumes. This more accurately models a migration scenario.

Given that organic growth will occur subsequent to the initial migration an approach based on a higher volume in year 2 and year 3 is also appropriate. The Option 1 approach proposed by ComReg has the merit of allowing some revision of the model if empirical evidence subsequently emerges from the market showing that the assumptions for the year 2 and year 3 are too conservative. Option 2 would be more complex to manage in this scenario and might also conceivably require some element of retrospection to cater for possible model adjustments in the future.

Therefore on balance Vodafone favours Option 1

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data.

In respect of the points made by ComReg at paragraph 3.8 of the consultation in relation to retail minus pricing Vodafone notes that the current consultation is a further consultation to Comreg document 10/56 which itself proposed a move to cost oriented pricing. Vodafone therefore believes that consideration of the retail minus scenario is not relevant, necessary or justified until the overall price control environment is defined.

In relation to ComReg's approach to any end-to-end white label Broadband product, Vodafone notes that a WBA price which protects the economic space for WPNIA based WBA would cover all of the end-to end elements between the customer's DSL modem and point 3 in the diagram at paragraph 3.5 of the consultation document. Therefore no further regulatory intervention would be necessary in relation to these elements.

Given that a number of the remaining elements would in general be commercially available from specialist outsource companies (modem fulfilment for example or care call centre activities), Vodafone believes that specification of a price floor for these elements should not be referenced to an SEO model but should be validated in the market as the use of an SEO model will likely yield prices above market rates.

To the extent that the ancillary services cannot be purchased on the merchant market (e.g. retail authentication) then use of the SEO model is appropriate.

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail.

Vodafone does not agree with ComReg's preliminary view in relation to specification of transparency obligations. End-to-end wholesale broadband access is a wholesale service and purchasers of end-to-end wholesale broadband access have a commercial interest in maintaining the maximum level of competition between competing providers. 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. Absent this level of eircom transparency, competing wholesale providers may well bid lower prices and enhanced facilities which are more in line with their own cost of provision. 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. In the light of this, remedies (such as notification of agreements to ComReg) which allow monitoring by ComReg are at the level which are proportionate, reasonable and justified.

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Vodafone believes that the proposed measure is deficient in its specification of its practical implementation.

Specifically given the varying multi-year nature of the proposed measure there is a requirement to specify the operative date of each price floor change so as to provide the necessary level of regulatory certainty to the market to enable efficient business planning and investment.

The proposed measure fails to address lead-in times for wholesale price changes necessitated by the measure. Given that the measure is a price floor there is not necessarily a change in price if the floor is lower than the current wholesale price. However if the specified floor is higher than the current price then its effect is binding and both OAOs and eircom will need time to asses the impacts of these changes, make commercial decisions based on the assessment, and potentially take market action at a wholesale or retail level to give effect to such decisions. On a purely operational and administrative level changes will be required to billing systems, eircom's published price lists, financial forecasts etc. The measure as drafted does not however allow for this.

Eircom has introduced differential pricing for 24Mbit/s BMB and 8 Mbit/s BMB but it is not clear either from the consultation or the draft decision whether the minimum price floor is to be some weighted average of these WBA products which might allow some products within the portfolio to be priced below the floor or whether it applies as a single price control to all products.

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Vodafone believes that the Regulatory Impact Assessment as set out in the Consultation Document is deficient in a number of material respects. These deficiencies are likely to lead ComReg to make a serious error if it imposes the measure as set out in the draft decision instrument as it will have failed to properly consider its statutory objectives in formulating this market intervention.

Specifically the RIA fails to address the following matters:

As this proposed measure deals with setting a lower bound of a range for wholesale prices and the consultation document at paragraph 2.29 references a separate consultation as to the maximum for such a range. Vodafone believes that this approach indicates a pre-judgement as to whether a range rather than a specific price point mechanism is the appropriate price control remedy. For the reasons set out in Vodafone's response this choice is material to the operation of the market. ComReg has not identified the use of a specified price remedy as a Regulatory option and ComReg's RIA fails to consider the relative merits of setting a wholesale price control based on specific price points rather than a range. In this regard Vodafone believes that ComReg's RIA is procedurally deficient in relation to Steps 2 and 5 of its stated approach to regulatory impact assessment.

ComReg's proposed measure may result in an increase in the current wholesale prices that OAOs pay for Bitstream products. This is particularly relevant for eircom's BMB product set where the proposed measure maps directly to the product pricing structure and where the year 1 levels in the measure exceed the current product pricing. OAOs and eircom have based their retail pricing and propositions based on the currently effective pricing. An increase in the wholesale pricing may have to be: 1) passed on to consumers, (which raises amongst other matters issues relating to changes to retail contracts), 2) Absorbed by OAOs – In this case the eircom retail may face a similar margin reduction however this would be offset by eircom Wholesale's margin increase and so eircom as a whole would be unaffected, or, 3) some combination of 1) and 2). Comreg has failed to consider both the potential impact on retail end user welfare and the potential impact on OAOs arising from any wholesale price increase caused by this measure. Vodafone notes that any wholesale price increase imposed on foot of this proposed measure would be equivalent to the imposition by an SMP operator of a Small but Significant Non-transitory Increase in Price (SSNIP). In ComReg Document 10/81 ComReg sets out the likely impacts on OAOs of a SSNIP. ComReg's own analysis concludes that up to half of any WBA price increase would be passed though to retail in a fully competitive market. In the event of a pass through to retail of any wholesale price increase ComReg's RIA fails to assess the impact on operators in the context of Regulation 17(4) of the Universal Services and User Rights Regulations (SI 308 of 2003)

ComReg's analysis set out in 10/81 states that "Based on the available plans, the assumed best case scenario for BT would imply that at the end of its unbundling programme approximately 40% of the available broadband market would be within reach of BT's network footprint and capable of receiving WBA services based on BT's purchased WPNIA inputs." Even taking this figure as being applicable to the market as a whole this means that at least 60% of the WBA market will be subject to this price control without any realistic prospect of it being amenable to any cost advantages that might be available by a migration to WPNIA based WBA. Any price increase in WBA pricing in these areas would therefore be a direct and unavoidable cost increase for OAOs, and one for which they have no mitigation mechanism. On the opposite side of the OAO/eircom relationship this cost increase for OAOs represents a margin windfall for eircom. ComReg's RIA omits entirely any consideration in the WBA market of this wider impact of any such price increase arising from this proposed measure. Vodafone notes that where a move to WPNIA based WBA is rendered cost effective by an increase in WBA pricing then the advantage of this is likely to be more than offset by the increased costs imposed on OAOs in non- WPNIA exchange areas.

5: Magnet Networks Limited

Magnet Networks welcomes this further consultation that deals with price floors for WBA products and also seeks to ensure transparency in white label WBA products. The following presumptions are ones that Magnet Networks must call into question:-

1. 25% Market Share
   No current alternative fixed provider irrespective of what they are selling i.e. bitstream or unbundled has a market share of 25%. Thus, Magnet feel that a new market entrant should be aiming for a 7% to 10% market share of the exchanges they unbundle is more realistic.

2. 80 exchanges
   LLU providers have been unbundling exchanges for over 6 years and not one provider has unbundled 80 exchanges. There is a considerable cost of unbundling exchanges. Thus, Magnet Networks believe that the new entrant would ramp up over three years starting at 10-15 exchanges in year 1 the same in year 2 and 3. Magnet Networks feel that 40 to 45 exchanges would be more reflective of a new market entrant.

3. 3 Years
   Magnet Networks has been in the LLU market for 6 years and have not achieved the levels of penetration that are anticipated by ComReg for a new market entrant. Magnet Networks suggest that ComReg should refine their presumptions to a realistic level on the percentage market share and number of exchanges unbundled in a 3 year period, as outlined above.

4. Backhaul.
   ComReg's presumption is that the new entrant would utilise eircoms' WEIL next generation Ethernet services. However, this is not feasible as firstly 850 MB of the 1gig traffic will delivered at best effort rather than expedited traffic. This would affect the services that the operator would be able to offer over their LLU network. The operator will have to build their own backhaul to get to the exchange.

Also obtaining such a large market share means a huge marketing campaign and may require selling the product potentially at a loss to acquire such a market and entice people away from the incumbent.

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response.

Overall, Magnet Networks agree with the proposed price control in relation to the minimum price floors for bitstream rental. However, Magnet Networks are wondering what sort of product a hypothetical entrant offers i.e. will it be line share plus line rental (WLR) or will it be line share solely and phone line is provided by an alternative provider.

Magnet Networks feel that the cost of migrations should also be considered in this review. The current cost of migration an OAO customer to lineshare is €90, however, the cost of migrating an eircom customer to lineshare is €45. This would need to be reflected in the model that ComReg are utilising for a new market entrant.

Magnet Networks believe that, from experience the cost of providing line share is the same as the cost of providing a full unbundled line from an investment point of view and thus trying to recover such a large investment would be more difficult on a lineshare basis as the copper rental of €18.02 would be added to the customer's bill. Thus, Magnet Networks feel that fully unbundled lines need to be considered in this consultation and in ComReg's new entrant calculation for cost recovery. The consultation mentions that reducing the prices of bitstream is to incentivise investment in unbundling in order to offer a greater number of products over an unbundled line. However, from our experience it is just as easy to send the same products that once distinguished bitstream from lineshare over the bitstream managed backhaul product supplied by eircom. The only product you can different is providing SHDSL services however, with the advent of WEIL/WSEA is making this product more redundant.

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the 'cost-plus' model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream.

The model appears to be favouring a lower bitstream price as lineshare penetration goes up however, Magnet Networks feel the that price should remain high for significantly longer than is currently mentioned. There should be a floor on bitstream however it should not reduce for a period of 36 months which would be enough time to incentivise a new entrant into the market and give them a potential window to receive a return. Lowering the bitstream price on an ongoing basis would not incentivise a new market entrant. As a new entrant it would not be in my interest to be successful knowing that I would be competing in a wholesale market where I could expect my competitors to be reducing their price each year.

Magnet Networks believe that this is a flawed model that avoids the fact that eircom retain €18.02 cent plus full control over call termination. Additional equipment and more intrusive processes are required for full LLU and by setting a bitstream floor by only looking at line-share makes it harder for an OAO to compete on with a full LLU offering as there is connection to the high cost full LLU offering (not only rental but implementation process, fault costs etc.).

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response.

Overall, Magnet Networks does not agree with ComReg's preliminary views in relation to the proposed annual setting of a minimum price floor relative to a presumed LLU line share take up of a new market entrant. As outlined in question 2 moving a competitors price year on year is a disincentive to a new market entrant. It will take a new market entrant up to 3 years to unbundle at least 40 exchanges and take a 7% market share, but knowing that a competitor will be able to reduce their price further in the subsequent years is disincentivising.

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data.

Magnet Networks agree with ComRe's proposal in relation to ensuring that White Label Broadband should be priced at the minimum price and add the price of the ancillary services associated with the White Label product.

Magnet Networks agree that the end to end product should include the cost of the enhancements that go with the service. If 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 these ancillary services. Thus, there would be no equivalence i.e. the end to end product may be self supplied and thus, transparency of the product and its pricing is required as per the WPNIA decision.

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail.

Magnet Networks agree with ComReg's preliminary view in relation to the transparency of the regulated components. As earlier outlined, this may be a self supplied product and thus transparency is a requisite.

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Magnet Networks believe that the proposed decision test is sufficiently detailed from a legal, technical and practical perspective and is sufficiently detailed clear and precise.

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory

Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Magnet Networks has no further views.