



Commission for
Communications Regulation

Draft Determination in a dispute between (i) four parties represented by Towerhouse LLP and (ii) Eircom Ltd

Draft Determination

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1 Introduction

- 1 Towerhouse LLP (**Towerhouse**) submitted a dispute to the Commission for Communications Regulation (**ComReg**) on 16 November 2015 (the **Dispute Referral**) on behalf of Sky UK Limited, BT Communications Limited, Vodafone Limited and Magnet Networks Limited (together, the **Referring Parties**). The Dispute Referral was allocated reference number “Case 850”.
- 2 On 2 December 2015, ComReg published an Information Notice defining the scope of the dispute (the **Dispute**) and appending the non-confidential version of the Dispute Referral. These documents were published on ComReg’s website as ComReg Document No 15/127¹ and 15/127a² respectively.
- 3 The respondent, Eircom Limited (**Eircom**), has been provided with a copy of the scope of the Dispute³ as well as a non-confidential copy of the Dispute Referral⁴.
- 4 The Dispute relates to provisions within Eircom’s service level agreements (**SLAs**) relating to the repair of faults for local loop unbundling (**LLU**) and single billing wholesale line rental (**SB-WLR**). Under the current SLAs, Eircom must compensate operators by way of service credits (**SCs**)⁵ when it fails to achieve certain targets in respect of the repair of faults.
- 5 ComReg has considered this Dispute pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011⁶ (the **Framework Regulations**).
- 6 The remaining chapters of this Draft Determination are structured as follows:
 - **Chapter 2** contains an executive summary.
 - **Chapter 3** defines the scope of the Dispute.
 - **Chapter 4** identifies ComReg’s dispute resolution powers and the Eircom obligations at issue.

¹ http://www.comreg.ie/fileupload/publications/ComReg_15127.pdf

² <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

³ Published on 2 December 2015.

⁴ Provided by email on 26 November 2015.

⁵ The Referring Parties use the term “Service Level Guarantees” to denote the financial payments made on foot of SLA provisions. This paper uses the term “Service Credits” as this is consistent with terminology used in previous ComReg decisions.

⁶ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

- **Chapter 5** sets out ComReg's analysis of the Dispute and its preliminary conclusions.
- **Chapter 6** evaluates ComReg's proposal for resolving the Dispute in light of statutory and other objectives.
- **Chapter 7** details how submissions in response to the Draft Determination can be made.
- **Annex 1** provides a chronology of events.
- **Annex 2** sets out the Draft Determination.
- **Annex 3** contains Eircom's initial response to the Dispute.

2 Executive Summary

- 7 Towerhouse submitted a dispute to ComReg on 16 November 2015 on behalf of the Referring Parties.
- 8 The Dispute relates to the conditions under which the Referring Parties obtain wholesale access from Eircom for services in a number of regulated markets. Specifically the Dispute centres on provisions within Eircom's SLAs relating to the repair of faults in LLU services and SB-WLR services.
- 9 The Dispute relates to failure for Eircom and the Referring Parties to reach an agreement on the percentage targets for fault repairs.
- 10 In April 2012 the parties initiated negotiations on the fault-repair performance targets contained in Eircom's SB-WLR and LLU SLAs. A fault-repair performance target (**performance target**) represents the percentage number of faults that Eircom would have to fix within a stipulated number of days of being notified. Those negotiations concluded with Eircom's best and final offer (**BAFO**).
- 11 Eircom's BAFO took effect from 1 September 2015 and reflects the current performance targets that are the subject of the Dispute. The table below sets out the performance targets that arose in the context of negotiations. The first column sets out the performance targets, at the beginning of the negotiation period in 2012. The second column sets out performance targets requested by the Referring Parties. The third column sets out Eircom's BAFO as part of those negotiations and reflects the current performance targets.
- 12 The figures apply equally to LLU and SB-WLR services. The table has been adapted from Table 3 on page 4 of the published Dispute Referral.

13 Requested SLAs vs Eircom's offer⁷

	Performance targets at the beginning of the negotiation period in 2012	Performance targets requested by the Referring Parties	Eircom's BAFO and current performance targets contained in SB-WLR and LLU SLA
2 working days	73%	85%	77% by 1 September 2015 80% by 2016 (conditional on reductions in "No Fault Found" levels)
5 working days	92%	95%	No change
10 working days	100%	100%	Reduction discussed

- 14 Eircom's BAFO set out in the table above provided an improvement to the performance target SLA for both SB-WLR and LLU for repairs to be completed within two working days from 73% to 77% (which took effect from 1 September 2015, prior to the Dispute Referral). The Referring Parties accepted Eircom's BAFO but also referred the present Dispute to ComReg in parallel.
- 15 On 10 December 2015, Eircom submitted its response to the Dispute (see Annex 3 of this draft Determination). In that response, Eircom disagreed with the representations made by the Referring Parties and argued against the claims made by the Referring Parties for the areas to be considered within the scope of the Dispute.
- 16 ComReg considered the Dispute⁸ and Eircom's response. We concluded that:
- 16..1 the duration of the discussions between the parties to the Dispute, and the failure to agree revised terms around the fault repair metrics to the satisfaction of all parties, meant that the matter constituted a genuine dispute; and
- 16..2 the Dispute falls within the scope of Regulation 31 of the Framework Regulations.

⁷ Source: Table 3 on page 4 of the published Dispute at : <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

⁸ See the Dispute at <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf> and the scope set out at: http://www.comreg.ie/fileupload/publications/ComReg_15127.pdf

- 17 In this draft determination we consider the matter in light of ComReg’s statutory objectives, including under Section 12 of the Communications Regulation Acts⁹. In particular, we are mindful of our responsibility under Section 12(1)(a): “(i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.” This is considered in more detail in Chapter 6.
- 18 ComReg has considered four possible options for resolving the Dispute:
- 18.1 Option (a) Breach determination.
 - 18.2 Option (b) Select one of the proposals put forward by the Referring Parties and/or Eircom.
 - 18.3 Option (c) Oblige the parties to enter into good faith negotiations.
 - 18.4 Option (d) Oblige the parties to implement ComReg’s proposed solution.
- 19 We propose that Option (d) is the most appropriate for the reasons set out in Chapters 5 and 6. In summary this proposes that SCs be paid on all faults extant for more than 2 working days, calculated on a per diem payment basis. We suggest that, in principle, SCs should reflect total costs of outages to other authorised operators (**OAOs**) (including revenues foregone, administrative costs, reputational damage etc.) and, ultimately, end users, although this is not part of this Draft Determination. Furthermore we consider that in principle SCs paid in circumstances where Eircom’s performance is equal to or better than a “reference performance” should not represent a net cost to Eircom. (This is not part of the Draft Determination and is without prejudice to any decisions taken in the context of access pricing: ComReg’s initial view is that such SCs should, in principle, be recoverable by Eircom via wholesale access charges).
- 20 We believe that a merit of this proposal is that Eircom will have the appropriate incentive to invest in improving fault repair services where it makes economic sense to do so.
- 21 We request submissions to our proposals within a period of 3 weeks. In addition, ComReg proposes to allow a period of at least 6 weeks from the date of publication of this Draft Determination before making any Final Determination, in order to allow the parties to engage further in respect of the level of SCs, having regard to our proposals.

⁹ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

3 Scope of the Dispute

3.1 The Dispute Referral

- 22 On 16 November 2015, Towerhouse submitted a Dispute Referral to ComReg on behalf of the Referring Parties. A non-confidential version of the Dispute Referral was published on ComReg's website on 2 December 2015.¹⁰
- 23 The Dispute Referral relates to Eircom's current generation access (**CGA**) regulated contract terms, in particular, to the repair performance targets for repair times offered as part of SLAs between Eircom and each of the Referring Parties.
- 24 Under the current SLAs, Eircom is subject to performance targets for the repair of faults on its wholesale lines. To the extent that it does not meet those performance targets (as calculated on an aggregated basis for each operator), a service credit will be payable to the affected operator (customer).
- 25 The regulated services within the scope of the Dispute are: local loop unbundling (**LLU**) in the form of unbundled local metallic path (**ULMP**), line sharing (**LS**) and combined GNP and ULMP (**GLUMP**); and single billing wholesale line rental (**SB-WLR**).¹¹ The Referring Parties consider that Eircom's current SLAs for repair on each of these services are not fair, reasonable and non-discriminatory. The Referring Parties state that they have made all reasonable efforts to negotiate better SLAs but have been unable to do so. In their view, Eircom is thus contravening obligations imposed on it as an operator with Significant Market Power (**SMP**) in the relevant markets (namely, Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Locations (**WPNIA**) Market and the Wholesale Call Origination on Public Telephone Networks provided at a Fixed Location (**FACO**) Market).
- 26 Eircom's BAFO took effect from 1 September 2015 and reflects the current performance targets that are the subject of the Dispute. The table below sets out the performance targets that arose in the context of negotiations. The first column sets out the performance targets, at the beginning of the negotiation period in 2012. The second column sets out performance targets requested by the Referring Parties. The third column sets out Eircom's BAFO as part of those negotiations and reflects the current performance targets.

¹⁰ Document 15/127a.

¹¹ In the remainder of this draft determination, ULMP, LS and GLUMP are referred to collectively as LLU.

27 The figures apply equally to LLU and SB-WLR services. The table has been adapted from Table 3 on page 4 of the published Dispute Referral.

28 **Requested SLAs vs Eircom's offer¹²**

	Performance targets at the beginning of the negotiation period in 2012	Performance targets requested by the Referring Parties	Eircom's BAFO and current performance targets contained in SB-WLR and LLU SLA
2 working days	73%	85%	77% by 1 September 2015 80% by 2016 (conditional on reductions in "No Fault Found" levels)
5 working days	92%	95%	No change
10 working days	100%	100%	Reduction discussed

29 Annex 4 of the published Dispute Referral sets out the faults with the line test data supplied by Access Seekers (**AS**) effective from 1 September 2015 for the services agreed by ComReg to be in scope for the Dispute (that is, SB-WLR and LLU).

30 Annex 3 of the Dispute Referral contains a summary of the Referring Parties' interactions with Eircom in relation to the SLAs¹³. The CGA SLA negotiations between Eircom and Industry (including the Referring Parties) were initiated when Industry submitted statements of requirements (**SoR**) to Eircom in April and May 2012 and were concluded in September 2015. The SLA negotiations were conducted at numerous industry meetings, bilateral meetings and at dedicated SLA workshops. ComReg supported Eircom and Industry (including the Referring Parties) through the course of the negotiations by providing meeting and secretarial facilities, when requested.

¹² Source: Table 3 on page 4 of the published Dispute at : <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

¹³ See page 27 Annex 3 "Chronology of Core Correspondence in the Dispute and Index of Attachments".

- 31 Prior to the submission of the Dispute Referral, Eircom offered (by way of a **BAFO**) to increase the performance target for repairs to be completed within 2 working days from 73% to 77%, in respect of both SB-WLR and LLU. That BAFO was accepted and took effect from 1 September 2015. The Referring Parties stated that they accepted the offer because they regarded any improvement in the relevant SLA repair performance targets as a positive step. However, the increased performance target is 8% below the performance target of 85% requested by the Referring Parties for both SB-WLR and LLU repairs to be completed within 2 working days. The Referring Parties also request an improvement in the performance targets at 5 and 10 working days.
- 32 The Dispute Referral also makes reference to Eircom's obligations as Universal Service Provider, specifically the Performance Improvement Programme 3 (**PIP3**)¹⁴. PIP3 was an extension of the performance improvement programme which was first established in 2010 based on the legally binding performance targets set out in D02/08 in relation to Eircom's quality of service performance under certain aspects of the Universal Service Obligation (**USO**). Eircom established the PIP in 2010 and this was then extended to the PIP2, then subsequently to the PIP3. The period for the improvement programme PIP3 ended in December 2015. ComReg's Decision D02/08¹⁵ remains in force and ComReg is currently consulting on proposed quality of service performance targets as part of its USO Access at a Fixed Location (AFL) consultation¹⁶.
- 33 The enforcement mechanism set out in Appendix A to ComReg Decision D02/08 sets a level which, if not achieved for USO, triggered penalty payments to ComReg. The Referring Parties submit that by failing to offer repair targets within the CGA SLAs that are at least as good as those offered to retail customers under PIP3, Eircom is in contravention of its regulatory obligations (in particular, the obligation of non-discrimination).
- 34 The Referring Parties requested ComReg to resolve the dispute by means of a series of directions and determinations as described in Section 3.2 below.

¹⁴ See ComReg Document No 14/129 at: <http://www.comreg.ie/fileupload/publications/ComReg14129.pdf> and see also Section 6.3 of this Draft Determination.

¹⁵ See ComReg Document No 08/37 (Decision No 02/08) at: http://www.comreg.ie/publications/decision_notice_-_response_to_consultation_on_eircom_s_universal_service_obligation_-_quality_of_service_performance_targets.583.103102.p.html

¹⁶ Universal Service Requirements, Provision of access at a fixed location (AFL), Response to Consultation, Further Consultation and Draft Decision <http://www.comreg.ie/fileupload/publications/ComReg1631.pdf>

3.2 Scope of the Dispute

- 35 The Referring Parties submitted that ComReg should resolve Case 850 by means of¹⁷:
- a. *“A direction under regulation 36 of the Framework Regulations fixing the terms of the Regulated Contracts by increasing the performance target for each SLA to the levels requested by the Referring Parties as set out in Table 3;*
 - b. *A determination under regulation 31(2) of the Framework Regulations stating that, under the current terms of the Regulated Contracts, eircom is in breach of the SMP conditions set by ComReg in the 2007 RNA Decision, the 2015 FACO Decision, the 2010 WBA Decision and the 2010 WPNIA Decision, in particular, the requirement to offer and provide network access to CGA services in a fair, reasonable and timely manner; and*
 - c. *A direction imposing an obligation which is enforceable against eircom by each Referring Party which purchases Regulated Services from eircom, to enter into a transaction between each relevant Referring Party and eircom on the terms and conditions fixed by ComReg (consistent with the approach taken above) within a specified period of not more than two weeks.”*
- 36 In section 9.6 of the Dispute Referral, the Referring Parties note that that *“the discussion on the appropriate level of service level guarantees (SLGs) [SCs]...are an essential component of any measure designed to encourage improved performance by a service provider such as eircom. Advancing the discussion on the appropriate level of SLGs [SCs] cannot commence until the appropriate level of the SLAs has been determined.”*
- 37 Having considered the Dispute Referral and the scope of ComReg’s dispute resolution powers, ComReg defined the scope of the dispute as follows:
- a. *“ComReg is of the view that it is not appropriate to resolve this matter pursuant to Regulation 36 as the relevant legislation for resolution of disputes is Regulation 31 of the Framework Regulations. ComReg therefore intends to progress this under Regulation 31.*

ComReg will consider the terms of the regulated contracts for the products specified below:

- *Local loop unbundling in the form of unbundled local metallic path (ULMP); line sharing (LS); combined GNP and ULMP (GLUMP) in the Wholesale (Physical) Network Infrastructure Access (including*

¹⁷ See ComReg Document No 15/127 at http://www.comreg.ie/publications/information_notice_-_comreg_accepts_request_from_towershouse_llp_for_the_resolution_of_a_dispute_with_eircom_ltd.583.104999.p.html

shared or fully unbundled access) at a Fixed Location (WPNIA) Market; and

- *Single billing wholesale line rental (SBWLR) in the Wholesale Call Origination on the Public Telephone Networks Provided at a Fixed Location (FACO) Market.*

ComReg considers that bitstream managed backhaul in the Wholesale Broadband Access (Market 5) is out of the scope of this investigation as the Referring Parties have not presented any evidence of engagement or dispute.

- b. ComReg is of the view that a breach determination is out of scope in the context of a dispute. In resolving this dispute ComReg will consider and respond, where appropriate, to the points raised by the Referring Parties. ComReg will assess whether it is appropriate to adjust the relevant SLA metrics with a view to resolving the dispute, and if so determine the relevant metrics. ComReg will take the relevant significant market power (SMP) obligations into consideration in any such determination under Regulation 31(2).*
- c. In relation to the Referring Parties' point (c) above, a consideration of any determination made under the Referring Parties' point (a) above will also address the appropriate timescale for implementation.*

Finally, in relation to section 9.6 of the Dispute [Referral], ComReg notes that in its view service level agreements (SLAs) and SLGs [SCs] are linked, however, it notes the Referring Parties' views that SLGs are not in scope and as such the SLGs [SCs] are considered out of scope."

- 38 The scope of the dispute as defined by ComReg (the **Dispute**) was published on ComReg's website on 2 December 2015.¹⁸

3.3 Summary of Eircom's response dated 10 December 2015

- 39 On 10 December 2015, Eircom responded to the Dispute Referral. Eircom's response is appended as Annex 3 of this draft Determination.
- 40 In summary, Eircom disagreed with the allegations made in the Dispute Referral that it has failed to comply with its SMP obligations in the relevant markets to provide access in a fair, reasonable and timely manner, on a non-discriminatory basis and in a transparent manner.

¹⁸ See ComReg Document No 15/127 at http://www.comreg.ie/publications/information_notice_-_comreg_accepts_request_from_towershouse_llp_for_the_resolution_of_a_dispute_with_eircom_ltd.583.104999.p.html

- 41 In its response, Eircom cited the example of its continuous engagement with Industry over the past number of years on CGA SLAs, both through industry forums and bilaterally with operators, to illustrate how, in its view, it has worked to offer high grade SLAs and ultimately ensure that its SMP obligations have been fulfilled.
- 42 Eircom also noted its disappointment that the Referring Parties appeared to refuse further engagement with Eircom, as suggested by paragraph 16.3(e) of the Dispute Referral.
- 43 In response to the Referring Parties' reference to PIP3, Eircom stated that it does not have repair SLAs in place with its retail customers. It noted that PIP3 is not an SLA, it is an out of Court settlement concerning the reasonable discharge by Eircom of performance targets imposed by ComReg in the context of Eircom's USO and the enforcement regime relied on by ComReg. The methodology for assessing performance against those USO targets is different to the CGA SLA approach. As a result, Eircom does not accept that it is appropriate to establish a formal and direct link between its obligations to achieve USO performance targets and the construction of a CGA SLA.
- 44 Eircom's position is that there is no basis for setting the performance targets at the levels requested by the Referring Parties, and that such intervention is not necessary to ensure compliance with Eircom's relevant obligations.

4 Dispute Resolution Powers

4.1 Legal basis

- 45 ComReg was established under Section 6 of the Communications Regulation Acts 2002 to 2011 (the **Communications Regulation Acts**)¹⁹. ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of, amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the national regulatory authority in the State. The functions of ComReg are set out in Section 10 of the Communications Regulation Acts.
- 46 Regulation 31 of the Framework Regulations sets out ComReg's powers regarding disputes arising between undertakings in connection with existing obligations under the Framework Directive²⁰, the Specific Directives²¹ or the Specific Regulations.²²
- 47 Regulation 31(2) of the Framework Regulations provides that, in the event of a dispute, ComReg shall, at the request of either party, initiate an investigation and make a determination aimed at ensuring compliance with the obligations of the Framework Directive, the Specific Directives or the Specific Regulations to resolve the dispute.
- 48 In making a determination, ComReg is required to have regard to its objectives under Section 12 of the Communications Regulation Acts and Regulation 16 of the Framework Regulations.
- 49 ComReg's determination under Regulation 31 is binding. Failure to comply with a Determination is an offence.

¹⁹ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

²⁰ Directive 2002/21/EC as amended.

²¹ Directives 2002/20/EC, 2002/19/EC, 2002/20/EC, 2002/22/EC and 2002/58/EC each as amended.

²² The Regulations implementing the Framework Directive and the Specific Directives into Irish law, namely SI 333 of 2011, SI 334 of 2011, SI 335 of 2011, SI 336 of 2011 and SI 337 of 2011.

50 In accordance with Regulation 31(2) of the Framework Regulations, ComReg has published its Dispute Resolution Procedures.²³ In Annex B of ComReg's published Dispute Resolution Procedures, step 7 states that:

*"The final determination of a dispute will be made having regard to the relevant regulatory framework. Such an outcome may be one other than what was requested by either party."*²⁴

4.2 Eircom's SMP obligations

51 Eircom has been designated as an undertaking with significant market power (**SMP**) in a number of markets relevant to the Dispute and is subject to related SMP obligations as set out in the following decisions:

- Wholesale Fixed Voice Call Origination and Transit (ComReg Document No 15/82, Decision No D05/15) (the **FACO SMP Decision**²⁵); and
- Wholesale (Physical) Network Infrastructure Access Market (Market 4) (ComReg Document No 10/39, Decision No D05/10) (the **WPNIA SMP Decision**²⁶).

Fixed Access and Call Origination (SB-WLR)

The FACO SMP Decision sets out the obligations for SB-WLR SLAs in Section 8.1 - 8.3 of the Decision Instrument at Appendix H thereto. Eircom is obliged to comply with the following obligations:

8.1 Pursuant to Regulation 12(3) of the Access Regulations, [Eircom] shall, in relation to the obligations set out in Section 7 above, grant Undertakings Access in a fair, reasonable and timely manner.

8.2 Without prejudice to the generality of Section 8.1 above and pursuant to Regulation 12(3) of the Access Regulations, where [Eircom] receives a request for Access (including Access to those products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument) in accordance with the requirements of this Decision Instrument at the same

²³ Response to Consultation and Decision Notice, Dispute Resolution Procedures - Framework Regulations (Response to Consultation Document No. 09/85) (Document No: 10/18R, Decision No: D03/10 Date: 29 March 2010).

²⁴ Step 7, page 26 of ComReg Doc No 10/18R

²⁵ http://www.comreg.ie/publications/market_review_-_wholesale_fixed_voice_call_origination_and_transit_markets.583.104910.p.html

²⁶ http://www.comreg.ie/publications/response_to_consultation_-_market_review_wholesale_physical_network_infrastructure_access_market_4_further_response_to_comreg_document_no_08_104_response_to_comreg_document_no_09_42_and_decision_the_decision_document_.583.103625.p.html

point in time as a request for another wholesale access product, service or facility, on foot of another Decision Instrument issued by ComReg, [Eircom] shall ensure that both access requests are met concurrently.

8.3 *Without prejudice to the generality of Section 8.1 above, pursuant to Regulation 12(3) of the Access Regulations, [Eircom] shall:*

- (i) conclude, maintain or update, as appropriate, legally binding SLAs with Undertakings, which shall include provisions for Performance Metrics;*
- (ii) negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA [Eircom] shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request [Eircom] may seek an extension to the six (6) month period from ComReg;*
- (iii) ensure that all SLAs include provision for Service Credits arising from any breach of an SLA;*
- (iv) ensure that the level of the Service Credits are fair and reasonable;*
- (v) ensure that SLAs detail how Service Credits are calculated and shall include the provision of an example calculation; and*
- (vi) ensure that application of Service Credits, where they occur, shall be applied automatically, and in a timely and efficient manner.*

WPNIA (LLU)

52 The WPNIA SMP Decision set out the obligations for LLU SLAs at Sections 8.1 and 8.2 of the Decision Instrument at Appendix C thereto. Eircom is obliged, amongst other obligations, as follows:

8.1 Pursuant to Regulation 13(3) of the Access Regulations, [Eircom] shall, in relation to the obligations set out under section 7, grant Access to Current Generation WPNIA, in a fair, reasonable and timely manner.

8.2 Without prejudice to the generality of section 8.1, [Eircom] shall:

- (i) Conclude, maintain or update, as appropriate, legally binding SLAs which include provision for associated Performance Metrics with OAOs²⁷;
- (ii) Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter for negotiation between [Eircom] and Access Seekers and recovery of service credits shall be in the first instance, a matter for the individual Access Seeker and [Eircom]

...

²⁷ See Appendix C, Section 8 of the following link:
http://www.comreg.ie/_fileupload/publications/ComReg1039.pdf

5 Analysis and preliminary conclusions

- 53 In this Chapter of the Draft Determination, ComReg considers the issues arising in the Dispute and in the relevant submissions of the parties to the Dispute.
- 54 As preliminary matters, we first consider whether the issues raised constitute a dispute within the scope of Regulation 31 of the Framework Regulations and whether there is a need for ComReg to act to ensure compliance with Eircom's SMP obligations. We then consider the incentives of all parties to an SLA and the appropriate service levels to be delivered. Finally, we make some preliminary remarks on certain relevant issues which are not within the scope of the Dispute.

5.1 Do the issues raised constitute a dispute within the scope of Regulation 31?

- 55 The first issue to address is whether the Dispute constitutes a dispute falling within the scope of Regulation 31 of the Framework Regulations.
- 56 The issue arises between the Referring Parties and Eircom. Each of the parties provide electronic communications networks and services in the State.
- 57 The issues relate to Eircom's obligations as an operator with SMP in various markets (as described in Section 4.2 above).
- 58 The Parties have been unable to agree satisfactory SLAs in respect of repairs for the CGA products in question. Since 2012, one or more of the Referring Parties has been requesting Eircom for an improvement in the 2 working day and 5 working day SLA repair performance targets. The improvements requested utilise the same SLA structure as is currently in use. Eircom submitted a BAFO which did not meet the repair performance targets requested by the Referring Parties.
- 59 Eircom's BAFO took effect from 1 September 2015 and reflects the current performance targets that are the subject of the Dispute. The table below (and previously explained in Chapter 3) sets out the performance targets that arose in the context of negotiations. The first column sets out the performance targets, at the beginning of the negotiation period in 2012. The second column sets out performance targets requested by the Referring Parties. The third column sets out Eircom's BAFO as part of those negotiations and reflects the current performance targets.

60 The figures apply equally to LLU and SB-WLR services. The table has been adapted from Table 3 on page 4 of the published Dispute Referral.

61 **Requested SLAs vs Eircom's offer²⁸**

	Performance targets at the beginning of the negotiation period in 2012	Performance targets requested by the Referring Parties	Eircom's BAFO and current performance targets contained in SB-WLR and LLU SLA
2 working days	73%	85%	77% by 1 September 2015 80% by 2016 (conditional on reductions in "No Fault Found" levels)
5 working days	92%	95%	No change
10 working days	100%	100%	Reduction discussed

62 ComReg considers that given the duration of discussions on the subject and the failure to agree revised terms, the matter constitutes a genuine dispute.

63 ComReg is thus satisfied that the Dispute falls within the scope of Regulation 31 of the Framework Regulations.

5.2 Is there a need for ComReg to act to ensure compliance with Eircom's SMP obligations?

64 ComReg's function under Regulation 31 is to make a determination to ensure compliance with SMP obligations and to resolve the dispute.

²⁸ Source: Table 3 on page 4 of the published Dispute at : <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

- 65 Having considered the Dispute, ComReg is of the preliminary view that the terms of the current SLAs which are the subject of the Dispute (as they apply to performance targets for repair times) do not comply with Eircom's SMP obligations. ComReg notes Eircom's obligations to provide access in a fair, reasonable and timely manner and more specifically to: conclude legally binding SLAs which include provisions for performance metrics; and to negotiate in good faith in relation to the conclusion of legally binding and fit-for-purpose SLAs.
- 66 As explained in Section 5.3 below, ComReg's view is that the failure of the current SLAs to compensate operators for costs associated with wholesale performance below an appropriate level demonstrates that they are not fit for purpose. The inability of the parties to the Dispute to agree revised repair performance targets supports the preliminary conclusion that the SLAs are not fit-for-purpose.
- 67 As explained in Section 6.1 below, this preliminary conclusion is not intended to constitute a finding of breach on the part of Eircom. Rather, in the context of resolving the Dispute ComReg is conscious of the need for it to make a determination in order to ensure compliance with these specific obligations and with Eircom's general obligation to provide access in a fair, reasonable and timely manner.²⁹

5.3 SLA incentives

- 68 The Dispute centres on the fault repair performance targets in the SLAs for SB-WLR and LLU. For the purposes of resolving the Dispute it is thus essential to consider the purpose of SLAs in the context of ComReg's objectives.³⁰
- 69 Appropriate service performance is of critical importance to the development of competition, particularly as retail operators can be constrained in their ability to offer a credible level of service to their customers if they do not have some degree of assurance over the quality of service provided to them by Eircom. If there are service faults at a wholesale level, this directly affects the quality of the service that a retail operator can provide to its end user. This can have other consequences for the retail operator in terms of its costs and ability to compete. There are also obvious implications for the welfare of end users of telecommunications services.

²⁹ With particular reference to Regulation 12(3) of the Access Regulations: see Section 4.2 above.

³⁰ ComReg's proposed determination is evaluated more fully in Chapter 6.

- 70 The Referring Parties are seeking to put in place repair performance targets which incentivise Eircom to achieve a repair performance of 85% of faults repaired within 2 working days, 95% within 5 working days and 100% within 10 working days. Eircom maintains that these targets are not reasonable and has therefore offered a figure of 80% (with some caveats) of faults within 2 working days, 92% within 5 working days and 100% within 10 working days. The Referring Parties accepted this offer but also submitted this dispute.
- 71 This regime implies that if Eircom achieves its proposed SLA targets of 80%, 92% and 100% there should be no SC payments made for repairs which fall inside that repair performance target. If, for example, Eircom's actual performance is 22% of faults taking more than 2 working days to repair, 9% of faults taking more than 5 working days to repair and 3% of faults taking more than 10 working days to repair; compensation would be paid for 2% of faults (2 working days), 1% of faults (5 working days) and 3% of faults (10 working days).
- 72 The Parties to the Dispute appear to accept that there is some measure of performance short of perfection which should be deemed to be acceptable. It also seems to be accepted that there should be some form of compensation paid by Eircom when service levels drop below this acceptable level. However, the level of performance that should be treated as acceptable is not agreed between the parties.
- 73 The current and proposed method of calculating SCs provides no incentive to Eircom to improve its repair performance once it achieves the SLA repair performance targets. In the example above there is no incentive arising from the proposed compensation mechanism to increase the percentage of repairs completed within 5 working days once the 92% target is achieved.
- 74 ComReg also notes that there appears to be a limited correlation under the parties' proposals between the duration of a fault on one hand and the level of SC payable on the other. It seems likely that the level of cost caused by a particular service outage is proportional to its duration (i.e. the longer the service outage, the greater the cost). This would suggest that SCs should reflect the duration of particular faults. However, there may be also an argument, on grounds of practicality and proportionality, that a brief outage due to a fault should attract no SC payment. Accordingly we propose that SCs would be payable only on faults extant for more than two working days.
- 75 ComReg's preliminary view is that the appropriate performance level should be assessed on a per line basis rather than on an aggregate basis and that the amount paid per fault should reflect the duration of the outage in excess of two working days.

5.4 Wholesale pricing arrangements

- 76 The Dispute relates to a number of wholesale services provided by Eircom. The cost (of repair) to Eircom is factored into the prices charged by Eircom to retail operators for each of these wholesale services, whether as a built-in cost, a separate monthly repair charge or on a pay-on-repair basis.
- 77 In the case of SB-WLR the cost of repair is included in the monthly rental charged by Eircom to the retail operator (currently €18.02 and proposed by ComReg to fall to €15.91 for 2016³¹).
- 78 Purchasers of ULMP can opt to either to pay a monthly charge for repair (currently €0.96c) or pay on a per repair basis (currently €117.31).
- 79 Line share is in practice used in conjunction with SB-WLR and the repairs charges specifically associated with it are de minimis: accordingly it is not specifically addressed further in this paper although the Draft Determination conclusions will apply in principle to it.
- 80 LLU is priced to reflect efficient costs in ComReg's Revised Copper Access Model (**RCAM**). Until now SB-WLR has been priced at a discount to retail prices although ComReg's Decision D03/16 referred to above implies also using the RCAM for SB-WLR. Charges associated with fault repair for ULMP are also priced at efficient cost.
- 81 The RCAM makes certain assumptions about, inter alia, Eircom's efficiency and also the impact of extraneous force majeure including storms and other events. It broadly reflects ComReg's best estimate of an efficient but achievable level of performance based on a review of Eircom's actual performance over a number of years.

³¹ ComReg Document No 16/39 (**Decision No D03/16**) *Pricing of Eir's Wholesale Fixed Access Services: Response to Consultation Document 15/67 and Final Decision*. See http://www.comreg.ie/fileupload/publications/ComReg_1639.pdf

The proposals for SB-WLR are:

1 July 2016 – 30 June 2017	15.91*
1 July 2017 – 30 June 2018	16.20*
1 July 2018 – 30 June 2019	16.41*

- 82 It follows that Wholesale regulated prices based on the RCAM are set at a rate that is sufficient to recover the cost of a reasonably adequate level of service provision. In this Draft Determination we propose to establish a “reference performance” by taking into account the level of service implied by the RCAM. The reference performance therefore represents the level of performance that operators have already paid for through wholesale access prices. It is not necessarily the level of performance that Eircom actually achieves.
- 83 It is not necessarily the case that SLA performance targets should be aligned with the reference performance. It is possible that they could be structured differently. However ComReg envisages that were Eircom to find itself in a position of paying SCs in a situation where it had achieved a performance equal to or better than the reference performance, then the cost of those SCs should be recoverable by Eircom through wholesale access prices. Where Eircom achieves the reference performance there would be no net cost to it under this proposal. Furthermore Eircom always has the choice to invest in improving its fault repair service thereby reducing the level of SC’s payable. This would make economic sense where the cost of the extra investment was less than the amount of SCs saved. In this situation Eircom would be better off financially than it is now while industry and end users would benefit from a better service.
- 84 Similarly, ComReg’s preliminary view is that SCs paid by Eircom in respect of performance *inferior* to the reference performance should not be recoverable. That is to say that the cost of SCs paid on the difference between its actual (inferior) performance and the reference performance would be borne by Eircom. Eircom is already being compensated for achieving the reference performance through wholesale access prices. Recovery of such SCs through access prices would represent a double recovery of cost and would, in our preliminary view, be inappropriate. Assuming that the level of SC (which is outside the scope of this Draft Determination) is set correctly, retailers would be compensated appropriately for the inferior performance.
- 85 Again, Eircom always has the choice to reduce these SCs payable by investing in improved performance.

- 86 The mechanism for recovery of such costs (i.e., the cost of service credits paid by Eircom on the difference between SLA performance targets and the reference performance) is outside the scope of this Dispute and is not part of this Draft Determination. However, without prejudice to any representations made by any party and to any decisions taken by ComReg in the context of access network pricing, ComReg's initial view is that wholesale access prices may be an appropriate mechanism to allow recovery of such costs by Eircom. Were this to be implemented, wholesale access prices would be adjusted by an amount calculated to recover the cost of service credits that would be paid if Eircom exactly achieved its reference performance.
- 87 We estimate on an approximate basis that if the appropriate SC was set, for example, at €1 per day per fault over 2 days that the impact on SB-WLR prices (as the most material service affected) would be somewhat less than 1c per month.

5.5 Eircom's Reference Performance

- 88 For the purposes of ComReg's proposal, clarity on what constitutes the "reference performance" is desirable. The assessment of what the performance level that could be expected to be achieved by Eircom is a complex consideration based on the current state of the network, operational costs associated with resources for repairing faults and capital investment associated with maintenance and improvements to the network as well as other considerations, such as severe weather incidents which can impact on Eircom's network performance.
- 89 In practice, operators are somewhat hampered in their approach to negotiating performance targets within SLAs to requesting what they think may be reasonable SLA targets. This is because they are not party to the level of information which Eircom has in terms of the current capability of the network, the relevant operational costs to achieve improved performance levels and the level by which operational and capital spend could be reasonably increased to achieve improved performance levels.
- 90 Eircom also has an information deficit as it is very difficult to predict weather patterns and the associated impact of weather incidents. In addition, the modelling of expenditure (current account and capital) against likely actual performance is itself a difficult exercise for Eircom even with the experience it has of the management of its network.

- 91 Having considered the matter our preliminary view is that, due to the complexity of measuring “efficient network” performance in this context, the reference performance should be based on Eircom’s BAFO because it is broadly reflective of its actual performance in 2015³² and is not materially inconsistent with ComReg proposals in respect of access network pricing. This approach has the merit of transparency and, presumably, would be accepted by the parties to the Dispute as being achievable.
- 92 The implication of this approach is that, in principle, and subject to appropriate consultation, SCs would likely be payable by Eircom even if it achieves the level of performance in its BAFO. However the cost to Eircom of paying these SCs would be recoverable through wholesale access prices where performance is at least as good as the BAFO. There should therefore be no material net cost to Eircom if it achieves its BAFO.

5.6 SLA compensation paid to operators (i.e. SCs)

- 93 The present Dispute relates to the structure of performance measures for SLAs for LLU and SB-WLR. The actual level of compensation is outside the scope of the dispute and is a matter for negotiation between the parties. Nevertheless, in determining the performance level in order to resolve the dispute, ComReg is conscious that SCs are a critical element in the overall SLA framework.
- 94 ComReg notes that the cost of faults that must be borne by operators will include not just administrative costs but may also include the cost of compensating end users, revenues foregone, reputational damage and so forth. We believe it is likely that the level of these costs increase as repair timelines are extended. However we also note that there may be a wider harm to the competitive process if end users perceive that faults will be repaired more quickly if they are Eircom customers than if they are with an OAO. Although this would be difficult to measure it should be borne in mind. Ultimately all of these costs must be borne by end users and it is our view that operators and especially Eircom should be incentivised to minimise them.
- 95 A difficulty with the proposals made by the parties is that no SCs will be paid if a particular performance level is achieved on an aggregate basis, even if there is still a cost or loss to the retail operator on an individual line basis. Furthermore, the correlation between the duration of a fault and SC levels is limited. It seems to ComReg that this structure of SCs does not optimally incentivise cost minimisation and efficiency. ComReg’s proposal is thus to require the payment of SCs on a per line, per diem basis.

³² <http://www.openeir.ie/kpis/>

5.7 Relationship to USO PIP3 penalties

- 96 In paragraph 23.1 of the Dispute Referral (see also Section 3.3 of this draft Determination), the Referring Parties make reference to the PIP3 mechanism. The Referring Parties submit that, by failing to provide at least equivalent SLA performance metrics at wholesale level under the SLAs, Eircom is in breach of its obligation to offer and provide access on a non-discriminatory basis.
- 97 Eircom's position is that it is not appropriate to establish a formal and direct link between its formal obligations to achieve USO performance targets and the construction of a CGA SLA.
- 98 PIP3 was based on D02/08 issued in May 2008 which set legally binding retail performance targets in relation to Eircom's quality of service performance under certain aspects of the USO. Eircom established the PIP in 2010 which was then extended to the PIP2 and then to the PIP3 (which ended in December 2015). ComReg Decision D02/08 remains in force.
- 99 The enforcement mechanism established by PIP3 set a level which if not achieved for USO triggered penalty payments to ComReg.
- 100 ComReg notes that the associated metrics which were in place for PIP3 and the SLAs relating to the CGA products are not the same. The definition applied to the relevant metrics (i.e. the definition of a fault) also differs.
- 101 The PIP3 mechanism and the associated payment to ComReg related to a penalty for a failure to meet PIP3 requirements rather than the SC provided for retail costs associated with the delays in repair of the wholesale product under the SLA.
- 102 Eircom's *actual* performance delivery as between its retail arm and OAOs must be non-discriminatory and is monitored by way of the publication of KPIs which compare retail and wholesale performance. This implies that service improvements driven at the retail level by USO targets must be achieved in equal measure at the wholesale level.
- 103 Notwithstanding the differences in computation and enforcement between SLA targets and USO targets ComReg is of the view that SLA targets which are inferior to those mandated under the Universal Service Regulations are likely to add little value to OAOs and ultimately end users. We have borne this in mind in framing our proposal.

5.8 Summary: Proposed Basis for a Repair SLA

- 104 ComReg considers that the level of SCs (which are to be determined through negotiation in the first instance and are outside the scope of this Dispute), should in principle reflect the full cost of faults to OAOs and to end users. This would provide Eircom with an incentive to improve services up to the point where the incremental cost of doing so is less than the out payments in the form of SCs.
- 105 SCs should, in principle, address all faults which are not repaired, not just a proportion of these faults. We therefore propose that SCs would apply to all faults extant for 2 working days or more.
- 106 ComReg's preliminary view is that the timescales themselves should be a proxy for the severity and hence associated retail costs for operators of such faults. SCs should therefore be proportionate to the duration of a fault. We propose that this could be done by calculating SC's on a per diem per fault basis.
- 107 As noted above, and although outside the scope of the Dispute, we believe that it may be appropriate to allow Eircom to recover through wholesale access prices the cost of SCs where these are paid out on a service equal to or superior to the reference performance. We suggest that SCs paid on foot of a performance inferior to the reference performance would not be recoverable. Were this to be implemented, wholesale access prices would be adjusted by an amount calculated to recover the cost of service credits that would be paid if Eircom exactly achieved its reference performance. This would have to be addressed separately to the present Dispute.

6 Evaluation of Proposed Approach

6.1 Options for resolving the Dispute

108 ComReg has considered a number of options for resolving the Dispute.

(a) *Breach determination*

109 The alleged failure of Eircom to negotiate fit-for-purpose SLAs raises the issue of Eircom's potential non-compliance with an SMP obligation. Regulation 31 of the Framework Regulations does not oblige ComReg to make a finding of non-compliance, or to make such a finding prior to making a dispute determination. In defining the scope of the Dispute, ComReg noted that a breach determination was out of scope in the context of a dispute. Accordingly, ComReg does not propose to make a formal finding on the issue of Eircom's compliance with its SMP obligations in the context of this dispute resolution process. ComReg considers that its primary obligation in the context of dispute resolution is to resolve the dispute and ensure future compliance with Eircom's SMP obligations.

(b) *Select one of the approaches suggested by the Referring Parties*

110 The Referring Parties requested ComReg to increase the performance targets in each of the SLAs under dispute as follows:

Repair time	Performance target requested by the Referring Parties
2 working days	85%
5 working days	95%
10 working days	100%

111 ComReg notes that the performance targets requested by the Referring Parties is based on essentially the same methodology as Eircom's BAFO – both of which reflect current SLAs. Consequently they both, in ComReg's view, suffer from similar deficiencies in that they:

- 111..1 do not adequately compensate retail operators for costs incurred as a consequence of failures in wholesale performance;

111..2 do not encourage Eircom to optimise its performance in respect of fault repair since there is only a limited incentive to improve performance beyond the thresholds in the proposed SLAs; and

111..3 do not promote efficiency in that Eircom does not face the correct price signals by which to evaluate its investments because the true cost of service outages are not reflected in the proposed SCs

111..4 ComReg thus considers that the performance targets requested by the Referring Parties are not an optimal solution to ensure compliance with the underlying SMP obligations.

(c) *Oblige the parties to enter into good faith negotiations*

112 A further option would simply be to oblige the parties to enter into good faith negotiations in order to conclude a fit-for-purpose SLA. This would essentially be a restatement of Eircom’s obligations under the relevant SMP decisions to “*negotiate in good faith with undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs*”.

113 However, given that negotiations have already taken place between Eircom and the Referring Parties and that they have been unable to reach a satisfactory agreement, this approach is unlikely to yield a different outcome, unless ComReg sets out a framework for the negotiations. Accordingly, simply requiring the Parties to engage in negotiations would not, in ComReg’s view, amount to an effective or certain resolution of the Dispute.

(d) *Oblige the parties to implement the proposed solution*

114 This is ComReg’s preferred option pending consideration of respondents’ views.

6.2 Assessment of the proposed solution

115 When making a determination under Regulation 31 of the Framework Regulations, Regulation 31(7) provides that ComReg must have regard to its objectives under Section 12 of the Communications Regulation Acts and Regulation 16 of the Framework Regulations.

116 Section 12 of the Communications Regulation Acts sets out ComReg’s objectives in the performance of its functions. Section 12(1)(a) sets out ComReg’s objectives in respect of electronic communications networks, services and associated facilities as follows:

“12. (1) The objectives of the Commission in exercising its functions shall be as follows—

(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—

(i) to promote competition,

(ii) to contribute to the development of the internal market, and

(iii) to promote the interests of users within the Community”

117 In relation to the objectives at Section 12(1)(a), Section 12(2) requires that ComReg take all reasonable measures which are aimed at achieving those objectives. The relevant measures listed in Section 12(2) include the following:

“12. (2)(a) in so far as the promotion of competition is concerned:

(i) ensuring that users... derive maximum benefit in terms of choice, price and quality

(ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector”

118 We have also had regard to the objectives and regulatory principles set out in Regulation 16 of the Framework Regulations. These include:

“16. (2) In pursuit of its objectives under paragraph (1) and under section 12 of the Act of 2002, the Regulator shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by, among other things—

.....

(c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure based competition,

(d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, while ensuring that competition in the market and the principle of non-discrimination are preserved.”

119 In light of the context of the dispute (i.e., access obligations), ComReg is also cognisant of its obligations under Regulation 6 of the Access Regulations which provides as follows:

“6. (1) The Regulator shall, acting in pursuit of its objectives set out in section 12 of the [Communications Regulation Acts] and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and the interoperability of services in such a way as to—

- (a) promote efficiency,*
- (b) promote sustainable competition,*
- (c) promote efficient investment and innovation, and*
- (d) give the maximum benefit to end-users.”*

120 ComReg considers that the most relevant objectives and principles for the purposes of the determination can be classified into the following headings:

- Impact on competition, including any potential distortions of competition and the impact on infrastructure-based competition;
- Impact on the internal market/provision of pan-EU services;
- Impact on end users/ the maximisation of consumer benefits;
- Efficiency
- Objectivity, transparency, non-discrimination and proportionality;

121 *Impact on competition*

- ComReg regards the proposal as having a positive impact on competition. It will tend to improve the competitiveness of the Eircom platform relative to other platforms in the market thereby stimulating inter-platform competition. It will also provide greater certainty to OAOs who can have greater confidence that they can meet their customers' requirements. We do not consider that the proposal causes any distortion of competition or inhibits infrastructure-based competition.

122 *Impact on the internal market/provision of pan EU services*

- We view the proposal as being mildly positive to the internal market in that a pan EU operator considering entering the Irish market can do so with extra confidence that its service offering will be attractive to end users. Similarly the proposal will benefit existing operators who are active in more than one member state.

123 *Impact on end users/ the maximisation of consumer benefits*

- ComReg's view is that our proposal is positive for end users in that it will encourage improved fault repair performance up to the point where it makes economic sense. The proposal, in our view, ranks well against the parties' proposals in this regard.

124 *Efficiency*

- We believe the proposal will encourage efficiency. This is because by capturing the cost of outages to OAOs and structuring service credits in a way that encourages Eircom to repair faults up to the point where it makes economic sense enhances overall efficiency. If SCs are structured to reflect the true costs to OAOs and their customers, this would set an appropriate measure of cost for Eircom by which to evaluate its investment decisions. If the cost of extra investment in service repair performance or fault mitigation is less than the cost of paying SCs then it will be encouraged to do so. Similarly if the benefits (or avoided cost) to OAOs and their customers of reduced fault durations are less than the cost to Eircom of investing to reduce outlays on SCs then that investment would be inefficient. Under ComReg's proposal such inefficiency would not be incentivised. This would be true regardless of the level of performance actually being achieved by Eircom.
- The parties' proposals are less strong in this regard because there is limited incentive to improve performance beyond the parameters set out in their proposals even where it may make sense to do so in overall economic terms.

125 Objectivity, transparency, non-discrimination and proportionality

- Our preliminary view is that the proposed resolution is the most objective of the options available in that the proposed reference performance can be related back to the RCAM, and the principles underpinning SCs can be related to actual costs. Operators' proposals, being essentially based on commercial negotiations, appear to lack this measure of objectivity. The proposed solution is transparent and easily understood since it is based on a simple formula which should be easily implemented. The proposal seems proportionate particularly if ComReg were to permit the recovery of the cost of SCs incurred on performance equal to or superior to the reference performance. In this case there would be no material net cost to Eircom once it achieved the reference performance which itself would be based on what Eircom regards as achievable. Our preliminary view is that it is non-discriminatory in that all operators would share in the cost of achieving the reference performance. Only Eircom would bear the cost of performance inferior to the reference performance.

6.3 Implications for retail operators

- 126 It is likely that a retail operator will wish to understand the details of the resolution of individual faults or reasons for associated delays to resolution of faults as an input to its decision process relating to retail compensation. This will be particularly important where the wholesale SLAs provide for exemptions for SLA SCs. An example may be that a fault is proven to relate to the failure of a customer's own device, such as a phone handset not provided by the retail service provider, or a delay in repair is due to a customer not being available for necessary internal work to be undertaken. Where this is considered appropriate, ComReg considers that the retail operators should engage with Eircom to ensure appropriate information exchange mechanisms are implemented and any relevant system development undertaken.
- 127 As the terms of the proposed SLA are different to the existing model ComReg considers that retail operators may need time to integrate the information flows associated with the service failures and the relevant SCs paid to them. Accordingly ComReg envisages that a reasonable period should be allowed for the implementation of the revised SLA parameters as set out in this Draft Determination. The time needed to do this could be agreed between industry players.

6.4 Other considerations

- 128 We note that the use of calendar days (as opposed to working days) is usually more appropriate as a measure in the context of retail faults given that consumers need access to telephony services at weekends and during holiday periods as well as on working days. Notwithstanding this, ComReg considers that (unless otherwise agreed between the Parties) the wholesale SLA should continue to operate in working days but would note that the proposed SLA would still incentivise resolving faults during out of hours periods as a means of keeping service level payments to a minimum.
- 129 The issue of “*force majeure*” exemptions (which could include for example, but is not limited to, storms, floods and third party damage and would include what Eircom describes as “Storm Mode”) was raised in the Dispute. The question arises as to whether Eircom should be exempt from SC payments where *force majeure* arises. ComReg’s preliminary view is that it should not. In general, retail customers should not be liable for charges for services they do not receive and as operators continue to incur wholesale charges and costs associated with the faults, operators should therefore be entitled to an SC in these circumstances. If Eircom’s aggregate performance over time is at least as good as its reference performance (which includes an allowance for storm occurrence) then the cost of these SCs will be recoverable through access prices under the current proposal.

6.5 Next Steps

- 130 While the quantum of SCs is outside the scope of the Dispute ComReg is conscious that this is an important consideration in implementing fit-for-purpose SLAs. Accordingly we propose that ComReg would not issue a Final Determination (or take other such step as may be appropriate) for at least six weeks from the date of publication of this Draft Determination. The purpose of this is to allow time for the Parties to the Dispute to enter discussions as to the level of SCs having regard to the proposals in this Draft Determination.
- 131 ComReg expects the Parties, without delay, to engage in good faith negotiations to agree fair and reasonable SCs (and indeed notes that Eircom is obliged to do so pursuant to its SMP obligations). We will monitor progress in this regard.

7 Representations on the Draft Determination

- 132 All representations are welcome on the Draft Determination. However, it would make the task of analysing responses easier if comments were referenced to the relevant sections and / or paragraph number from this Draft Determination.
- 133 The Draft Determination consultation process will run from 20 May 2016 to 10 June 2016 during which time ComReg welcomes written submissions in response to its Draft Determination.
- 134 In order to promote further openness and transparency ComReg will publish all respondents' submissions to this Draft Determination, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No. 05/24³³. We would request that electronic submissions be submitted in an-unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.
- 135 Please submit all documents by email to wholesaleconsult@comreg.ie and by post to:
- Ms. Claire Kelly
Commission for Communications Regulation
Irish Life Centre
Abbey Street
Dublin 1
Ireland
- 136 ComReg appreciates that many of the issues raised in this Draft Determination may require respondents to provide confidential information if their comments are to be meaningful.

³³ ComReg Document No. 05/24 entitled "Guidelines on the treatment of confidential information – Final text of Guidelines" dated 22 March 2005
<http://www.comreg.ie/fileupload/publications/ComReg0524.pdf>

- 137 As it is ComReg's policy to make all responses available on its website and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response.

Annex: 1 Investigation process

A 1.1 The following table sets out the key dates in the investigation to date:

Key dates	Description
16 November 2015	Towerhouse submits a request for dispute resolution on behalf of the Referring Parties.
17 November 2015	ComReg acknowledges the Dispute Referral and accepts it for investigation.
26 November 2015	ComReg notifies Eircom of the Dispute Referral and gives Eircom 10 working days to submit its initial response to the Dispute Referral.
2 December 2015	ComReg publishes the scope of the Dispute along with the non-confidential version of the Dispute Referral.
10 December 2015	Eircom provides its initial response to the Dispute.
18 December 2015	ComReg issues an information request to Eircom.
8 January 2016	Eircom submits one part of its response to the information requested by ComReg on 18 December 2015.
19 January 2016	Eircom provides the remainder of its responses to the information requested by ComReg on 18 December 2015.
23 February 2016	ComReg presentation to the parties to the Dispute of its draft proposals to resolve the Dispute.
23 February – 4 March 2016	Initial comments received from the parties on ComReg's draft proposals to resolve the Dispute.

Annex: 2 [Draft] Determination

[Draft] Determination to resolve the dispute between (i) four parties represented by Towerhouse LLP and (ii) Eircom Limited relating to Eircom Limited's current generation access regulated contract terms

1. STATUTORY POWERS GIVING RISE TO THIS DETERMINATION

1.1. This [draft] Determination is made by the Commission for Communications Regulation (**ComReg**) and relates to a dispute under Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011 (the **Framework Regulations**) in connection with existing obligations imposed pursuant to Regulations 8 and 12 of the Access Regulations and in the following SMP decisions:

- Market Review: Wholesale (Physical) Network Infrastructure Access Market (Market 4), (ComReg Document No 10/39 and Decision No D05/10); and
- Market Review Wholesale Fixed Voice Call Origination and Transit Markets (ComReg Document No 15/82 and Decision No D05/15).

1.2. This [draft] Determination is made:

- (i) Pursuant to Regulation 31 of the Framework Regulations;
- (ii) Having had regard to sections 10 and 12 of the Communications Regulation Acts (as defined below) and Regulation 16 of the Framework Regulations; and
- (iii) Having taken account of submissions received from the Parties.

2. DEFINITIONS

2.1. In this [draft] Determination, unless the context otherwise suggests:

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

‘Authorisation Regulations’ means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011).

‘BT Communications Limited’ means BT Communications Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls BT Communications Limited, and its successors and assigns. For the purpose of this [draft] Determination, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.

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

‘Dispute Referral’ means the dispute as submitted by Towerhouse LLP to ComReg on 16 November 2015 on behalf of the Referring Parties.

‘Effective Date’ means the date this [draft] Determination is published and notified to the Parties.

‘Eircom’ means Eircom Limited, trading as Eircom, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this [draft] Determination, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.

‘FACO SMP Decision’ means ComReg Decision “Market Review Wholesale Fixed Voice Call Origination and Transit Markets” (ComReg Document No. 15/82 and Decision D05/15).

‘Framework Regulations’ means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).

‘LLU’ means local loop unbundling in the form of unbundled local metallic path (ULMP), line sharing (LS), and combined GNP and ULMP (GLUMP) (collectively).

‘Magnet Networks Limited’ means Magnet Networks Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Magnet Networks Limited, and its successors and assigns. For the purpose of this [draft] Determination, the terms

“subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.

‘Other Authorised Operator or OAO’ means an undertaking that is not Eircom, providing an electronic communications network or an electronic communications service authorised under Regulation 4 of the Authorisation Regulations.

‘Parties’ means Eircom and the Referring Parties.

‘Referring Parties’ means Sky UK Limited, BT Communications Limited, Vodafone [Ireland] Limited and Magnet Networks Limited.

‘Sky UK Limited’ means Sky UK Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Sky UK Limited, and its successors and assigns. For the purpose of this [draft] Determination, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.

SBWLR’ means single billing wholesale line rental.

‘SLA’ means service level agreement.

‘Towerhouse’ means Towerhouse LLP.

‘Undertaking(s)’ shall have the same meaning as under Regulation 2 of the Framework Regulations.

‘Vodafone [Ireland] Limited’ means **Vodafone [Ireland] Limited** and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls **Vodafone [Ireland] Limited**, and its successors and assigns. For the purpose of this [draft] Determination, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.

‘Working day’ means [the time between 09:00 to 17:00 on any day other than Saturdays, Sundays, or Public Holidays as defined in the Second Schedule to the Organisation of Working Time Act, 1997]

‘WPNIA SMP Decision’ means ComReg Decision “Market Review: Wholesale (Physical) Network Infrastructure Access Market (Market 4)”, (ComReg Document No.10/39 and Decision No. D05/10);³⁴

³⁴ See http://www.comreg.ie/_fileupload/publications/ComReg1039.pdf

3. SCOPE AND APPLICATION

- 3.1. This [draft] Determination applies to the Referring Parties and Eircom (together the Parties) and is binding upon the Parties. The Parties shall comply with this [draft] Determination in all respects.
- 3.2. This [draft] Determination relates to the SMP Obligations set out in:
- Sections 8.1 and 8.2 of the WPNIA SMP Decision and
 - Sections 8.1 to 8.3 of the FACO SMP Decision.
- 3.3. In section 9.6 of the Dispute Referral, the Referring Parties highlight that that “*the discussion on the appropriate level of service level guarantees (SLGs)...are an essential component of any measure designed to encourage improved performance by a service provider such as eircom. Advancing the discussion on the appropriate level of SLGs cannot commence until the appropriate level of the SLAs has been determined.*” ComReg has thus treated the level of service credits as out of scope of the purposes of the [draft] Determination.
- 3.4. ComReg has considered the scope of the Dispute Referral and has concluded that the appropriate scope for the dispute the subject of this [draft] Determination is the appropriate level of repair time performance targets in SLAs offered by Eircom in respect of the following:
- (i) LLU in the Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location (WPNIA) Market (pursuant to Section 8 of the Decision Instrument at Appendix C of the WPNIA SMP Decision); and
 - (ii) SB-WLR in the Wholesale Call Origination on the Public Telephone Networks Provided at a Fixed Location (FACO) Market (pursuant to Section 8 of the Decision Instrument at Appendix H of the FACO SMP Decision).
- 3.5. Notwithstanding its inclusion in the Dispute Referral, ComReg considers that bitstream managed backhaul in wholesale broadband access (Market 5) is out of the scope of this [draft] Determination.

4. [DRAFT] DETERMINATION

- 4.1. In accordance with Regulation 31 of the Framework Regulations; the Communications Regulation Acts; and for the purpose of resolving the dispute between Towerhouse, on behalf of the Referring Parties, and Eircom, ComReg hereby determines that:
- (i) The extant contractual obligations in relation to the repair performance targets, under the existing SLAs between the Parties for the services listed at Section 3.4 above, shall, unless otherwise agreed between Eircom and the Referring Parties, continue in force until the newly agreed SLAs pursuant to Section 4.1(ii) of this [draft] Determination are implemented.

- (ii) Within one month of the Effective Date of the [draft] Determination, Eircom shall offer the Referring Parties an SLA in respect of [each of] the services listed at Section 3.4 above reflecting the following parameters:
 - (a) all faults extant in excess of two (2) working days shall attract a service credit per line per working day until such time as that fault is cleared; and
 - (b) a service credit shall be payable in accordance with Section 4.1(ii)(a) of this [draft] Determination irrespective of whether the fault is wholly or partly attributable to a force majeure incident.
- (iii) For the avoidance of doubt, in accordance with Eircom's obligations of non-discrimination set out at Section 9 of the Decision Instrument at Appendix C of the WPNIA SMP Decision and Section 9 of the Decision Instrument at Appendix H of the FACO SMP Decision, Eircom must also offer an SLA on the terms set out in Section 4.1(ii) above to any other OAOs to which Eircom provides access to the services listed at Section 3.4 above.

5. MAINTENANCE OF OBLIGATIONS

- 5.1. Unless expressly stated otherwise in this [draft] Determination, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to the parties and in force immediately prior to the Effective Date of this [draft] Determination, are continued in force by this [draft] Determination and the parties shall comply with same.
- 5.2. If any section, clause or provision or portion thereof contained in this [draft] Determination is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this [draft] Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this [draft] Determination, and shall not in any way affect the validity or enforcement of this [draft] Determination.
- 5.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and the Parties obligations now set out herein, this [draft] Determination shall prevail, unless otherwise indicated by ComReg.

6. STATUTORY POWERS NOT AFFECTED

- 6.1. Nothing in this [draft] Determination shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or

secondary legislation (in force prior to or after the Effective Date of this Draft Determination).

7. EFFECTIVE DATE

7.1. The Effective Date of this [draft] Determination shall be the date of its publication and notification to the Parties and it shall remain in force until further notice by ComReg.

JEREMY GODFREY

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [...] DAY OF [...] 2016

Annex: 3 Eircom Submission dated 10 December 2015

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eir response to the Dispute dated 16th November 2015 referred to ComReg by Towerhouse LLP in relation to eir's Current Generation Access Regulated Access Contract Terms

10th December 2015

Introduction

1. eir understands that following the submission by Towerhouse LLP of a dispute to ComReg on behalf of Sky UK Limited, BT Communications Limited, Vodafone Limited and Magnet Networks Limited in respect of eir's current generation access regulated contract terms, ComReg accepted the dispute for resolution pursuant to Regulation 31 of the Framework Regulations. This is eir's representations to the dispute further to ComReg's notification of 26 November 2015.
2. eir's representations only address the matters in Towerhouse's submission that ComReg has included within the scope of the Dispute for resolution pursuant to Regulation 31. eir notes in particular that SLGs and Bitstream SLAs are outside the scope of this Dispute. For the avoidance of doubt, the fact that other matters are not addressed does not mean that eir accepts the position as put forward by Towerhouse.
3. eir does not believe that a determination by ComReg aimed at ensuring eir's compliance with its obligations under the WPNIA and FACO Decisions, in accordance with ComReg's jurisdiction pursuant to Regulation 31(2), is warranted and/or necessary at this point in time. In particular, eir rejects the premise upon which Towerhouse's request for a determination is based, namely that eir would have failed to offer better grade repair SLAs and failed to offer repair SLAs that are "*at least as good as the repair SLAs eircom offer to retail customers under PIP3*", which failure would constitute a failure by eir to comply with its obligations to provide access in a fair, reasonable and timely manner, on a non-discriminatory basis and in a transparent manner.
4. As explained in further detail below, eir has not failed to offer better grade repair SLAs. On the contrary, consistent with its obligation to negotiate in good faith, eir has engaged extensively with OAOs on this matter and, consistent with its obligation of transparency, provided significant detail of information on the repair process and data. In addition, it is simply not the case that eir offers "*repair SLAs to retail customers under PIP3*". The Referring Parties' allegation that eir has acted in a discriminatory fashion in this respect proceeds from a fundamental misunderstanding of PIP3.

Eir has not failed to offer better grade repair SLAs

5. eir has been working with industry over the past number of years on the CGA SLAs. The discussions have been through the industry forums and bilaterally with Operators. In January 2015 eir proposed a two phased approach to improve the repair performance from the then level of 73% in 2 working days for SB-WLR and LLU to 77% by September 2015 and 80% by April 2016 or when non fault found ("NFF") level is at 10%, whichever is the later. Importantly, the offer of an improved repair performance to 77% was accepted by the Referring Parties and the first phase was implemented from October 2015.

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6. The Industry non-fault performance levels continue to show significant reductions over the last few months. Open eir Wholesale and industry have been working to improve these through a number of workshops, training initiatives and IT developments.

The two phased approach proposed was to allow Operators time to achieve the reductions in the non-fault levels whilst providing an improvement in the short term from September 2015. NFF reduction is a key enabler to offering improved service levels as there is more resource available to focus on valid faults.

7. Insofar as the matter of NFF is concerned, it is not clear to eir in this context the relevance of the findings made by ComReg in Decision D02/08, as referred to at paragraph 16.3(a) of the Dispute. eir maintains that NFF reduction will facilitate improved service levels as it will free up available resources and is therefore directly related to the matter of SLAs. eir notes that these discussions started in the LLU forum in 2013. eir presented a definition which Operators required be changed to include "eircom". At a workshop on 12 March 2013, Operators only expressed concern re using an average industry performance and required instead that NFF be assessed at individual operator level in order to avoid better performing Operators being disadvantaged by poor performing Operators.

8. eir also does not accept that OAOs do not have fault tools, fault repair processes and detailed line information that would impede their ability to assess NFF. In particular, FHS information on the status of the faults (on site, on route) has been available via the UG for a number of years and eir has implemented a number of further initiatives to improve fault reporting and repairs over the last two years:

8.1 In 2013 the period of time fault history available to OAOs in respect of their customers was extended from 3 months to the entire duration of the relationship between the OAO and its customer, or to the data available on the system (typically 14 months), whichever was the longer. OAOs were also given a presentation on the interpretation of test results and the tools available via the UG for fault screening.

8.2 UG Developments were carried out in December 2014 and April 2015 to provide Operators with the same level of fault diagnosis tools as are available to eir's downstream arms.

8.3 Further developments were carried out in December 2015 to ensure the fault history available to eir's downstream arms is the same as that available to operators via the UG.

9. In the context of the above, eir is disappointed that the Referring Parties appear to refuse further engagement, as suggested by paragraph 16.3(e) of the Dispute. For the avoidance of doubt, eir does not believe that the Notifications of non-compliance are of any relevance to this Dispute.

eir does not discriminate between its wholesale and retail customers

10. The Referring Parties suggest that by "*failing to offer repair SLAs that are at least as good as the repair SLAs eircom offers to retail customers under PIP 3... eircom is not complying with its requirement to offer and provide network access ... on a non-discriminatory basis*". The Referring parties also say that "*eircom currently outsources the majority of its field work to a third party. As a result, any risk to eircom can be substantially "backed off" into contracts with third party suppliers...*".
11. This is entirely incorrect.

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12. First, as advised to Industry, including the Referring Parties, on a number of occasions, the repair of faults is not outsourced by eir to third parties but it is instead carried out by open eir technicians. eir's field force operates on a non-discriminatory basis. In particular, the repair of all access lines is treated in an equivalent manner irrespective of the downstream entities providing service to the end user. This is evidenced in eir's quarterly equivalence KPI statistics published on its website. This means that the network performance underpinning retail and wholesale services is the same.
13. Second, eir does not have repair SLAs in place with its retail customers, under PIP3 or otherwise. PIP3 is not an SLA, nor does it provide for SLAs. PIP3 is, as highlighted in ComReg 14/129, an out of Court settlement concerning the reasonable discharge by eircom of performance targets imposed by ComReg under ComReg Decision D02/08 in the context of eir's USO and the enforcement regime to be relied upon by ComReg. Contrary to what is the case under the CGA SLAs, no payment to eir's retail division or indeed, as suggested by the Referring Parties, to eir's retail customers arises where performance targets are not met. PIP3 does not in any way relate to the CGA SLA nor does it establish an SLA for eir's Retail business. Whether performance targets under PIP3 are met is determined on an averaged, national basis, performance. This is obviously not the case in respect of whether obligations to pay under an SLA are triggered. This also means that contrary to what the Referring Parties suggest at paragraph 18.1, it does not follow from the fact that eir agreed to PIP3 that *"the targets sought by OAOs are achievable and reasonable"*.
14. Third, and in any event, the methodology for calculating USO performance metrics is different to the CGA SLA approach. In other words, the fault types that are taken into account for the purpose of determining USO performance are not entirely the same as the faults taken into account for the purpose of determining whether the SLA is triggered. eir has supplied information to ComReg and Industry that details which clear codes are included in each calculation. There will naturally be different expressions of performance values given that the calculation methodologies are not the same. All metrics are based on cleared faults but each has its own unique rules as to what faults are included and how the metric is measured. This explains how eir could introduce a 4% improvement in 2 day repair SLA from October 2015. The 4% change is independent of the USO performance metric adjustment in PIP3 and will endure beyond the expiry of PIP3 on 31st December 2015.
15. The USO performance targets are obligations imposed on eir by ComReg in accordance with the framework for the provision of universal services under the Universal Service and Users' Rights Regulations 2011. The performance targets are imposed in the context of eir's obligation to meet any reasonable request for access at a fixed location. As noted by ComReg in section 6 of Decision 02/08, "should eircom not be designated as the USP beyond [the expiry date of the designation period] then the targets beyond that date will not apply". eir's designation as Universal Service Provider of access at a fixed location will expire on 31 December 2015.
16. eir accordingly does not accept that it is appropriate to establish a formal and direct link between its formal obligations to achieve USO performance targets and the construction of a CGA SLA.

Conclusion

17. In the light of the above, eir does not accept the basis for the dispute brought to ComReg. In particular, following extensive engagement with Industry on the issue of CGA SLAs since 2012, in February 2015, eir agreed with OAOs increased SLAs and in October implemented Phase 1 of a two phased approach by increasing the repair metric for faults repaired within two days from 73% to 77%. While an agreement has not been reached as regards the conditions and timing to Phase 2, which would see the repair metric increase to 80%, eir

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submits that there is no basis whatsoever in the circumstances for a determination that repair time within 2 working days should be set at 85%. In particular, the Referring Parties have not established in any way that this trigger is necessary to ensure compliance by eir with relevant obligations. It is eir's view that such a trigger is not reasonable and justified in the circumstances. There is accordingly no basis for ComReg to make such a determination.

18. eir believes that reasonable progress had been made between eir and the Referring Parties and it is eir's intention to try and bring the negotiations to a satisfactory solution and to that end, eir will make an amended proposal to operators in the coming days.