



Further Consultation and Draft Decision

Wholesale Broadband Access

Further consultation to Consultation Document No. 10/56 and draft decision in relation to price control and transparency

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All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg 10/108” as indicated above,
and sent by post, facsimile or e-mail to arrive on or before 5pm, 4
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1 Executive Summary

- 1.1 This further consultation and draft decision is a follow up to Consultation Document No. 10/56¹ where the Commission for Communications Regulation ('ComReg') consulted on the forms of price control for Wholesale Broadband Access ('WBA') provided by the incumbent operator, Eircom.
- 1.2 This further consultation on price control will only address the appropriate minimum price floors for bitstream² as the issue of maximum price ceilings, which were to prevent excessive pricing, will be addressed at a later date following further consideration of respondents' views. Therefore, pending that further consultation, Eircom's obligations in the WBA market in relation to excessive pricing and to not cause a margin (price) squeeze remain as specified in the existing price control of ComReg Decision D01/06³.
- 1.3 Following consideration of responses to Consultation Document No. 10/56, the purpose of this further consultation and draft decision is to set out:
 - 1.3.1 How ComReg proposes to set minimum price floors for bitstream based on a Reasonably Efficient Operator availing of LLU Line Share
 - 1.3.2 How ComReg proposes to add an obligation not to margin (price) squeeze between the price of the WBA component parts of a resale or end-to-end wholesale broadband access products⁴ and the pricing of the corresponding WBA products based on a Similarly Efficient Operator
 - 1.3.3 How ComReg proposes to detail a transparency obligation to support the proposed obligation not to margin (price) squeeze.

Price control: Minimum price floors for bitstream based on a Reasonably Efficient Operator availing of LLU Line Share

- 1.4 ComReg proposes to set minimum price floors for bitstream by reference to a hypothetical entrant (a Reasonably Efficient Operator) availing of LLU Line Share (a Wholesale Physical Network Infrastructure Access 'WPNIA' product). This approach recognises the fact that LLU Line Share is a component of bitstream, therefore it is logical that bitstream should be more expensive than LLU Line Share as bitstream requires less infrastructure investment than LLU Line Share.
- 1.5 In the WBA market, Eircom, the current Significant Market Power ('SMP') operator, has economies of scale due to its advantage of incumbency, therefore ComReg

¹ 'Wholesale Broadband Access: Consultation and draft decision on the appropriate price control' dated 15 July 2010.

² Essentially, bitstream is where an operator provides wholesale broadband services which include access to broadband capacity over its local loop, the use of its broadband equipment and some element of backhaul and handover

³ Decision No: D01/06 - Retail Minus Wholesale Price Control for the WBA Market, Document No. 06/01 dated 13th January 2006.

⁴ Sold by Eircom as "White Label Broadband". It allows Other Authorised Operators ('OAOs') to avail of broadband products from Eircom Wholesale without the need for investment in network backhaul infrastructure

believes it is logical to use a Reasonably Efficient Operator as the hypothetical entrant, with a lower market share and therefore lower economies of scale, to set the minimum price floors for bitstream, as to use Eircom's unit costs based on a larger installed customer base would not encourage LLU Line Share based entry and therefore would not encourage appropriate infrastructure competition.

- 1.6 In addition, ComReg believes that implementation of the proposed minimum price floors for bitstream rentals in the WBA market should minimise the risk of a margin (price) squeeze in the WPNIA market, in accordance with Eircom's existing regulatory obligation⁵.
- 1.7 Furthermore, ComReg is seeking views on how to set the minimum price floors for bitstream rentals. ComReg's preliminary view is to set the year by year minimum price floors by reference to the LLU Line Share take-up assumptions for the hypothetical entrant made in the cost-plus model. Thus, the minimum price floor will reduce over time even if actual LLU (both ULMP and Line Share) take-up has not materialised. ComReg believes that this approach would provide the correct investment signals for LLU operators and would allow Eircom the flexibility to offer lower bitstream prices which are not dependent on actual LLU take-up. Therefore, the proposal would provide certainty on when flexibility is allowed and, as such, revised pricing plans can be developed. In utilising the assumed LLU Line Share take-up in the model, ComReg will be minded to any LLU product related issues that may be limiting the actual take-up of ULMP and LLU Line Share. It should be noted that no matter which pricing method is selected, ComReg proposes that the minimum price floors should be subject to annual review to ensure that they remain appropriate to market circumstances.

Price control: Obligation not to margin (price) squeeze between the price of the WBA component parts of a resale or end-to-end wholesale broadband access products and the pricing of the corresponding WBA products based on a Similarly Efficient Operator

- 1.8 Also, ComReg is seeking views in relation to a price control obligation to prevent a margin (price) squeeze between the price of the WBA component parts of a resale or end-to-end wholesale broadband access products and the pricing of the corresponding WBA products. ComReg considers that an appropriate price control should ensure that any price charged by Eircom for wholesale products does not foreclose efficient investment made or being made by OAOs.
- 1.9 Thus, ComReg proposes a margin (price) squeeze test based on a Similarly Efficient Operator to set the appropriate minimum price floors for the regulated WBA component(s) in the SMP operator's resale or end-to-end wholesale broadband access product.

⁵ Section 12.4 of ComReg Decision D05/10 (ComReg Document No. 10/39) 'Market Review: Wholesale Physical Network Infrastructure Access (Market 4): Further Response to ComReg Document No. 08/104, Response to ComReg Document No. 09/42 and Decision' dated 20 May 2010.

Transparency obligations in the WBA market

- 1.10 Finally, this consultation proposes to detail Eircom's transparency obligations in the WBA market to support the margin (price) squeeze obligation. The transparency obligation will provide that Eircom is required to publish the minimum price floors for the regulated components within its resale or end-to-end wholesale broadband access. In addition, Eircom will be required to publish detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of bitstream and other regulated WBA components within the resale or end-to-end wholesale broadband access services.

Conclusion

- 1.11 ComReg in making its final decision will consider all the views of respondents to this consultation, Consultation Document No. 10/56 and will take utmost account of the views of the European Commission.
- 1.12 Responses to this consultation must arrive at ComReg by 5pm, Friday 4 February 2011.

2 Minimum price floors for bitstream rentals based on a Reasonably Efficient Operator availing of LLU Line Share

- 2.1 In relation to pricing of regulated bitstream products, this consultation is seeking further views on setting minimum price floors only for all bitstream rental products⁶ offered by Eircom, subject to Eircom being designated the SMP operator in the WBA market⁷. Pending a further consultation in relation to the setting of maximum price ceilings and a revised margin (price) squeeze test between retail and WBA, the current regime of a retail-minus price control set out in ComReg Decision D01/06 will remain.
- 2.2 As noted in Consultation Document No. 10/56, ComReg proposes to set minimum price floors for bitstream rentals by reference to the efficient costs of a hypothetical new entrant availing of LLU Line Share, a product in the WPNIA market. In essence, this sets the minimum price floors by reference to a Reasonably Efficient Operator ('REO') as the minimum price floors are informed by the costs facing a hypothetical new entrant availing of LLU Line Share and with a lower retail market share than the incumbent.
- 2.3 Furthermore, it is assumed, similar to the assumptions used for the setting of the LLU price, that the hypothetical entrant will target and gain market share in the larger exchanges, which tend to be in urban locations and therefore tend to have lower unit costs as urban locations tend to have a larger customer base to achieve economies of scale and shorter lines which tend to be less costly to maintain. Therefore, if the hypothetical entrant achieves a reasonable market share and scale, it should have a lower unit cost than Eircom, as Eircom also has a market share in rural locations which have a higher unit cost due to longer lines and lower overall customer numbers in those rural locations.

Reasoning for setting minimum prices for bitstream rentals

- 2.4 ComReg believes that OAOs availing of LLU have the best potential to offer competition to Eircom to the benefit of customers, as such OAOs having made their efficient infrastructure investments, can offer differentiated retail products at possibly lower prices. ComReg believes that such competition would pose a risk to Eircom, therefore absent an appropriate price control, it could be argued that it is in Eircom's interests to set bitstream prices low enough to dis-incentivise investment in LLU. If OAOs remained on bitstream to provide retail broadband products, the potential for market differentiation to the benefit of consumers would be limited.
- 2.5 Therefore, the need to set minimum prices for bitstream rentals was noted by ComReg in the recent WBA market review:

“ComReg is of the preliminary view that, absent regulation and given its presence in a number of related input markets, Eircom would have the ability and incentives to price its wholesale inputs in a way that increases uncertainty and could dissuade potential entrants from engaging in efficient infrastructural investments. ... where

⁶ Applies to all bitstream products sold by SMP operator including all legacy ATM/VC bitstream product where continued to be sold.

⁷ Preliminary designation in ComReg Document No, 10/81 'Market Review: Wholesale Broadband Access (Market 5)' dated 1 October 2010

WBA inputs are priced too low relative to WPNIA inputs, this could also potentially discourage efficient infrastructural investments.”⁸

- 2.6 Furthermore, setting minimum price floors for bitstream rentals would reduce the risk of a margin (price) squeeze to WPNIA in accordance with Eircom’s existing regulatory obligation⁹. In particular, ComReg Decision D05/10 noted that:

“ComReg’s objective here is to encourage efficient infrastructure-based competition, and we recognise that this objective could be undermined if the relationship between the WPNIA price and the WBA price distorts incentives to invest and operate in the WPNIA market. At present, the concern is between LLU pricing and bitstream pricing. Therefore, ComReg wishes to establish a principle that will maintain an economic space between WPNIA and WBA pricing.”¹⁰

- 2.7 Furthermore, ComReg believes that this proposal to set minimum price floors for bitstream rentals is consistent with the report of the ERG (now BEREC)¹¹ which noted “...that the economic space between WBA and LLU prices should be wide enough so as to avoid eviction prices and not hinder LLU competitors’ investments in LLU...by artificially restraining LLU extension.”
- 2.8 Also, ComReg believes that setting minimum price floors for bitstream rentals also allows Eircom flexibility to offer promotions to the benefit of end-users as required.

Responses to Consultation Document No. 10/56

- 2.9 As noted in Consultation Document No. 10/56 ComReg proposes to set the minimum price floors by reference to a hypothetical entrant module in the ‘cost-plus’ model. ComReg has previously consulted on this and in particular paragraphs 5.76 – 5.94 of Consultation Document No.10/56 set out the details and assumptions contained in the hypothetical entrant module of the draft cost-plus model.
- 2.10 There were six responses to Consultation Document No.10/56 namely:
1. Eircom Limited (“Eircom”)
 2. BT Communications Ireland Limited (“BT”)
 3. Vodafone Ireland Limited (“Vodafone”)
 4. Magnet Networks Limited (“Magnet”)
 5. Alternative Operators in the Communications Market (“ALTO”)
 6. Sky Ireland (“Sky”)
- 2.11 Except for Eircom, all respondents to Consultation Document No.10/56 welcomed the proposed implementation of minimum price floors to maintain an appropriate economic space between the pricing of the WPNIA and WBA markets.

⁸ Page 142 of Consultation Document No. 10/81

⁹ Section 12.4 of ComReg Decision D05/10 (ComReg Document No. 10/39) ‘Market Review: Wholesale Physical Network Infrastructure Access (Market 4): Further Response to ComReg Document No. 08/104, Response to ComReg Document No. 09/42 and Decision’ dated 20 May 2010.

¹⁰ Para 7.182 of ComReg Document No. 08/104 which forms part of D05/10

¹¹ ERG (09) 21: ‘ERG Report on price consistency in upstream broadband markets’ dated June 2009 – at page 11

- 2.12 In its response, BT and ALTO claimed that Eircom's current pricing of 8Mb Bitstream Managed Backhaul ('BMB') is putting pressure on the economic space to LLU Line Share.
- 2.13 In its response, Eircom noted that maintaining an appropriate economic space between the pricing of the WPNIA and WBA markets may be a valid regulatory objective but needed to be supported by an updated WBA market analysis.
- 2.14 In its response, Vodafone considered that the minimum price floors should be informed by the full unbundling product (ULMP) and not LLU Line Share.
- 2.15 In relation to BT's and ALTO's response, ComReg considers that the proposed minimum price floors in this consultation, which will apply to BMB, will ensure that an appropriate economic space is maintained to LLU Line Share.
- 2.16 In relation to Eircom's response, ComReg now proposes to set the minimum prices by reference to the updated WBA market review has now been consulted on and within that market review the possible competition problems with setting bitstream prices too low was noted. Furthermore, setting minimum price floors in the WBA market will also mitigate the risk of a margin (price) squeeze to WPBNIA contrary to Eircom's existing obligation in WPNIA¹².
- 2.17 In relation to Vodafone's response, given the limited take-up of the full unbundled product so far, ComReg believes it would not be appropriate at this time to use this input in the assessment of the economic space between WPNIA and WBA. Also, the use of the full unbundling product would require consideration against WBA and Wholesale Line Rental combined with the full unbundled product where both voice and broadband services can be offered. Nonetheless, ComReg believes that the maintenance of an appropriate economic space between LLU Line Share and bitstream reflects the current market where there has been a limited take-up of LLU Line Share but still relatively insignificant to the take-up of bitstream. Also, the proposed use of LLU Line Share in the minimum price floors provides the correct signal for operators to invest further in infrastructure to avail of the full unbundled product. ComReg believes that the proposed option of using an assumed level of take up of LLU Line Share and allowing the floor to reduce over time will set the correct "build" or "buy" signals to any operator who wishes to use full unbundling.

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

¹² Section 12.4 of D05/10

Proposed price control obligation: minimum price floors for bitstream rentals based on a Reasonably Efficient Operator

- 2.18 At paragraph 6.2 of Consultation Document No. 10/56, ComReg gave indicative minimum price floors for bitstream rentals based on the last two years of the draft cost-plus model (at which it is assumed LLU take-up has been reasonably successful). Since the consultation, ComReg has continued to refine and update the draft 'cost-plus' model.
- 2.19 Having reviewed the responses to Consultation Document No. 10/56 and cognisant of market developments in WBA including the launch of Eircom's BMB products, ComReg sets out below proposed year by year indicative minimum price floors for bitstream rentals together with some of the key underlying assumptions regarding LLU take-up including the LLU Line Share take-up of the hypothetical entrant. These revised indicative minimum price floors are based on consideration of the responses to Consultation Document No. 10/56, further engagement and consideration by ComReg since the publication of Consultation Document No. 10/56 and, therefore, views are now sought on those proposed changes which had a major impact on the proposed minimum price floors.
- 2.20 For the avoidance of doubt, these indicative minimum price floors may be different from those set out in the final decision following consideration of responses to Consultation Document No. 10/56 in conjunction with responses to this further consultation and any comments from the European Commission.

Entrant subscriber base utilising LLU Line Share assumed in draft cost-plus model

- 2.21 Assumptions in relation to LLU Line Share take-up are a key variable in the cost-plus model that drives the minimum price floors for bitstream rentals.
- 2.22 As noted earlier, ComReg proposes to set the minimum price floors for bitstream rentals by reference to a hypothetical entrant availing of LLU Line Share. The key for the hypothetical entrant is to drive down its average costs through volume take-up, that is, if the hypothetical entrant only achieves low volumes on LLU Line Share, its average costs will be high and the resultant minimum price floors for bitstream set by reference to that hypothetical entrant will therefore be high also.
- 2.23 Therefore, the assumptions in the draft cost-plus model regarding the total fixed broadband market and the assumed hypothetical entrant subscriber numbers on LLU Line Share¹³ are now provided in the table below to inform respondents' views on the indicative minimum price floors.

¹³ The hypothetical entrant is assumed to only avail of LLU Line Share from WPNIA

Volume assumptions in current draft cost-plus model – subject to consultation	2011 (‘000)	2012 (‘000)	2013 (‘000)
Average subscriber base of total fixed broadband market			
All OAO	237	288	310
Total market	754	788	794
Average subscriber base of all OAOs between LLU and bitstream			
All OAO LLU (both ULMP and Line Share)	71	144	161
All OAO bitstream	166	144	149
Total OAO	237	288	310
Average subscriber base of hypothetical entrant utilising LLU Line Share¹⁴ – used to set the minimum price floors for bitstream rental			
	38	77	87
Average number of lines of hypothetical entrant utilising LLU Line Share – used to set the minimum price floors for bitstream rental			
	38	77	87

- 2.24 To inform views on the above assumptions, the current total number of LLU lines¹⁵ is c.38,000 consisting of c.23,000 shared LLU lines. ComReg hopes that LLU Line take-up will continue to increase as evidenced by BT’s commitment to un-bundle further exchanges as part of its deal with Vodafone¹⁶. Also, to inform views on the above assumptions, the current total of the broadband connections (OAO and Eircom) on the Eircom network, according to Eircom wholesale, is c.738,000 at the end of November 2010.
- 2.25 As can be seen from the table above, the hypothetical entrant is assumed to have the same number of lines and subscribers on LLU Line Share. From responses to Consultation Document No. 10/56, ComReg understands that this is unlikely to be the case as, for example, certain subscribers, such as businesses, will have multiple lines.
- 2.26 **ComReg would welcome views on the general assumptions made above in relation to the fixed broadband market and the likely share of these subscribers and lines for a hypothetical entrant utilising LLU Line Share over the next three years.**

¹⁴ The hypothetical entrant is assumed to only use LLU Line Share in WPNIA

¹⁵ As at end Quarter 3, 2010 – source ComReg Document No. 10/106 ‘Quarterly Key Data Report: Data as of Q3 2010’ dated 16 December 2010

¹⁶ <http://www.siliconrepublic.com/comms/item/13681-bt-and-vodafone-llu-pact/>

Indicative minimum price floors by year (based on latest draft 'cost-plus' model):

Output of current draft 'cost-plus' model - subject to consultation	Monthly minimum price floor ex VAT 2011¹⁷	Monthly minimum price floor ex VAT 2012	Monthly minimum price floor ex VAT 2013
Per Port	€7.65	€4.82	€4.50
Monthly per Mbps	€50.00	€25.08	€19.53

- 2.27 The table above is the output of the current draft 'cost-plus' model and is the indicative minimum price floors for 'per-port' and 'monthly per Mbps' as an overall price control. The minimum price floors are shown for 2011 and the following next two years, 2012 and 2013, based on assumptions in relation to the WBA and WPNIA (LLU) take-up and in particular the hypothetical entrant's take-up of LLU Line Share as can be seen in the previous section.
- 2.28 As can be seen from the table above, the indicative minimum price floors for bitstream rentals in 2011 are higher than the indicative maximum prices set out in Consultation Document No. 10/56; this is because of the low number of lines on LLU Line Share assumed for 2011 whereas Consultation Document No. 10/56 gave the range for 2012 – 2013 based on an assumed successful take-up of LLU Line Share.
- 2.29 Also, for the avoidance of any doubt, the indicative maximum price ceilings set out in Consultation Document No. 10/56 are subject to further consultation and final maximum prices ceilings subsequently set may vary from those set out in Consultation Document No. 10/56.

Updates to hypothetical entrant module of draft 'cost-plus' model since Consultation Document No. 10/56

- 2.30 The following sets out below the major updates to the draft 'cost-plus' model since Consultation Document No. 10/56 with the aim of setting minimum price floors for bitstream rentals.

Backhaul costs:

- 2.31 As noted in Consultation Document No. 10/56, the draft cost-plus model for the hypothetical entrant also considers transmission costs for backhaul from the Digital Line Subscriber Line Access Multiplexers ('DSLAMs'). The draft cost-plus model for Consultation Document No. 10/56 assumed that the link between DSLAMs and aggregation nodes was provided through an Eircom wholesale Gigabit Ethernet connection at €21,000 per link. The requirements were based on one link per DSLAM location using a link dimensioned at 155 Mbps to serve each site.

¹⁷ Set for the calendar year 2011, inputs informed by Eircom's financial year 2010/11.

- 2.32 Since Consultation Document No. 10/56, Eircom has launched NGN Wholesale Symmetric Ethernet Access ('WSEA') services and Eircom considers that these may have become the more relevant option for LLU backhaul for the hypothetical entrant in the cost-plus model.
- 2.33 For the purposes of modelling this, an assumption could be made that the hypothetical entrant has a single hub site in Dublin where their Broadband Remote Access Server ('BRAS') is located and that all LLU backhaul is routed to that site. The combination of published products required to carry the OAO traffic from DSLAM to the BRAS is a Wholesale Ethernet Interconnect Link ('WEIL') configured for in-building handover ('IBH') at each DSLAM site together with WSEA physical and logical connection from that WEIL to the OAO's BRAS site. ComReg understands that this offering is available at all LLU sites.
- 2.34 The proposed modelling treatment is that each hypothetical entrant's DSLAM will be connected to the OAO's BRAS initially at 200 Mbps using the appropriate WSEA contended packet conveyance combined with an IBH WEIL service at the OAO's collocation footprint in the Eircom exchange. When busy hour traffic demand rises above 90% of the initial 200 Mbps capacity, it is assumed that the WSEA circuit is upgraded to 300 Mbps. This capacity is sufficient for the projected volume of traffic originating with the largest DSLAM configuration deployed in the draft cost-plus model.
- 2.35 ComReg recognises that WSEA may not be available at all main exchanges and therefore some other proxy for LLU backhaul costs may be needed for those exchanges for the hypothetical entrant and would therefore welcome any input from respondents to inform this.
- 2.36 This update to the backhaul costs in the cost-plus model had a major reduction on the proposed minimum price floors for Mbps. The following would be the indicative minimum price floors if the calculation for backhaul remained based on Eircom wholesale Gigabit Ethernet connection as set out in Consultation Document No. 10/56.

Output of current draft 'cost-plus' model - subject to consultation - reversing backhaul cost update only	Monthly minimum price floor ex VAT 2011	Monthly minimum price floor ex VAT 2012	Monthly minimum price floor ex VAT 2013
Per Port	€7.65	€4.82	€4.50
Monthly per Mbps	€7.17	€6.99	€6.55

- 2.37 **ComReg would welcome views on this possible revised calculation of backhaul costs in the cost-plus model to determine the minimum price floor for bitstream rentals together with any supporting data/information on the costing and availability of backhaul for a LLU operator.**

Fault rate:

- 2.38 ComReg proposes to amend, based on data in relation to OAOs' fault rates, the fault rate for the hypothetical entrant to 3% instead of the 5% proposed in Consultation Document No. 10/56.
- 2.39 The impact of this proposed change is to reduce the minimum price floors for the 'per port' charge. If the fault rate % remained at 5% as proposed in Consultation Document No. 10/56, there would be a small increase in the 'per port' charge as set out as follows:

Output of current draft 'cost-plus' model - subject to consultation - reversing fault rate % only	Monthly minimum price floor ex VAT	Monthly minimum price floor ex VAT	Monthly minimum price floor ex VAT
	2011	2012	2013
Per Port	€7.90	€5.06	€4.74
Monthly per Mbps	€0.00	€25.08	€19.53

- 2.40 **ComReg would welcome views on this possible revision to the fault rate % assumed for the hypothetical entrant in the cost-plus model to determine the minimum price floor for bitstream rentals together with any supporting data/information on the actual fault rate % for a LLU operator.**

Per Port Installation Charge:

- 2.41 A correction has been made in the update of the cost plus model to include a per port installation charge of €31.25 per port to cover labour cost involved for IP based DSLAMs ('ISAMs') installation (initial configuration and expansion) as this was missing from the draft 'cost-plus' model used for Consultation Document No. 10/56.
- 2.42 The effect of this inclusion is to increase the per port minimum price floors. If the inclusion of the installation charge was not made, the indicative minimum price floors for 'per port' would be much lower as set in the table below:

Output of current draft 'cost-plus' model - subject to consultation - reversing correction only	Monthly minimum price floor ex VAT	Monthly minimum price floor ex VAT	Monthly minimum price floor ex VAT
	2011	2012	2013
Per Port	€5.78	€3.77	€3.54
Monthly per Mbps	€0.00	€25.08	€19.53

2.43 ComReg believes this correction should be made and would welcome respondents' views in this respect.

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

Options for setting minimum price floors for bitstream rentals

2.44 In setting the minimum price floors for bitstream rentals, a number of options are available. ComReg could take:

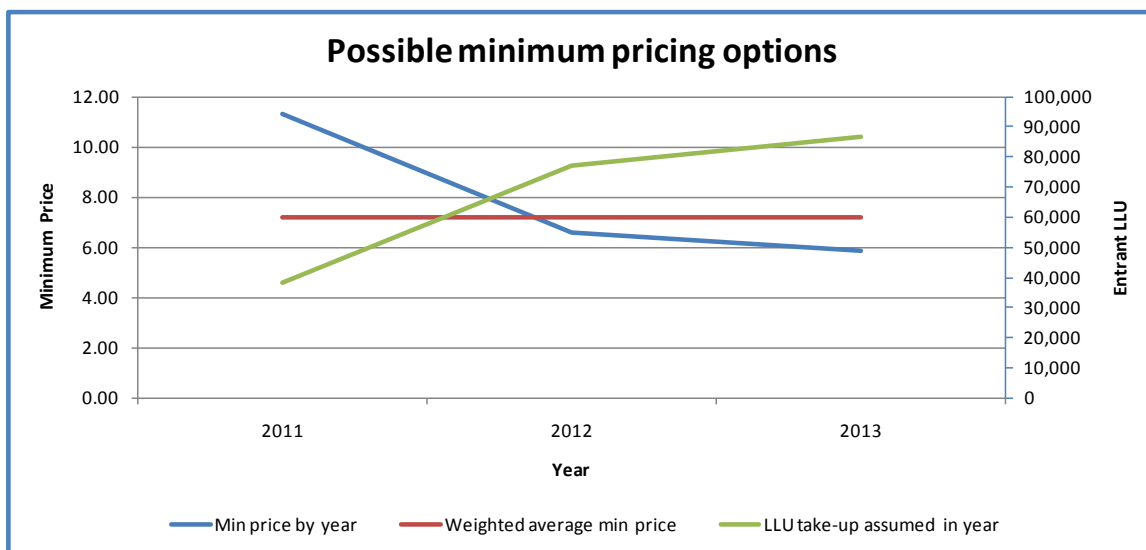
- 2.44.1 Option 1: year by year minimum price floors set by assumptions in 'cost-plus' model
- 2.44.2 Option 2: a weighted average¹⁸ of the range of minimum price floors from the cost-plus model
- 2.44.3 Option 3: Annual minimum price floors set by actual LLU take-up inputted into the 'cost-plus' model.

2.45 Options 1 and 2 can also be represented in the following table set by reference to the latest draft of the 'cost-plus' model: Option 1 being the 2011 – 2013 prices shown, Option 2 being the weighted average price shown. The minimum price floors based on actual LLU Line Share take-up are not included in the table below or in the graph as, naturally, they are unknown at this stage:

Monthly per port cost (€month ex vat)		2011	2012	2013	Weighted average
Total		7.65	4.82	4.50	5.22
Monthly per Mbps cost (€month ex vat)		2011	2012	2013	Weighted average
Total		50.00	25.08	19.53	27.42

2.46 Options 1 and 2 can be presented graphically as follows (assuming 70 kbps usage):

¹⁸ Based on assumed LLU Line Share lines of hypothetical entrant



2.47 Therefore, based on the current draft of the cost-plus model, the options would be minimum price floors from €7.65 per port / €50.00 per Mbps for the first year reaching €4.50 per port / €19.53 per Mbps by year 3 or a weighted average of the three year prices could be used to be the effective minimum price floor for all 3 years. Based on the current draft of the cost-plus model, this weighted average minimum price floor to apply for each of the three years would be €5.22 per port / €27.42 per Mbps.

2.48 ComReg will now explore the likely advantages and disadvantages of each pricing method and will present its preliminary view below:

Option 1: Year by year minimum price floors set by assumptions in 'cost-plus' model

2.49 Under this option, the year by year minimum price floors are set on the LLU take-up assumed in the model. This option could be utilised to provide a clear signal to industry that minimum price floors for bitstream will lower over the period of the price control and could therefore provide an incentive for OAOs to move to LLU Line Share or LLU before the assumed take-up in the model in order to gain some competitive advantage. The risk with this pricing option is that it is not based on actual LLU take-up and this could put LLU operators at a commercial disadvantage if their actual LLU take-up was lower than that assumed in the 'cost-plus' model used to set minimum price floors for bitstream.

Option 2: Weighted average of the minimum price floors set by assumptions in 'cost-plus' model

2.50 Option 2, the weighted average approach, offers some pricing flexibility to Eircom as the minimum bitstream prices for 2011 would be lower than that under the year by year approach of Option 1 or 3. In other words, Eircom could set bitstream prices to the weighted average minimum price floor of €5.22 per port/€27.42 per Mbps in 2011 even though the modelled 2011 would show an applicable minimum price floor of €7.65 per port/€50.00 per Mbps. Therefore, the risk with the weighted average

approach is that it may not reflect the reality of the current LLU market and could therefore result in lower minimum bitstream prices at the early stage but higher minimum bitstream prices at the later stage. Given the current early stage of LLU development, this approach may adversely affect the current commercial decisions of LLU operators.

Option 3: Annual minimum price floors set by actual LLU take-up inputted into the 'cost-plus' model

- 2.51 The minimum price floors could be set yearly in advance by inputting the actual total LLU (both ULMP and Line Share) take-up in the cost-plus model as the LLU Line Share take-up of the hypothetical entrant to derive an appropriate minimum price floor for bitstream. This would ensure that the minimum price floor would approximate the reality of the LLU market at that time but would not reflect the market if there was a marked increase or decrease in LLU over the year ahead.

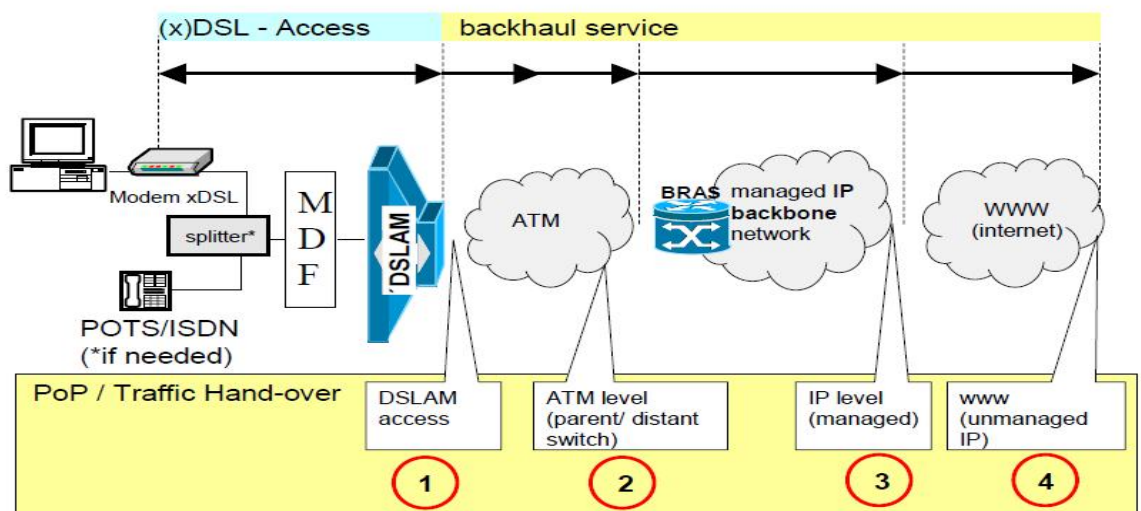
Preliminary view

- 2.52 ComReg is of the preliminary view that Option 1 based on an assumed successful take-up of LLU Line Share, should be used to set the annual minimum price floors for bitstream.
- 2.53 ComReg believes that this approach should provide the appropriate signal to LLU based operators to move more customers to LLU Line Share or LLU before the assumed take-up in the model in order to gain an appropriate level of competitive advantage over the period of the price control. ComReg believes this approach should be an appropriate balance of industry needs. Furthermore, ComReg believes that this approach offers Eircom pricing flexibility allowing them to offer competitive offers to their retail customers regardless of whether LLU take-up occurs or not. However, in this respect, ComReg will be cognisant of ensuring that all Eircom's LLU product processes are fit for purpose and delivered in good faith to ensure there is no impediment to actual LLU take-up in accordance with Eircom's obligations in the WPNIA market. If Eircom's LLU product processes are not considered fit for purpose, ComReg may adjust downwards the assumed LLU take-up in the 'cost-plus' model thereby increasing the annual minimum price floors.
- 2.54 Furthermore, ComReg believes that whichever method is used to set the minimum price floors for bitstream, it should be subject to an annual review to ensure that they remain appropriate to market circumstances.
- 2.55 **ComReg would welcome views on its preliminary view in relation to the setting of minimum price floors for bitstream rentals given the twin objectives of allowing Eircom appropriate pricing flexibility, such as offering promotions for a limited time, and ensuring that the risk of a margin (price) squeeze against WPNIA is minimised in accordance with Eircom's existing regulatory obligation.**

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

3 Obligation not to margin (price) squeeze and supporting transparency obligation for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access based on a Similarly Efficient Operator

- 3.1 Subject to respondents' views, ComReg is proposing to set a price control obligation to not to cause a margin/price squeeze between the price of the WBA component parts of a resale or end-to-end wholesale broadband access product service and the pricing of the corresponding regulated WBA products.
- 3.2 The recent consultation on the market review of WBA¹⁹ has noted the potential for horizontal leverage and margin (price) squeeze by Eircom offering resale or end-to-end wholesale broadband access.
- 3.3 Furthermore, BT and ALTO in their respective responses to Consultation Document No.10/56 have claimed that Eircom's resale or end-to-end wholesale broadband product is putting price pressure on the underlying regulated components in the WBA market.
- 3.4 Resale or end-to-end wholesale broadband access, which Eircom sells as 'White Label Broadband'²⁰ is a wholesale product offered by Eircom which allows OAOs to avail of broadband products from Eircom without the need for investment in network backhaul infrastructure.
- 3.5 This can be represented graphically as follows²¹, with all 4 points included in a resale or end-to-end wholesale broadband access product:



¹⁹ At paras 7.25 – 7.25 of Consultation Document No. 10/81: 'Market Review: Wholesale Broadband Access (Market 5)' dated 1 October 2010

²⁰ <http://www.eircomwholesale.ie/Products/Access/White-Label/White-Label-Broadband/?pageid=330&tab=0>

²¹ Source:

http://www.irg.eu/streaming/erg_03_33rev2_bitstream_access_final_plus_cable_adopted.pdf?contentId=543379&field=ATTACHED_FILE

- 3.6 ComReg believes that Eircom's provision of resale or end-to-end wholesale broadband access, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment by offering resale or end-to-end wholesale broadband access at price below the prices of its regulated WBA components.
- 3.7 The main purpose of the proposed price control is to protect OAOs who have made infrastructure investments to avail of WBA from any possible margin (price) squeeze where Eircom re-sells those regulated WBA components in resale or end-to-end wholesale broadband access that does not require infrastructure investment to avail of the product. ComReg believes that the proposal will encourage efficient infrastructure investment and therefore promote competition and innovation amongst operators.
- 3.8 ComReg believes that this proposal should protect all OAOs who have made infrastructure investments to purchase Eircom's physical rental products from OAOs, which may not have made infrastructure investments, who have availed of resale or end-to-end wholesale broadband access at too low a price relative to the price of the regulated components which are associated with making infrastructure investments. Furthermore, Eircom is currently subject to a retail-minus price control in the WBA market and an obligation not to margin squeeze between the price of its retail and matching WBA products. It could be considered that Eircom's offer of resale or end-to-end wholesale broadband access at too low a price could bypass this obligation by allowing certain OAOs using Eircom's resale or end-to-end wholesale broadband access product to compete against other OAOs who may be regarded as more of a competitive threat to Eircom as they have made infrastructure investments and therefore use less of Eircom's network.
- 3.9 Also, ComReg believes the proposal will ultimately ensure that retail consumers derive benefits in terms of price, choice and quality by ensuring that infrastructure based operators are not squeezed. ComReg considers that if OAOs have reduced incentives to choose WBA over resale or end-to-end wholesale broadband access then this potentially reduces the scope for long term infrastructure competition, which is a loss to consumers.
- 3.10 Therefore, subject to respondents' views, it is proposed that Eircom in pricing its White Label Broadband product must, at a minimum, in order to minimise the risk of margin (price) squeeze in the WBA market, include the full price of the related bitstream product and any other regulated WBA component products such as the backhaul product, Bitstream Ethernet Connection Service ('BECS'), included in its White Label Broadband product. Therefore, the regulated bitstream component in White Label Broadband cannot be offered below the applicable bitstream rental prices in effect in the WBA market and cannot be priced to the minimum price floors allowed for such bitstream rentals²², unless that price is on offer to all bitstream access seekers. For Eircom to do otherwise, that is offer different prices for regulated WBA products to different types of access seekers, would be contrary to an obligation of non-discrimination in the WBA market.

²² Subject to final decision made following this consultation and Consultation Document No. 10/56

- 3.11 To re-iterate, ComReg believes that this ensures that OAOs who have invested in infrastructure to avail of Eircom's bitstream product are not price (margin) squeezed by Eircom offering lower broadband prices to its White Label customers who do not need to have made infrastructure investments. ComReg further believes that this also ensures that appropriate build/buy decisions are made and maintained.
- 3.12 Furthermore, in order to specify the margin (price) squeeze price control test, the type of OAO that the additional price control should protect from possible margin (price) squeeze needs to be considered. ComReg believes that the Similarly Efficient Operator ('SEO') standard, which is set by reference to Eircom's prices/costs but adjusted for economies of scale differences, is appropriate as the SEO standard recognises that the hypothetical OAO would not benefit from the same economies of scale and scope of Eircom.
- 3.13 As the resale or end-to-end wholesale broadband access product is between the retail and WBA markets, to ascertain the SEO costs, ComReg proposes to utilise the SEO costs from the existing D01/06 retail minus model as this model was based on an SEO and has been subject to significant review, engagement and update with Eircom to date. Therefore, ComReg believes using the existing D01/06 model, which has been updated annually since, together with the known regulated prices of WBA components should not limit Eircom's ability to offer "White Label Broadband".
- 3.14 ComReg understands that Eircom's White Label Broadband product can offer the following enhancements/additions over its standard bitstream product which ComReg believes need to be appropriately costed in any minimum price floor for the regulated WBA component(s) in White Label Broadband to ensure that the risk of any margin (price) squeeze is minimised. The enhancements/additions could include:
- 3.14.1 Despatch of customer premises equipment (e.g. modem);
 - 3.14.2 Customer account and billing set-up and provision of billing records to support retail billing;
 - 3.14.3 Provision of onward access to the internet/world-wide-web (www);
 - 3.14.4 Authentication of the retail customer, upon connection, as having access right and allocation of the appropriate level of bandwidth and customer profile configuration at port level via Radius server and on-line access portals for ordering / managing service;
 - 3.14.5 Project management and dimensioning of network requirements including aggregation of the customer traffic from all points of presence and service establishment testing.
 - 3.14.6 Ongoing maintenance and support costs of customer premises equipment (e.g. modem) and associated fault resolution activity.
- 3.15 ComReg proposes to set the costs of the above enhancements/additions by reference to the latest retail-minus SEO model of D01/06. However, ComReg will also consider any robust cost data for the above provided by OAOs in (confidential) response to this consultation for inclusion in an update of the D01/06 SEO model. Also, where the above enhancements/additions are covered by revenue from another resale or end-to-end wholesale broadband access charge, ComReg will consider that revenue in its review of possible margin (price) squeeze.

- 3.16 Furthermore, ComReg wishes to make clear that transfers from one regulated component to a different component in resale or end-to-end wholesale broadband access, for example from 1Mb Bitstream to the 8Mb Bitstream Managed Backhaul ('BMB') regulated component should face the usual applicable ancillary charges in effect in the WBA market. Therefore, if there is any waiver by Eircom of such WBA ancillary charges for connections, transfers, upgrades, downgrades to the regulated component in resale or end-to-end wholesale broadband access, ComReg will add such costs to the applicable minimum monthly price for the regulated component by dividing such costs by a 42 month customer lifetime for the SEO operator's customers, consistent with the assumption in the existing D01/06 price control decision. In other words, a move or connection to 'White Label Broadband' must reflect the cost of the regulated ancillary charges components.
- 3.17 Also, if there is a BMB regulated component in a 'White Label' product on offer by Eircom, ComReg is of the preliminary view that the BMB charge applicable to that regulated component should be based on an assumed SEO usage (based on OAOs' customers usage) availing of that wholesale product consistent with the current pricing structure of BMB. **Therefore, ComReg would welcome data from OAOs for typical customer kbps usage by BMB product to inform the SEO test.**
- 3.18 Therefore, assuming Eircom's 'White Label Broadband' product included all of the above; ComReg would be of the preliminary view that the minimum price floor for the regulated WBA component(s) could be the sum of the known prices for the regulated components plus the costs facing the SEO to minimise the risk of margin (price) squeeze.
- 3.19 **ComReg would welcome respondents' views on the setting of an appropriate minimum price floor for the regulated components in resale or end-to-end wholesale broadband access ('White Label Broadband'). Furthermore, to support the setting of an appropriate monthly minimum price floor for the regulated component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, ComReg would appreciate any detailed costings which are supported by robust data to utilise as the costs facing the SEO²³ in particular, ComReg seeks views on:**
- 3.19.1 **What costs do you incur in providing retail broadband based on the WBA regulated inputs?**
- 3.19.2 **What costs do you / would you incur in providing end-to-end resale of wholesale broadband access based on the WBA regulated inputs?**

²³ This would be consistent with ComReg Decision D01/06 definition of a SEO which notes that the SEO costs will be set by reference Eircom's costs in the first instance and that these costs can be modified to take account of costs borne by similarly efficient new entrants.

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

Transparency of regulated components within resale or end-to-end wholesale broadband access product(s)

- 3.20 ComReg is of the view that there is currently insufficient transparency regarding the regulated WBA components within resale or end-to-end wholesale broadband access services provided by Eircom which is contrary to Eircom's existing regulatory obligation. In particular, ComReg believes that it is not demonstrably clear what precisely the nature of the regulated WBA component products included by Eircom in its provision of resale or end-to-end wholesale broadband access services are or that they are clearly provided on a non-discriminatory basis in terms of quality. This is despite the existing transparency obligations which apply to the component parts of the resale or end-to-end wholesale broadband access service which are regulated within the WBA market.
- 3.21 Therefore, subject to Eircom being designated with SMP in the WBA market which will result in the introduction of the Wholesale Broadband Access Reference Offer ('WBARO') proposed in the recent WBA market review, ComReg wishes to propose that Eircom will be required to publish the minimum price floors for the regulated components within its resale or end-to-end wholesale broadband together with detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of bitstream and other regulated WBA components within the resale or end-to-end wholesale broadband access services. Subject to this consultation, ComReg proposes that Eircom is to publish:
- 3.21.1 The minimum price floors for regulated WBA components within its provision of resale or end-to-end wholesale broadband access services;
- 3.21.2 The terms, conditions, service level agreements, guarantees and other product related assurances of the WBA component parts within its provision of resale or end-to-end wholesale broadband access services.

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- 3.22 ComReg believes that this will provide some assurance to OAOs in relation to Eircom's provision of regulated components within its provision of resale or end-to-end wholesale broadband access as:
- 3.22.1 It will be clear to OAOs by reviewing the applicable tables in the WBARO that bitstream and other regulated WBA components are not offered at a lower price by Eircom in the provision of resale or end-to-end wholesale broadband access services.
- 3.22.2 It will be clear to OAOs by reviewing the WBARO that there is no product advantages to availing of resale or end-to-end wholesale broadband access services from Eircom relative to availing of the individual regulated WBA components from Eircom.
- 3.23 ComReg is consulting separately on key performance indicators from Eircom Wholesale which should help satisfy industry that there is little scope for discriminatory behaviour²⁴.
- 3.24 **ComReg would welcome respondents' views on ComReg's proposal in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product.**

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

²⁴ ComReg Document No. 10/74 'Consultation on the Introduction of Key Performance Indicators for Regulated Markets' dated 27 September, 2010

4 Draft Decision

4.1 ComReg would appreciate respondents' views on this draft decision.

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

DECISION INSTRUMENT

1. STATUTORY AND LEGAL POWERS

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

- 1.1.1 Pursuant to Regulations 9, 10, 14 and 17 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003²⁵;
- 1.1.2 Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom Limited contained in Decision DXX/XX which imposed SMP obligations on Eircom relating to transparency, non-discrimination, access, cost accounting and price control;
- 1.1.3 Pursuant to and having regard to the Significant Market Power (SMP) designation on Eircom Limited contained in Decision D05/10²⁶ which imposed SMP obligations on Eircom relating to transparency, non-discrimination, access, cost accounting and price control;
- 1.1.4 Having, where appropriate, complied with Policy Directions made by the Minister²⁷;
- 1.1.5 Having regard to ComReg Document No.10/56 where relevant and the responses thereof;
- 1.1.6 Having taken account of the submissions received in relation to Document No. 10/108;

²⁵ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. NO. 373 of 2007).

²⁶ Decision No. D05/10 - ‘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’, Document No. 10/39, dated 20 May 2010

²⁷ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21st February, 2003 and 26th March, 2004.

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- 1.1.7 Having regard to its functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended by the Communications Regulation (Amendment) Act 2007;
 - 1.1.8 Having notified the draft measure to the European Commission, further to Regulation 20 of the Framework Regulations whereby it was also made accessible to national regulatory authorities (NRAs) in other EU Member States, and having taken the utmost account of the European Commission's response.
- 1.2 The reasoning and analysis set out in Consultation Document No. 10/56, Consultation Document No. 10/108, Response to Consultation Document No. 10/108, Decision No. XX/XX and Decision No. 05/10 [the SMP decisions] shall, where appropriate, be construed with this Decision Instrument.

2. DEFINITIONS

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

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007) as amended;

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

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

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

“product” means any offering in the WBA market. Products are subsets of services;

“Reasonably Efficient Operator” means an operator which has a different basic cost function to Eircom and does not yet enjoy the same economies of scale and scope as Eircom;

“service” means a group of offerings in the WBA market;

“Similarly Efficient Operator” means an operator which shares the same basic cost function as Eircom but which does not yet enjoy the same economies of scale and scope as Eircom;

“WBA market” means wholesale broadband access market as defined in Decision DXX/XX;

“WPNIA market” means wholesale physical network infrastructure access market as defined in Decision D05/10.

3. SCOPE AND APPLICATION

3.1 This Decision Instrument, comprising a Decision and Direction, applies to Eircom. The Decision is taken pursuant to Regulation 14 of the Access Regulations.

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

4. PRICE CONTROL OBLIGATION: MINIMUM PRICE FLOORS FOR BITSTREAM RENTALS

4.1 Eircom shall, pursuant to Regulation 14 of the Access Regulations, have the following price control obligation in the market for WBA:

4.1.1 Setting minimum price floors for bitstream rental products in the WBA market which will be based on a Reasonably Efficient Operator.

4.2 Pursuant to 4.1, Eircom shall not price bitstream rentals below the minimum price floors as set out below which may be changed by ComReg from time to time:

Additional Price control	Monthly minimum price floor ex Vat
Per Port	
Per Mbps	
Legacy bitstream products^{28 29}	Monthly minimum price floor ex Vat
Connect IP – “up to” 1024/128kb/s/48:1	
Kronos IP -“up to” 1024/128kb/s/48:1	
Expand IP – “up to” 3072/384kb/s/48:1	
Rapid IP – “up to” 7168/684kb/s/48:1	
Swift IP – “up to” 8192/800kb/s/12:1	
Arrow IP – “up to” 12288/1024kb/s/12:1	
Turbo Plus IP – “up to” 12288/2048/12:1	

²⁸ Also applies to legacy ATM/VC Bitstream product where continued to be sold

²⁹ As set out in Eircom’s Bitstream Service Price List at the effective date of this decision

Sprint IP – “up to” 24576/1024kb/s/12:1	
Zoom IP – “up to” 24576/768kb/s/48:1	
Bitstream Managed Backhaul	

4.3 Notwithstanding section 4.2, these minimum price floors can be amended at any stage following further review by ComReg, or if Eircom provides robust supporting evidence that the minimum price floors based on a Reasonably Efficient Operator can be amended.

4.4 Notwithstanding section 4.3, the review referred to in section 4.2 will be conducted at least annually by ComReg.

5. PRICE CONTROL OBLIGATION: MARGIN (PRICE) SQUEEZE

5.1 Eircom shall, pursuant to Regulation 14 of the Access Regulations, have the following price control obligation in the market for WBA:

5.1.1 Eircom shall not cause a margin (price) squeeze between the price for the WBA component part(s) of an end-to-end product and the price of the corresponding wholesale WBA product(s). The assessment of same shall be based on a Similarly Efficient Operator test.

6. TRANSPARENCY

6.1 Eircom shall, pursuant to Regulation 10 of the Access Regulations, publish on its website:

6.1.1 the minimum price floors for the WBA component parts of an end-to-end product; and

6.1.2 the terms, conditions, service level agreements, guarantees and other product related assurances of the WBA component parts of an end-to-end product.

7. STATUTORY POWERS NOT AFFECTED

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

8. MAINTENANCE OF OBLIGATIONS

8.1 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section,

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clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

9. EFFECTIVE DATE

9.1 This decision instrument shall be effective from [date of decision] until further notice by ComReg.

[]

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [] DAY OF []

5 Submitting comments

- 5.1 All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this consultation document.
- 5.2 The consultation period will run from 22, December 2010 to 4, February 2011 during which the Commission welcomes written comments on any of the issues raised in this consultation.
- 5.3 Having analysed and considered the comments received, ComReg will finalise the appropriate price control for the WBA price control and publish a decision and response to consultation which will, *inter alia* summarise the responses to the consultation.
- 5.4 In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Please note

- 5.5 ComReg appreciates that many of the issues raised in this consultation may require respondents to provide confidential information if their comments are to be meaningful.
- 5.6 As it is ComReg's policy to make all responses available on its web-site 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.
- 5.7 Such information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Appendix A – Regulatory Impact Assessment

Role of the Regulatory Impact Assessment

- A1. Regulatory Impact Assessment ('RIA') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy and analyses the impact of regulatory options on different stakeholders.
- A2. ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines³⁰, adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003³¹ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- A3. In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions, e.g. revising obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. ComReg's ultimate aim in conducting a RIA is to ensure that all proposed measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact; ComReg may carry out a lighter RIA in respect of those decisions.

Steps Involved

- A4. In relation to the current draft decision a RIA was conducted in relation to the minimum price floors for bitstream rentals in Consultation Document No. 10/56³². Therefore, this RIA considers the price control proposal not to margin (price) squeeze between Wholesale Broadband Access ('WBA') and the regulated WBA components in Eircom's offer of resale or end-to-end wholesale broadband access

³⁰ See 'REVISED RIA GUIDELINES: How to conduct a Regulatory Impact Analysis' dated June 2009 @ http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf

³¹ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

³² 'Wholesale Broadband Access: Consultation and draft decision on the appropriate price control' dated 15 July, 2010

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(also known as White Label Broadband³³) as that was not considered in Consultation Document No. 10/56. ComReg has conducted this RIA in order to demonstrate that it has considered and evaluated the regulatory options available, with due regard to ensuring that they are appropriate, proportionate and justified. However, ComReg will consider all respondents' views to this consultation and therefore in finalising the decision, the draft decision as set out in this document may change and if so, ComReg will assess whether a further RIA should be conducted, though it is not mandatory for ComReg to do so.

A5. In assessing the available regulatory options, ComReg's approach to RIA follows five steps as follows:

- Step 1: describe the policy issue and identify the objectives
- Step 2: identify and describe the regulatory options
- Step 3: determine the impacts on stakeholders
- Step 4: determine the impacts on competition
- Step 5: assess the impacts and choose the best option

Describe the policy issue and identify the objectives

A6. Following consideration of responses to Consultation Document No. 10/56 in which the potential of Eircom's resale or end-to-end wholesale broadband access product to squeeze WBA was noted by some respondents, the regulatory objective is to prevent margin (price) squeeze between WBA and the WBA components in Eircom's resale or end to end-to-end wholesale broadband access products (sold by Eircom as "White Label Broadband").

A7. Furthermore, transparency requirements are set out to support compliance with the proposed margin (price) squeeze obligation.

A8. ComReg believes that Eircom's provision of resale or end-to end wholesale broadband access, if not subject to appropriate regulatory controls for its regulated component parts, may conflict with the important regulatory goal of infrastructure investment by offering resale or end-to-end wholesale broadband access at a price below the prices of its regulated WBA components.

A9. The main objective of the proposed price control is to protect OAOs who have made infrastructure investments to avail of WBA from any possible margin (price) squeeze where Eircom re-sells those regulated WBA components in resale or end-to-end wholesale broadband access. ComReg believes that this will encourage efficient infrastructure investment and therefore promote competition and innovation amongst operators.

A10. Therefore, ComReg believes that this proposal should protect all OAOs who have made infrastructure investments to purchase Eircom's physical rental products from

³³ It allows Other Authorised Operators ('OAOs') to avail of broadband products from Eircom Wholesale without the need for investment in network backhaul infrastructure

OAOs, which may not have made infrastructure investments, who have availed of resale or end-to-end wholesale broadband access at too low a price relative to the price of the regulated components which are associated with making infrastructure investments. Furthermore, Eircom is currently subject to a retail-minus price control in the WBA market and an obligation not to margin squeeze between the price of its retail and matching WBA products. It could be considered that Eircom's offer of resale or end-to-end wholesale broadband access at too low a price could bypass this obligation by allowing certain OAOs, using Eircom's resale or end-to-end wholesale broadband access product, to compete against other OAOs who may be regarded as more of a competitive threat to Eircom as they have made infrastructure investments and therefore use less of Eircom's network.

A11. Also, ComReg believes the proposal will ultimately ensure that retail consumers derive benefits in terms of price, choice and quality by ensuring that infrastructure based operators are not squeezed. ComReg considers that if OAOs have reduced incentives to choose WBA over resale or end-to end wholesale broadband access then this potentially reduces the scope for long term infrastructure competition, which is a loss to consumers.

A12. In these proposals, ComReg has considered its statutory objectives, as set out in section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007³⁴ ("the Act") in particular the objectives in exercising its function in relation to the provision of electronic communications networks, electronic communications services and associated facilities:

- To promote the interests of users within the Community, and
- To promote competition

A13. And the obligation on ComReg to take all reasonable measures which are aimed at achieving its statutory objectives, including *inter alia*, in so far as the promotion of competition is concerned.

- Ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- Encouraging efficient investment in infrastructure and promoting innovation.

A14. To conclude, ComReg considers that the proposal will prevent foreclosure on those OAOs who have made efficient infrastructure investments in WBA.

Identify and describe the regulatory options

A15. In essence, the regulatory option under consultation is the setting, or not, of minimum price floors for WBA components when offered in resale or end-to-end wholesale broadband access, also known as "White Label Broadband" so that no margin (price) squeeze occurs.

³⁴ No. 22 of 2007

A16. As regards the above option, the following key considerations arise:

A16.1 To set the margin (price) squeeze test, ComReg could use an equally efficient operator test by which margin squeeze can be demonstrated by showing that the SMP operator could not trade profitably in resale or end-to-end wholesale broadband access on the basis of its prices in the WBA market. Alternatively, a margin squeeze can also be demonstrated by showing that the margin between the price Eircom charges to competitors in the WBA market and the price that Eircom charges for the resale or end-to-end wholesale broadband access product is insufficient to allow a reasonably efficient service provider in the WBA market to offer resale or end-to-end wholesale broadband access and to obtain a normal profit (“reasonably efficient competitor test”). Or a similarly efficient operator (“SEO”) could be utilised which is set by reference to the SMP operator’s costs but adjusted for economies of scale and scope differences.

A16.2 The SEO/REO approach recognises that even in the long-run alternative operators may not be able to compete with the SMP operator due to structural diseconomies of scale and scope, and the nature of the market. The EEO approach recognises, however, that in a competitive situation an effective alternative operator will be able to compete if it is as efficient as the SMP operator and thus encourages efficient investment in infrastructure. Therefore, to the extent that operators do not benefit from the same economies of scale and scope and having different unit network costs, a test based on SEO/REO may be more appropriate as it recognises that OAOs do not have the advantage of incumbency.

A16.3 The recent consultation on the market review of WBA³⁵ has noted the potential for horizontal leverage and margin (price) squeeze by Eircom pricing resale or end-to-end wholesale broadband access too low relative to WBA or WPNIA inputs, which might discourage potentially efficient investment in infrastructure to the detriment of end users. To set the appropriate economic space between WBA and the price of the WBA components within Eircom’s offer of resale or end-to-end wholesale broadband access, options include EEO/REO/SEO. ComReg’s preferred approach is to use SEO, consistent with the existing price control margin squeeze test of D01/06 as this recognises that OAOs do not have the advantage of incumbency.

Determine the impacts on stakeholders and competition

A17. In assessing the merits of each of the individual options explored above and taking account of the impacts of the proposed price control for stakeholders, for competition and consumers, there are a number of reasons why the proposed price control obligation not to margin (price) squeeze would be considered consistent with ComReg’s statutory objectives under Section 12 of the Act. These are summarised in the below table as follows.

³⁵ At para 7.27 of Consultation Document No. 10/81: ‘Market Review: Wholesale Broadband Access (Market 5)’ dated 1 October 2010

Summary of Impacts on Stakeholders and on Competition

Option – Obligation not to margin (price) squeeze in WBA and supporting transparency obligation by setting minimum price floors for WBA components when offered in resale or end-to-end wholesale broadband access (also known as ‘White Label Broadband’)		
Impact on incumbent	Impact on OAOs	Impact on consumer
<p>ComReg does not believe that the proposal will limit the incumbent’s selling of resale or end-to-end wholesale broadband access as:</p> <ol style="list-style-type: none"> 1. The proposed test will include the prices of the existing regulated WBA components 2. The proposed test will be SEO consistent with the current price control margin (price) squeeze test between retail and WBA. 	<p>Resale or end-to-end wholesale broadband access at an appropriate price point allows the promotion of competition by OAOs/entrants who do not wish to invest in WBA/LLU.</p> <p>It also protects those OAOs who have invested in infrastructure to avail of Eircom’s physical rental products being subject to any margin (price) squeeze by Eircom’s pricing of its resale or end-to-end wholesale broadband access.</p>	<p>Allows the promotion of competition by all OAOs/entrants regardless of the underlying wholesale product, whether it be resale or end-to-end wholesale broadband access or using the regulated WBA components themselves.</p> <p>Absent the proposed price control, if firms have reduced incentives to choose WBA over resale or end-to-end wholesale broadband access then this potentially reduces the scope for long term infrastructure competition, which is a loss to consumers.</p>

Assess the impacts and choose the best option

A18. ComReg is of the view that the price control proposal not to margin (price) squeeze between WBA and the regulated WBA components in Eircom’s offer of resale or end-to-end wholesale broadband access are for the reasons set out in this consultation justified and should foster OAO and entrant competition while also ensuring that consumers derive maximum benefits in terms of price, choice and quality of service. In particular, it is considered consistent with ComReg’s statutory objectives under section 12 of the Act, as follows:

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

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- b. Ensuring that there is no distortion or restriction of competition
By seeking to pre-empt the possibility for anti-competitive practices by the SMP operator to induce strategic barriers to entry in the WBA markets, the proposal would thus ensure that competitors can enter and sustain competition in the broadband market and in adjacent markets.
- c. Encouraging efficient investment in infrastructure and promoting innovation
The proposal should encourage entry and expansion by competitors wishing to invest in their own infrastructure over time³⁶.

A19. ComReg is moreover of the view that the price control proposal not to margin (price) squeeze between WBA and the regulated WBA components in Eircom's offer of resale or end-to-end wholesale broadband access, together with the supporting transparency obligation, is appropriate, proportionate and justified as follows:

- i. ComReg has clearly outlined why it is **appropriate** to undertake this review. ComReg believes that it safeguards alternative operators who have made infrastructure investments from potential anti-competitive behaviour by the SMP operator.
- ii. ComReg considers that it has been **proportionate** in its review. ComReg believes the proposal should not be overly burdensome or onerous on Eircom as the current SMP operator in the WBA market as the proposed margin (price) squeeze test based on SEO is similar to the current margin (price) squeeze test in effect.
- iii. ComReg considers that the proposed regulatory option has been shown to be **justified** in its review and that it has provided all of the detail, reasoning and information necessary to demonstrate how it reached the preliminary view that that proposed approach is required. ComReg believes that its preliminary option is consistent with its statutory objectives under section 12 of the Act. However, ComReg will review and consider responses to this consultation and based on those responses ComReg may make decision(s) different to the preliminary views expressed in this consultation.

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

³⁶ Subject to fit for purpose processes and prices related to infrastructure investment being in place

Appendix B – Consultation Questions

List of Questions

Q. 1. Do you agree or disagree with ComReg's proposed price control to set minimum price floors for bitstream rentals? Do you have any further views on the preliminary views expressed in relation to the setting of minimum price floors in ComReg Consultation Document No. 10/56? Please explain your response. 7

Q. 2. Do you have any further views on the proposed minimum price floors for bitstream rentals? Do you agree or disagree with the proposed amendments made to the draft hypothetical entrant module of the 'cost-plus' model to set the minimum price floors for bitstream rentals? Please explain your response and provide any robust supporting data to inform the minimum price floors for bitstream. 13

Q. 3. Do you agree or disagree with ComReg's preliminary views in relation to the proposed annual setting of bitstream minimum price floors by an assumed level of LLU Line Share take-up in the hypothetical entrant module in the 'cost-plus' model? Please explain your response. 16

Q. 4. Do you agree that the minimum price floor for the regulated WBA component(s) in the SMP operator's offer of resale or end-to-end wholesale broadband access, such as White Label Broadband, should at a minimum be the price of the applicable bitstream rental and the price(s) of any associated regulated WBA components such as BECS backhaul and other ancillary charges? Do you agree that the minimum price floor for the regulated bitstream component in the SMP operator's offer resale or end-to-end wholesale broadband access, such as of White Label Broadband, should also consider the cost of the additions/enhancements over standard bitstream in that minimum price floor? Please state the reasons for your response and provide any relevant data. 21

Q. 5. Do you agree with ComReg's preliminary view in relation to the transparency of the regulated components within Eircom's resale or end-to-end wholesale broadband access product? Please explain your response in detail.... 22

Q. 6. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required. 23

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg. 34