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Commission for Communications
(COMREG)

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Ireland

For the attention of:
Mr Alex Chisholm
Chairperson of the Commission

Fax: +35318788193

Dear Mr Chisholm,

Subject: Commission Decision concerning Case IE/2012/1404, Wholesale physical network infrastructure access and Wholesale Broadband Access – Remedies in Ireland

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 16 November 2012, the Commission registered a notification from the Irish national regulatory authority, the Commission for Communications Regulation (ComReg),¹ concerning remedies applied in the market for wholesale physical network infrastructure access at a fixed location (WPNIA) and in the market for wholesale broadband access (WBA)² in Ireland.

The national consultation³ ran from 4 April 2012 to 18 May 2012.

On 27 November 2012, a request for information⁴ was sent to ComReg and a response

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 4 and market 5 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

was received on 30 November 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The market for WPNIA in Ireland was previously notified to and assessed by the Commission under case IE/2009/0875.⁵ ComReg designated Eircom Limited as a SMP operator and imposed the obligations of (i) access, (ii) transparency, (iii) non-discrimination, (iv) price control, (v) cost accounting and accounting separation. The Commission invited ComReg to include fibre lines in the relevant market, to revisit its analysis when carrying out its next review of these markets along the lines of the NGA Recommendation once adopted and to notify the details and implementation of the price control obligation and the accounting separation obligation in accordance with Article 7(3) of the Framework Directive.

The market for WBA in Ireland was previously notified to and assessed by the Commission under case IE/2011/1207.⁶ ComReg designated Eircom Limited with SMP and proposed to impose the full set of obligations, including obligations of (i) access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation, and (v) price control and cost accounting. The Commission noted that in relation to next generation WBA, the obligations were defined in general terms and that their implementing details were to be completed. In its comments letter the Commission invited ComReg to analyse markets 4 and 5 together in order to ensure a coherent approach to NGA regulation.

II.2. Regulatory remedies

Appropriate remedies for NGA would according to ComReg's proposal include the following obligations:

Obligation to provide access

In relation to WPNIA, ComReg proposes that Eircom shall have an obligation to provide access to its civil engineering infrastructure (CEI) on an Equivalence of Outputs (EoO) basis.⁷ Where Civil Engineering is not available, Eircom will be required to provide access to dark fibre. Given the lack of demand for FTTH, ComReg proposes to mandate access in principle but without detailing the conditions for the access remedy. As regards the sub-loop unbundling (SLU) remedy, ComReg takes into account the fact that there has been no demand for SLU in the past years while Eircom has stated its intention to deploy next generation access through a FTTC network architecture and to deploy VDSL2 vectoring technology which, at least for the current (first) generation of vectoring technology precludes access by another operator to the copper sub-loop. ComReg proposes that SLU be available nationally on a reasonable request basis except in non-

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ C(2009) 1283.

⁶ C(2011) 3530

⁷ ComReg explains that EoO is a more proportionate remedy than Equivalence of Inputs (EoI) given the complexity required if Eircom were to disaggregate its legacy CEI topology. ComReg could impose EoI at a later stage in case the proposal proves to be unsatisfactory.

commercial areas identified under a State aid scheme where the availability of SLU would be mandatory.⁸

In relation to WBA, ComReg proposes that Eircom be mandated to provide access to NGA bitstream and to virtual unbundled access (VUA)⁹ with multicast capabilities and *inter alia* co-location and backhaul.

Furthermore, Eircom is subject to an obligation not to withdraw access to services and facilities already granted (e.g. in the case of withdrawal of facilities equivalent access based on at least a virtual product or a fibre unbundling offer should be offered on reasonable request), to ensure migration across and between regulated current generation and next generation products and services, and to provide associated services for NGA on a reasonable request basis (i.e. access obligations relating to in-house wiring and customer premises equipment).

Obligation of transparency

The main transparency requirements to be met by Eircom include inter alia:

- Obligation to publish on its website and keep updated the Access Reference Offer (the “ARO”) and the Wholesale Broadband Access Reference Offer (the “WBARO”) which will contain information relating to Next Generation WPNIA and WBA services and facilities;
- Obligation to make publicly available wholesale pricing and non-price information at least six months prior to the initial launch of the wholesale product (retail launch may not take place in advance of wholesale launch) and, post launch, to make available non-pricing information at least six months prior to an offer of next Generation WPNIA and WBA.
- Obligation to provide changes to the relevant ARO and WBARO to ComReg as part of the notification process (Eircom shall notify ComReg of price and non-price information at least one month in advance of its publication) and to make publicly available price changes;
- Eircom should publish Key Performance Indicators (KPIs) in respect of Next Generation WPNIA and WBA services and facilities and publish actual service standards achieved in the context of service level agreements (SLAs). Furthermore, Eircom must identify and justify any differences of services between the next generation WPNIA and WBA services and facilities provided to access seekers and self-supplied;
- Eircom will have an obligation to make publicly available information on new infrastructures, technologies, services or facilities including, on a quarterly basis, performance related to network roll out and vectoring enablement at the cabinet level.

⁸ A request to Eircom ought to be considered *reasonable* if the following three conditions are met: 1) the request for SLU is at a cabinet in an exchange location where NGA roll out and vectoring enablement has not already taken place and is not imminent or credibly scheduled; 2) There is a commitment to open access by the SLU operator by way of virtual unbundled access and next generation bitstream services; 3) ComReg will also consider the impact on the availability of bandwidths to end users. Where Eircom does not meet its planned rollout commitments ComReg would on request reconsider its position and find a request for SLU *prima facie* reasonable.

⁹ VUA is described as having technical functionality reflecting an active access product closer to a Bistream and distinguishing it from ULL.

Obligation of Non-discrimination

With regard to the non-discrimination obligation, ComReg proposes:

- Eircom shall provide on an EoI basis end-user related pre-ordering, ordering, provisioning, fault reporting and repair for next Generation Bitstream and VUA, including multicast. ComReg finds this to be proportionate and justified and does, in Comreg's view, not create a disproportionate burden to implement.
- All other Market 5 services and associated facilities will be provided on, at least, an Equivalence of Output (EoO) basis.
- Access and voice provided over legacy technology and sold in conjunction with next generation services at the wholesale level must be provided, at a minimum, to an EoO standard. The Market 5 element should be provided on an EoI basis, for pre-ordering, ordering, provisioning, fault reporting and repair and the services provided over legacy technology must be provided at a minimum of EoO.
- All WPNIA services should be delivered to at least an EoO standard.

Furthermore, ComReg stresses that performance on non-discrimination will be closely monitored. Should it become evident that a level playing field for competitors does not develop, as has been evidenced in the past, ComReg will consider the associated cost to industry of not implementing a wider scope of equivalence, and may revisit the level of equivalence required of Eircom.

Obligations relating to price control and cost accounting

ComReg observes that in the case of NGA both the costs and the consumer demand profiles are less well understood than for many current generation services, making the application of a cost orientation obligation more difficult. ComReg considers as a key risk that investment will not happen at all.

Against this background, ComReg proposes to allow additional price flexibility by way of margin squeeze tests for the NGA services in the WBA market. ComReg proposes that a retail margin squeeze approach should be applied along with a number of wholesale margin squeeze tests between the various products along the investment ladder. The proposed margin squeeze approach means that wholesale prices will be priced so as to allow an efficient entrant to compete at the retail level using Eircom's regulated wholesale products.

The margin squeeze tests will include:

(1) *Retail margin squeeze test* between retail next generation broadband product(s) and NGA Bitstream.¹⁰ The retail margin squeeze test for NGA in the WBA market would require that there is sufficient economic space between the price of the regulated wholesale next generation Bitstream product and the price(s) of relevant retail NGA broadband products to allow the necessary additional costs of providing retail products and services to be covered;¹¹

¹⁰ The retail margin squeeze test for NGA services will be assessed on a portfolio basis, where Eircom must ensure that the average of Eircom's retail revenues for its retail NGA broadband products recovers the retail costs in the margin squeeze test. Eircom will have some flexibility to price above or below the retail costs on certain retail NGA broadband products but it must ensure that on a weighted average basis the retail costs plus wholesale input price are covered by the retail NGA broadband revenues.

¹¹ The proposed cost standard for the retail margin squeeze test is a Similarly Efficient Operator (SEO).

(2) *Wholesale margin squeeze test between NGA Bitstream and VUA.*¹² The wholesale margin squeeze test between NGA Bitstream and VUA requires that there is sufficient economic space between the price of the NGA Bitstream product and the price of the VUA product;¹³

(3) *Wholesale margin squeeze test between VUA and SLU.*¹⁴ The wholesale margin squeeze test between VUA and SLU requires that there is sufficient economic space between the price of the VUA product and the price of the SLU product.

In relation to the WPNIA market, ComReg proposes that cost orientation should be the appropriate price control in the context of NGA services. The charges for civil engineering access, dark fibre and SLU Backhaul should be priced at no more than the “BU-LRAIC plus” costs in the Copper Access Model but adjusted where appropriate for fibre costs. For fibre unbundling, ComReg proposes that the cost orientation obligation should apply but it will further specify it at a later stage given that Eircom has no plans at this time to roll out FTTH at any significant level.

Obligation of Accounting Separation

ComReg intends to maintain on Eircom the obligation to have separated accounts for next generation services.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the ComReg and has the following comments:¹⁵

Use of an EoI standard in the application of the non-discrimination obligation

The Commission notes that ComReg proposes to impose a FTTH unbundling obligation should FTTH be rolled out during the life time of the review. However, ComReg concludes on proportionality grounds to mandate only Equivalence of Outputs for FTTH unbundling given the limited rollout of FTTH lines so far planned by the SMP operator.

Against this background, the Commission reminds ComReg that effective non-discrimination is best achieved by the application of Equivalence of Inputs. In this respect the Commission further points out to ComReg that providing wholesale

A SEO means an operator which shares the same basic cost function as Eircom but does not yet enjoy the same economies of scale and scope as Eircom. The Reasonably Efficient Operator (REO) test is similar to the SEO standard.

¹² ComReg considers that without this test there is a real risk that investments made and currently being made by companies such as BT Ireland, Vodafone and Sky could be unfairly undermined by a margin squeeze between NGA Bitstream and VUA prices.

¹³ ComReg proposed that the wholesale margin squeeze test between NGA Bitstream and VUA should be based on the SEO standard.

¹⁴ It is not envisaged that any other operator will unbundle cabinets in parallel to Eircom due to the economics of the business case for such an investment where Eircom has made its intentions clear. Therefore, instead ComReg proposed that the wholesale margin squeeze test from VUA to SLU should be based on the costs of an Equally Efficient Operator (EEO) given that Eircom is currently the only operator providing the SLU service and in general the same costs would apply if another SLU operator were to provide the services.

¹⁵ In accordance with Article 7(3) of the Framework Directive.

inputs consisting wholly or partly of optical elements on an Equivalence of Input basis is likely to be proportionate given the low incremental costs of designing new systems, a consideration also acknowledged by ComReg. As a result, the Commission asks ComReg to reconsider (within an industry forum if suitable) the feasibility and proportionality of mandating Equivalence of Inputs for unbundled FTTH products should FTTH roll-out occur, even on a small scale.

Sub-loop unbundling and vectoring technology

The Commission notes that ComReg proposes not to mandate SLU, in principle, in areas where vectoring enablement has already taken place and is "imminent" or "credibly scheduled". ComReg would monitor the SMP operator's roll out plans' realisation.

Against this background and in order to avoid that the SMP operator unduly pre-empt investment from alternative operators, the Commission welcomes ComReg's commitment to monitor Eircom's FTTC rollout plans. The Commission further asks ComReg to reconsider the imposition of the SLU obligation in those instances where FTTC and vectoring deployment plans do not materialise as announced, and where there is a serious risk that alternative investments are unduly hindered due to the lack of a SLU obligation.

The Commission, in particular, invites ComReg to indicate in a clear and precise way in their final measure the circumstances under which non-SLU obligations might be reviewed.

Margin Squeeze Tests, price flexibility for fibre and the need for a consistent European approach

The Commission agrees with ComReg not to impose cost orientation in market 5 given in particular the strict non-discrimination obligations put in place (Equivalence of Inputs for key products and the application of margin squeeze tests).

The Commission understands that the set of margin squeeze tests developed by ComReg takes into account the specific stage of development of NGA services in the Irish market and that it aims at fostering investments while making sure that market distortions are avoided.

The Commission highlights that the Commission is working towards the adoption of a Recommendation on the consistent application of non-discrimination obligations and cost methodologies to promote competition and enhance the broadband investment environment, which will give some guidance on the design of an *ex ante* economic replicability test. This test should be used in case pricing flexibility is granted to the SMP operator for NGA wholesale inputs in the presence of other competitive safeguards. Accordingly, the Commission invites ComReg to revisit the proposed margin squeeze tests along the lines of the forthcoming Recommendation once adopted.

Pursuant to Article 7(7) of the Framework Directive, the Commission for Communications Regulation (ComReg) shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any

position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁶ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁷ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.¹⁸ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹⁶ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

¹⁷ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁸ The Commission may inform the public of the result of its assessment before the end of this three-day period.