



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Direction to Eircom Limited with respect to Access to CEI under ComReg Decision D10/18

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1 Introduction

1. In ComReg Decision D10/18 of 19 November 2018 (ComReg Document 18/94) (**‘ComReg Decision D10/18’**)¹, the Commission for Communications Regulation (**‘ComReg’**) found that Eircom Limited (**‘Eircom’**) had significant market power in the market for Wholesale Local Access (**‘WLA’**) and imposed on Eircom obligations designed to address the associated competition problems. These obligations included Access to Civil Engineering Infrastructure (**‘CEI’**)² including, as set out in Section 7.2(xiii) of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18 (the **‘WLA Decision Instrument’**), Access to Eircom’s Duct network.
2. As set out in ComReg Decision D10/18, including in Section 2.1 of the WLA Decision Instrument, a Duct is the underground pipe or conduit that carries or is capable of carrying cables that are in turn used to deliver electronic communication services to End Users. A Duct may contain Sub-Ducts, that is, a tube or tubes inserted in a Duct through which a cable is installed.
3. ComReg is concerned about aspects of the products offered by Eircom in discharge of its obligation to provide Access to CEI, including in the context of a product notified by Eircom following a request for Access by Industry for Duct Access, known as **‘Sub-Duct Self-Install’**. By the request for a Sub-Duct Self-Install product, Access Seekers are seeking to have the option as part of Duct Access to themselves install their own Sub-Ducts in Eircom’s Ducts.
4. Having engaged with Eircom on specific aspects of the provision of Duct Access under ComReg Decision D10/18, in particular in respect of Sub-Duct Self-Install, ComReg considers that it is necessary and appropriate to further specify the requirements to be complied with by Eircom in making available Duct Access, in order to help ensure that a complete, effective, fit-for-purpose Duct Access offering is available to Access Seekers. ComReg may under Regulation 18 of the Access

¹ ComReg Decision D10/18, Market Review - Wholesale Local Access (WLA) provided at a Fixed Location and Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products, Response to Consultation and Decision, ComReg 18/94, 19 November 2018.

² Civil Engineering Infrastructure also known as passive access infrastructure is the physical access path facilities deployed by Eircom to host cables such as copper wires, optical fibre and co-axial cables. It includes, but is not limited to, subterranean or above-ground assets such as Sub-Ducts, Ducts, Chambers and Poles.

Regulations,³ “for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an operator or undertaking to do or refrain from doing anything which [ComReg] specified in the direction”. ComReg may also issue directions regarding amendments to reference offers under Regulation 9 of the Access Regulations and in respect of the cost orientation of prices under Regulation 13(4).

5. Section 2 below sets out Eircom’s obligation to provide Access to CEI, including Duct Access, under ComReg Decision D10/18 and provides details of the engagement to date with Eircom in the context of Eircom’s development of the Sub-Duct Self-Install product; Section 3 sets out ComReg’s key concerns; Section 4 describes ComReg’s functions and powers and Section 5 sets out the requirements which are the subject of the direction. The direction is set out in Appendix 1.

³ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011(Si No. 334 of 2011).

2 Duct Access and the Sub-Duct Self-Install option

2.1 Obligation to provide Access to CEI

6. Section 7 of the WLA Decision Instrument sets out a number of obligations on Eircom to provide access, including as follows:

- Section 7.1 requires Eircom to meet all reasonable requests for the provision of Access to Wholesale Local Access including Associated Facilities;
- Section 7.2 sets out a number of specific products, services and Associated Facilities which Eircom is required to provide as part of its general obligation of access in Section 7.1, including in Section 7.2(xiii), Access to Civil Engineering Infrastructure (CEI) and in particular:
 - At Section 7.2(xiii)(a), Duct Access (and Pole Access);
 - At Section 7.2(xiii)(b), Direct Duct Access and Sub-Duct Access;
 - At Section 7.2(xiii)(d), to the extent utilised in combination with (a) or (b), Access to I. Ingress⁴ and Egress⁵ points; II. CEI Tie Connection Service⁶; and III. Chambers.⁷

7. Duct Access, Direct Duct Access and Sub-Duct Access are all defined in Section 2.1 of the WLA Decision Instrument.

⁴ Ingress is “the point on Eircom’s CEI where, in the case of Direct Duct Access, Duct Access and Sub-Duct Access, an Undertaking’s cable enters the Eircom owned Sub-Duct, Duct or Chamber. In the case of Pole Access, the ingress point is the first Pole used or to be used by the Undertaking on an Eircom aerial route”.

⁵ Egress is “the point on Eircom’s CEI where, in the case of Direct Duct Access, Duct Access and Sub-Duct Access, an Undertaking’s cable or Sub-Duct exits an Eircom Duct, Sub-Duct or Chamber. In the case of Pole Access, Egress is the last Eircom Pole used by an Undertaking on a particular route”.

⁶ CEI Tie Connection Service is “the fibre connection, offered or provided by Eircom, between an Undertaking’s co-located equipment in its equipment rack or from an Undertaking’s co-located ODF [Optical Distribution Frame] to a Chamber or Pole on an Eircom CEI route usually in close proximity to the Exchange building site”.

⁷ A Chamber is “any underground construction which is built to facilitate access to cables within Eircom’s Duct network for the purposes of splicing, jointing, distribution, fault localisation and repairs.”

8. Duct Access is defined as “*Access to Eircom’s Duct*”. Footnote 640 (p. 210) of ComReg Decision D10/18 (ComReg 18/95) also states that Duct Access means “*the installation of a Sub-Duct into an Eircom Duct in order to allow Access Seekers to install cables*”. Similarly, Sub-Duct Access is defined as “*Access to Eircom’s Sub-Duct*”, and Footnote 641 (p. 210) of ComReg Decision D10/18 (ComReg 18/94) states that Sub-Duct Access means “*access to Eircom’s Sub-Duct for the installation of Access Seekers’ cables*”. Direct Access means direct access to Eircom’s Ducts for the installation of cables without the use of a Sub-Duct.
9. Paragraphs 7.388 to 7.391 of ComReg Decision D10/18 make it clear that in making Duct Access available, Eircom is required to allow Access Seekers access for their own Sub-Ducts and offer Access Seekers the option to install Multi-Way Sub-ducts (e.g. 3-way, 7-way)⁸ in Eircom’s Ducts on the same basis that Eircom provides this option to itself.⁹
10. In addition, Section 8 of the WLA Decision Instrument sets out a number of conditions attached to the Access obligation. Section 8.1 requires that Eircom grant Access in a fair, reasonable and timely manner and Section 8.2 requires Eircom to negotiate in good faith and conclude, maintain and update legally binding and fit-for-purpose Service Level Agreements (SLAs) which shall encourage an efficient level of performance, in accordance with the detailed requirements set out in that Section.
11. Finally, the Consultation Document preceding ComReg Decision D10/18 (ComReg Consultation 16/96) noted that access to CEI (which includes Duct Access) should not be subject to undue restrictions although some limited restrictions may be valid such as those concerning public safety or health and safety. In particular, reasonable restrictions would include restrictions relating to the technical and/or structural limitations of CEI, health and safety considerations and network integrity issues.¹⁰

2.2 Eircom’s Notification of Sub-Duct Self-Install

12. To date, while Eircom installs its own Sub-Ducts into its Ducts, Access Seekers have had no option available in Eircom’s product suite allowing them to do the same and

⁸ Multi-Way Sub-Ducts consist of collection of Sub-ducts (typically 3 or 7, referred to as 3-way and 7-way respectively) combined in a single bundle encased in an outer plastic protective sheath.

⁹ Furthermore, Section 9.5 of the WLA Decision Instrument requires that Eircom, from 19 September 2019, offer and provide pre-ordering, ordering, provisioning, fault reporting and repair for CEI on an Equivalence of Inputs (EoI) basis, that is within the same timescales, at the same price, functionality, service and quality levels and on the same terms and conditions and by means of the same systems and processes as the Eircom provides to itself, and the systems and processes shall operate in the same way and with the same degree of reliability and performance as between OAOs and Eircom’s provision to itself.

¹⁰ Paragraphs 8.208, 8.214, also 8.225 and 8.253.

self-install their own Sub-Ducts into Eircom's Ducts. On 9 April 2020, an Access request was submitted to Eircom by BT Ireland ('**BT**') on behalf of itself and other Access Seekers to provide Access Seekers with the option of being able to install their own Sub-Ducts in Eircom's Ducts. This was accompanied by an associated Access request for a Service Level Agreement ('**SLA**'). This Access request was accepted by Eircom into its product development process and was assigned a unique reference by Eircom of CRD 745¹¹.

13. On 15 December 2020, pursuant to its transparency obligations under Section 10 of the WLA Decision Instrument, Eircom notified ComReg of proposed amendments to the product documentation forming part of its Access Reference Offer ('**ARO**') for a product referred to by Eircom as 'Subduct Self-Install' or 'Duct Access Self-Install' arising as a result of CRD 745, with a launch date of 15 July 2021. For simplicity this is referred throughout this Direction as 'Sub-Duct Self-Install'.
14. Following a review of the Sub-Duct Self-Install product documentation notified to it, by email of 15 January 2021, ComReg raised a number of concerns with Eircom, including concerns in respect of requirements on Access Seekers to perform all Duct unblocking activities themselves and at their own cost, requirements on Access Seekers to be supervised for the majority of activities relating to Sub-Duct Self-install and Eircom's approach to pricing.¹²
15. ComReg invited Eircom to respond to ComReg's comments comprehensively by 12 February 2021, suggesting that additional engagement between Eircom and operators, as and where appropriate, takes place first so that Eircom could address concerns that operators may have in relation to the versions of the documents that had been notified; and that Eircom then renotify ComReg the product documentation, amended as required, including prices, on 15 April 2021, thereby allowing for publication on 15 May 2021 two months in advance of launch on 15 July 2021, in accordance with the timelines set out in Section 10.10 (and Section 10.12) of the WLA Decision Instrument.
16. ComReg also said that if its concerns were not addressed to its satisfaction in Eircom's response, ComReg reserved its rights in respect of any further action

¹¹ Customer Requirements Document ('CRD') is a document used by Eircom in which a request for Access is described. Each Regulated Access Product ('RAP') under development has its own CRD and an associated CRD ID.

¹² Additional issues or queries were raised in respect of Lead-in Duct; SLAs; the assessment of OAO Self-install Design Plan, Method Statement, Deed of Variation; and on the nature of an IT development that Eircom had referred to. They are not concerned with this Direction and will be dealt with, as and if appropriate, separately by ComReg.

required to ensure that a fit-for-purpose Sub-Duct Self-Install product is available to Access Seekers, including the right to issue a direction pursuant to Regulation 18 of the Access Regulations to further specify Eircom's obligation as set out under Section 7.2(xiii)(a) of the WLA Decision Instrument.

17. On 12 February 2021, Eircom provided a response to ComReg with respect to the concerns raised in January 2021, agreeing to the timelines suggested by ComReg.¹³ Following consideration of Eircom's response, on 1 April 2021, ComReg shared a draft version of this Direction with Eircom, providing Eircom with the opportunity to comment. Eircom provided comment on the draft Direction on 30 April 2021 including proposals as regards the manner in which supervision could be exercised in respect of Sub-Duct Self-Install and indicating in a cover letter its intention to notify the Sub-Duct Self-Install product one week later, on 7 May 2021, with the view to proceeding to publication on 14 May 2021. Eircom also sought clarification as regards the process which ComReg intended to follow, including in terms of public consultation and notification to the European Commission.
18. On 6 May 2021, ComReg wrote to Eircom noting that ComReg had no difficulties with Eircom proceeding to notification on 7 May 2021 but that it was not in the position to agree to publication on 14 May 2021 so that the timelines regarding publication under ComReg Decision D10/18 continued to apply until ComReg's agreement or direction otherwise. ComReg indicated also that in the event that ComReg found that the product documentation as notified did not address the concerns expressed previously, it may proceed to issue the Direction to Eircom in the form of the Draft Direction, or amended as the case may be to take into account Eircom's comments and the product notification. ComReg noted in this regard that Eircom's proposals as regards supervision may be acceptable but several additional matters had not been addressed, or addressed satisfactorily, and invited Eircom to join with its notification full justification for prices and charges. ComReg also confirmed that it did not intend to hold a public consultation or notify the European Commission in respect of the proposed Direction to specify further obligations in relation to CEI Access.
19. On 14 May 2021, Eircom provided ComReg with its notification of the Sub-Duct Self-Install product, including the proposed amendments to the product documentation

¹³ Eircom indicated its disagreement with ComReg that Section 10.10 of the WLA Decision Instrument, which is concerned with material amendments to existing products, applies, rather than Section 10.11, which is concerned with new products, on the basis that Sub-Duct Self-Install is a new product and the changes required by operators to avail of it are not insignificant. ComReg remains of the view that Sub-Duct Self-Install is to be treated as an amendment to an existing product (Duct Access) on the basis that it implies changes to an existing product. Contrary to Eircom's suggestion, the fact that Sub-Duct Self-Install will have no direct implications on a retail offering is not the "main basis" for ComReg's position. Rather it is a relevant matter to take into account in considering the appropriate length of the required publication period in light of ComReg's retained discretion under the WLA Decision Instrument.

forming part of the ARO, together with an amended ARO Price List and a Pricing Statement of Compliance.

20. Having considered Eircom's submissions of 30 April 2021, and the notification received on 14 May 2021, ComReg is of the view that certain matters have not been addressed to its satisfaction. ComReg is of the view that it is now necessary to specify further the requirements which Eircom must comply with in relation to its obligation to provide Access to its Duct network, by way of Direction.

3 ComReg concerns with respect to CEI

3.1 Overview

21. ComReg welcomes notification by Eircom of a product allowing Access Seekers to install by themselves their own Sub-Ducts in Eircom's Ducts, a form of Access mandated under the WLA Decision Instrument. However, while a number of issues has been resolved in the engagement with Eircom described in Section 2, three issues remain that, unless properly addressed, mean that Eircom's CEI Access products involving Eircom's Ducts will not provide efficient and fit-for-purpose Access. They are the question of unblocking of Ducts and associated reinstatements; the issue of supervision of works; and pricing.

3.2 Unblocking of Ducts

22. Access Seekers can be prevented from installing their Sub-Ducts into Eircom Ducts when Ducts are either blocked, due to for example a build-up of material in the Duct such as silt, or because the structure of the Duct itself has been compromised, for example where the Duct has been compressed. In its engagement with Eircom following notification of the Sub-Duct Self-Install product documentation in December 2020, ComReg raised the matter of the requirement that the unblocking of Ducts was to be carried out by Access Seekers, at their expense. ComReg expressed the concern that not allowing Access Seekers to request that Eircom unblock Ducts may be an unreasonable condition which may deter Access Seekers availing of Sub-Duct Self-Install particularly in circumstances where the unblocking of a Duct may be complex, which could arise for example where more than one Access Seeker utilise a Duct and they have no ready contractual means to address liability issues which may arise as regards other Access Seekers.
23. In its submissions, including in particular in its submissions of 30 April 2021, Eircom disagreed that there was such a concern, noting that a requirement that Access Seekers unblock Ducts, with no possibility to request Eircom to do so as part of the product's features, followed from the nature of the Sub-Duct Self-Install product. For Eircom, the clearance of blockages, if they are present on a planned route, is an activity that is an integral part of installing one's own Sub-Ducts into Ducts. It is, Eircom says, "*part of the rod, rope and test procedure to prepare a route*". In this context, Eircom disputed in its submission of 30 April 2021, any suggestion that it may be inefficient for unblocking of Ducts to be performed by the Access Seeker. In Eircom's view, an approach whereby Eircom would perform such unblocking would introduce unnecessary delays, increase costs and make the product inefficient.

24. Having considered Eircom's submission of 30 April 2021 and having assessed the product documentation notified on 14 May 2021, ComReg is of the view that it is appropriate to draw a distinction between the situations where the unblocking of Duct requires remediation to the Duct by way of repairs, and those situations where the Duct may be unblocked without repairs. This is a distinction which builds upon the distinction found in the product documentation for the Sub-Duct Self-Install product notified on 14 May 2021 whereby activities in connection with fault management are exclusively reserved to Eircom and may not be performed by the Access Seeker. By contrast, the unblocking of Ducts short of fault repair is to be performed by the Access Seeker.
25. While the product documentation says nothing explicitly about repairs in the context of maintenance activities, rather than fault management, Eircom's position as owner of the assets does not change depending on whether repair is conducted following a fault report, or for maintenance purpose, and Eircom's reserving of fault repair activities logically extends to maintenance repairs. This means that where a Duct requires repair, because for example the structure of the Duct is compromised or where the Duct may need to be excavated and opened to clear a blockage that cannot otherwise be cleared, in order that an Access Seeker is able to install its Sub-Duct, such an activity is to be performed by Eircom.
26. Drawing, or clarifying, such a distinction, so that blockages of Ducts that require repairs are resolved by Eircom, and blockages that do not require repairs to be resolved are carried out by the Access Seekers, addresses the concerns previously expressed by ComReg. For the purpose of this Direction, accordingly, *repair* in the context of maintenance includes the following:
 - a. Activities required to remediate a Duct's structure where damage to the Duct's structure has the effect of preventing an Access Seeker installing its Sub-Duct into the Eircom Duct.
 - b. Civil works, including in particular Duct excavation and opening activities, required to clear a blockage that cannot be cleared otherwise where that blockage is preventing an Access Seeker from installing its Sub-Duct into the Eircom Duct.
27. This means that having considered Eircom's submission and the notified product documentation, ComReg no longer proposes to direct that Eircom on request from an Access Seeker perform unblocking of a Duct (unless such unblocking requires repair as defined above). ComReg accepts that where an Access Seeker encounters a blockage in circumstances where the structure of the Duct has not been compromised in any way and can be cleared without a need to excavate and

open the Duct, it is appropriate and efficient that the Access Seeker clears that blockage.

28. ComReg, however, does not accept that the costs of unblocking of Ducts are to be borne by Access Seekers via one off charges. While Eircom has argued that it would be unreasonable for Eircom to pay to unblock a Duct for the benefit of an Access Seeker where Eircom itself has no need to unblock the Duct, ComReg maintains that this is tantamount to requiring Access Seekers to invest in Eircom's assets with the result that, having regard to the applicable price control discussed in Section 3.4, Eircom would subsequently benefit from the Access Seekers' investment over the remaining life of the asset. In particular, an allowance for Duct remediation¹⁴ is included in the rental prices set in ComReg Decision D03/16 (and re-imposed in ComReg Decision D10/18). In the circumstances, as explained in further detail in Section 3.4 below, requiring Access Seekers to bear the costs of the unblocking of Ducts is clearly unreasonable and is not supported by any "economic principles" underpinning the regulation of CEI pricing as Eircom contends.
29. Insofar as repairs in the context of Sub-Duct Self-Install are concerned, ComReg notes that Access offered by Eircom must be by way of fit-for-purpose products, that is products which provide adequate and effective Access to Eircom's network. In its submission of 30 April 2021, Eircom makes the point that there would be no obligation on its part to provide Access "*to fit-for-purpose products*". There would be no "*legal foundation*" for ComReg's reference to a fit-for-purpose product, be it in the WLA Decision Instrument, or in the Access Regulations. The appropriate legal standard by which to measure Eircom's provision of Access is, Eircom contends, that of 'Equivalence of Inputs' ('EoI'), whereby Eircom is required to provide Access '*within the same timescales, at the same price, functionality, service and quality levels and on the same terms and conditions and by means of the same systems and processes as the SMP Undertaking provides to itself.*' "*The 'hybrid' model proposed by ComReg, whereby an Access Seeker can, when it encounters a blockage, require Eircom to step in to clear it, before it then presumably resumes its own work*" would not, in Eircom's view, "*meet the legal 'Equivalence of Inputs' requirement, as this is not how Eircom provides sub-duct installation to itself. As such it goes beyond the EoI threshold*".
30. While ComReg no longer proposes to follow the "*hybrid model*" as described by Eircom, ComReg wishes to make clear it fundamentally disagrees with, and rejects, Eircom's argument that the only legal standard that would apply is that of EoI or that

¹⁴ Duct remediation generally refers for the purpose of the Price Control as described in Section 3.4 below to any work required in terms of duct repair in order to ensure the network is NGA ready. It can involve clearing blockages or repairing damaged or compromised chamber/joint boxes.

a requirement that Eircom offers unblocking would “*go beyond EoI*” as Eircom contends. For the avoidance of doubt, in making available a Sub-Duct Self-Install product in accordance with its obligations under ComReg Decision D10/18, Eircom is subject not only to an obligation to provide Access on a non-discriminatory basis at the EoI standard in accordance with Section 9.5 of the WLA Decision Instrument, but also to the separate obligation to provide Access under Section 7 of the WLA Decision Instrument, including meeting reasonable requests from Access Seekers, and in accordance with the requirements set out in Section 8.1 and Section 8.2 of the WLA Decision Instrument. At a fundamental level, this involves Eircom making available a product which is usable, and accordingly remediating assets where and as necessary.

31. ComReg also disagrees with Eircom’s suggestion that ComReg’s “*hybrid model*” “[did] *not appear to meet the requirements of proportionality, namely that (i) the proposed measure does not exceed the limits of what is necessary, (ii) where there is a choice between options, the NRA must have recourse to the least onerous, and (iii) the disadvantages caused must not be disproportionate to the aims*”, in circumstances where Eircom “*already offers two effective options to Access Seekers, while the proposed additional option has significant feasibility and cost issues*”. It is not entirely clear what two options Eircom is referring to. ComReg understands that Eircom’s offer of Sub-Duct Access includes the option for an Access Seeker to Access Eircom Sub-Duct that is fully maintained and controlled by Eircom or an option whereby an Access Seeker can Access Eircom Sub-Duct where it has a level of control over that Sub-Duct that allows the Access Seeker to cut into it. In particular, ComReg does not accept that such options (which are made under Sub-Duct Access) or Direct Duct Access come under consideration in determining the requirements to be met by Eircom when providing Sub-Duct Self-Install Duct Access, and their proportionality. Neither Sub-Duct Access nor Direct Duct Access constitute Duct Access. Rather they are two separate forms of access which Eircom is specifically required to offer under Section 7.2 of the WLA Decision Instrument, in addition to Duct Access. That Eircom offers Sub-Duct Access and Direct Duct Access does not constitute an option which ComReg would be required to consider when specifying the requirements to be complied with by Eircom when providing a separately mandated different form of access.
32. Section 7 and Section 8 also mean that where remedial (repair) work is required to ensure that Access to Duct is available, such tasks must be completed by Eircom in a timely manner so as not to impede effective Access, subject to Service Level Agreements that adequately incentivise Eircom to deliver an efficient level of performance by the use of effective service credits. This means, in accordance with Section 8.2(viii) of the WLA Decision Instrument, that Service Credits must be

sufficient to allow Access Seekers recoup, at a minimum, the direct costs and any other reasonable loss of value that the Access Seekers incur as a result of the circumstances that had triggered the payment of Service Credits.

3.3 Supervision

33. The product documentation notified to ComReg in December 2020 for Eircom's Sub-Duct Self-Install product included requirements for supervision by Eircom of activities that Access Seekers need to perform in relation to the installation of their Sub-Duct. As a result, work could not commence or continue by Access Seekers in the absence of an Eircom supervisor and charges would apply for supervision for the following activities:
- a. Sub-duct installation in Eircom Duct by Access Seekers or their contractors.
 - b. Direct Duct Access, where fibre cables are installed in Duct without the use of a Sub-duct, including installation of single stranded drop cable¹⁵.
 - c. Core drill break-in to Eircom underground chambers.
 - d. Dig down by Access Seekers to buried Eircom underground chambers.
 - e. Any civils work carried out on Eircom plant by an Access Seekers in connection with providing their Sub-duct, including unblocking of Ducts.
34. The same position in respect of the following activities regarding Sub-Duct Access and Direct Duct Access applies for Eircom's existing offer of Access to CEI:
- a. Core drill break-in to Eircom underground chambers.
 - b. Dig down by Access Seekers to buried Eircom underground chambers.
 - c. Fleeting¹⁶ of Access Seekers' cable(s).
35. The product documentation for Sub-Duct Self-Install subsequently notified to ComReg on 14 May 2021 includes no requirement that an Eircom supervisor be present in order for Access Seekers to continue working on Eircom's network, and no charges for supervision. However, charges remain to cover the cost of

¹⁵ The installation without sub-duct of short runs of singled stranded drop cable in Eircom Duct between the Access Seeker's final distribution point and the boundary of the customer's premises.

¹⁶ Fleeting is a process where fibre cable can be installed from a point in the network where fibre can be blown in 2 directions. This can give Access Seekers the longest possible run of fibre, without fibres needing to be joined together via a process known as splicing.

supervision where an Access Seeker ceases its Access to a CEI route and needs to remove Sub-Ducts from Eircom's Ducts and Chambers. In addition, the product documentation is not clear whether work can not only continue in the absence of a supervisor but also commence. In this regard the product documentation as notified does not include the condition proposed by Eircom in its submission of 30 April 2021 whereby in the event that the Eircom supervision resource is not in attendance at the scheduled time, the Access Seeker may proceed with the planned works in accordance with the agreed method statements and in line with the whereabouts notification. Furthermore, all supervision requirements remain in respect to Eircom's existing Access to CEI product set.

36. Generally speaking, supervision requirements, as they have operated to date and as notified in December 2020 in respect of Sub-Duct Self-Install, mean that Access Seekers are dependent on planning their activities on an appointment-based process controlled by Eircom and that work in relation to CEI cannot commence or be carried out unless an Eircom supervisor is made available and is present at the location where work is to be performed. Where supervision gives rise to an additional charge, supervision requirements also place an additional overhead on Access Seekers. In addition, such a process is unlikely to be suitable for Access Seekers wishing to avail of Access to Eircom's CEI at scale and has therefore the potential to be detrimental to competition.
37. When ComReg raised concerns by email of 15 January 2021 with respect to Eircom's proposed requirement that Access Seekers be supervised when carrying out work on Eircom's CEI in the context of Sub-Duct Self-Install, in response, Eircom justified this by reference to the need to ensure the integrity of the network and the risk associated with works on its network by third parties that are not directly answerable to Eircom. In particular, in its 12 February 2021 response, Eircom explained as follows:
 - a. Each of the activities described at paragraph 33(a) to (e) could result in damage being caused to Eircom Ducts, Sub-Ducts or the cables running through them. Supervision is crucial in allowing for early detection of the fault resulting in a faster repair and restoration of service.
 - b. Such damage could result in services outages to Eircom's wholesale customers and for End User retail customers including vulnerable people, hospitals etc. Eircom described that it has a duty of care to all end customers using its infrastructure to ensure that these customers' services are protected and not disrupted.

- c. Supervision is justified given that Eircom is liable for damages caused not only by it but also by Access Seekers. Damages which may be suffered by Eircom extend to loss of revenues but also negative impacts on Universal Service Obligation metrics. This according to Eircom, is an “equivalence of outputs issue”.
38. In its 30 April 2021 response, Eircom repeats the above justifications and further criticises what it describes as ComReg’s proposal to remove from Eircom “*the ability to exercise its own judgement over the level of supervision of third parties (including its own contractors) required in order to ensure physical security and integrity of its own network*”. Eircom suggests also that ComReg’s position on supervision is at odds with other initiatives being pursued by ComReg and the Department for Environment, Climate and Communications (‘DECC’) arising from the critical importance of ensuring network security and integrity, and designed to establish Electronic Communications Security Measures including consideration of the physical security of network assets and specific measures to strictly limit third party access. Eircom also views ComReg’s proposed allowance of supervision in case of serious risks as evidence that it is acceptable for ComReg “*for there to be a degree of risk of damage to the network in allowing Access Seekers to self-install their sub-duct*” while introducing unnecessary subjectivity and lack of clarity leaving Eircom unsure of when it can take action to supervise in order to protect its network integrity.
39. More generally Eircom submits that “*by severely limiting the circumstances in which Eircom can even monitor third parties carrying out significant engineering work (e.g. breaking into ducts) and installing infrastructure on its property*”, ComReg is further restricting Eircom’s constitutional property rights (beyond existing restrictions arising from infrastructure access obligations such as Duct Access). This Eircom says, requires justification not only under the Access Regulations and Directive, but also “*under the tests laid down in Irish and international case-law relating to interference with rights of property*”. Eircom also makes the point that while ComReg’s concerns as regards supervision were raised in the context of Sub-Duct Self-Install, the measure envisaged by ComReg extends to all Access to CEI without any justification advanced for such extension.
40. ComReg does not dispute that Eircom may reasonably impose terms and conditions associated with Duct Access that are designed to ensure that the integrity of its network is maintained at all times and to that end, that reasonable skill and care is applied by Access Seekers when carrying out works associated with CEI Access. ComReg further accepts that this includes imposing supervision by Eircom for Access to CEI. However, as set out further below, this is subject to the condition that supervision is exercised in a manner consistent with Eircom’s non-discrimination

obligations and does not work in such a way that it unduly restricts Access, e.g., by impeding the work of Access Seekers or producing inefficiencies or unnecessary overheads for Access Seekers.

41. ComReg in this regard rejects Eircom's suggestion in its submission of 30 April 2021 that imposing limitations on the manner in which Eircom supervises Access to its network would significantly further "*abridge*" Eircom's rights in its own property, in circumstances where ComReg would not have established that this "*significant further abridgement... meets the relevant legal tests, including of necessity and proportionality*". While Eircom does not say what those tests are more specifically, ComReg does not accept that this Direction involves any further "*abridgement*" of Eircom's rights to property. ComReg notes in particular that Eircom is subject to a requirement to provide Access to its CEI including Duct Access and that any further limitations specified by way of this Direction is designed to ensure that the manner in which Eircom provides Access is effective, and that Eircom only imposes conditions that are necessary or proportionate. There is in this context no "*further abridgement*" of Eircom's rights.
42. ComReg notes in this regard that systematic, or automatic, supervision requirements, the costs of which are borne by Access Seekers, as applies to Eircom's existing offer of Access to CEI (and in the manner proposed for Sub-Duct Self-Install in the notification of December 2020), unduly restricts Access by impeding the work of Access Seekers and producing inefficiencies or unnecessary overheads for Access Seekers in circumstances where Eircom has not established that such systematic supervision is in fact proportionate and necessary.
43. In particular, no satisfactory explanation or justification has been provided by Eircom in terms of why systematic supervision, and no other less intrusive means of control, could be used to avoid damage being caused to Eircom equipment, Ducts, Sub-ducts or the cables running through them, including in respect of each of the activities listed at paragraphs 33 and 34 above. No satisfactory explanation has been offered as to how each of the specific tasks for which supervision is required by Eircom could result in damage or the level of risk of damage attached to the relevant activity, and how Eircom's requirements with respect to supervision constitute an appropriate and proportionate means of addressing that risk.
44. ComReg does not agree with Eircom that supervision is crucial for allowing early detection of faults resulting in a faster repair and restoration of service and notes that no supervision is required by Eircom with respect to its self-supply of Duct Access, Sub-Duct Access and Direct Duct Access. Active components in Eircom's network that rely upon the correct functioning of fibre cables carried in its Ducts and

Sub-ducts would raise alarms if Eircom's services were to be disrupted as a result of damage to such cables, thereby allowing for detection of loss of fibre based services in real time. In that context, Eircom has not explained why supervision is the appropriate and proportionate way to mitigate risks of service outages and ensure that services to all users of Eircom's infrastructure are protected and not disrupted. In the absence of such justification, requirements for systematic supervision, where such requirements could impede the work of Access Seekers or result in inefficiencies or unnecessary overheads for Access Seekers, constitute unreasonable restrictions on Access to its CEI.

45. ComReg notes further that Eircom appears to suggest that risks arising to its network and other third parties' services from allowing Access Seekers install Sub-Ducts in its Ducts would be mitigated were liability issues addressed and Eircom were not to bear the full brunt of damages being suffered in the context of its provision of Duct Access Self-Install, seemingly by giving Access Seekers the incentive to use sufficient care that damages will be avoided. Unless this is the case, Eircom suggests, supervision is necessary to mitigate those risks in order that Eircom is in the same position as it would be were it to install Sub-Ducts itself.¹⁷
46. However, it is not clear what Eircom means when it says in its response of 12 February 2021 that in case of damages, an operator "*is not held accountable for its actions*". ComReg notes that as a matter of contract between Eircom and an Access Seeker, there are several provisions which address the issue of damages caused by an Access Seeker (as well as by Eircom), under both the ARO and the Duct Master Licence Agreement, including:
- Clause 19 of the ARO, including in particular Clause 19.1, and Clause 19.3 governing limitation of Access Seeker liability;
 - Clause 8 of the Duct Master Licence Agreement, including Clause 8.1 governing limitation of Eircom's liability, and Clause 8.4 governing limitation of Access

¹⁷ In its response of 12 February 2021, Eircom says:

"...if an operator damages duct/sub-duct/cables open eir will still be liable for any penalties that are incurred and it appears that the operator is not held accountable for its actions. On that basis there is a consequential liability on open eir as a result of the operator's actions when accessing sub ducts. If the operator carried this liability i.e. whereby it would be held to account for its actions when accessing the sub duct etc. e.g. damage to duct and service then it might be easier for open eir to allow unsupervised installations, although as ComReg will be aware proving an operator actually caused the damage might prove difficult.

The same applies to revenue losses caused by their damage and USO metric impacts caused by their damage. In essence eir suffers if eir causes damage. eir still suffers if OAO causes damage. It is not just an issue of repairing damage. Therefore open eir should be able to insist on the supervision. It is an equivalence of outputs issue."

Seeker liability to Eircom including, under (b), in respect of acts and omissions of *other* providers of telecommunications services;¹⁸

- Clause 9 of the Duct Master Licence Agreement whereby the Access Seeker is required to provide Eircom with an indemnity in respect of damage to Eircom's network arising out of, or occasioned by, anything done by the Access Seeker as a result of its negligence or malicious acts or of its staff or anything which ought to have been done by the Access Seeker under the Licence but was not done;
 - Clause 10 of the Duct Master Licence Agreement which requires the Access Seeker to insure at its own cost its liability in respect of Employer's liability and third party liability for loss, injury or damage, for no less than €13 million.
47. In light of this and having regard to the inefficiency and unnecessary overhead that Eircom's requirements for supervision for its existing offer of Access to CEI place on Access Seekers, the reasons for supervision advanced by Eircom are not in any way sufficient to justify the systematic use of supervision by Eircom in the manner that this is currently required. ComReg also does not see how there is any issue of "equivalence of outputs" as contended by Eircom. Equivalence of outputs is one of the standards under which Eircom may be required to provide non-discriminatory Access under ComReg Decision D10/18. However, insofar as Duct Access is concerned, as Ducts are included within CEI, Eircom is also subject to an obligation to provide non-discriminatory Access on an Equivalence of Inputs basis in respect of pre-ordering, ordering, provisioning, fault reporting and repair.¹⁹ In this context it is notable that Eircom self-supplies Duct Access by installing Sub-ducts but does not supervise all of its own subcontractors with respect to Sub-duct installation/blockage activities; rather Eircom carries out quality checks on the work.²⁰

Options open to Eircom

48. ComReg notes that there are alternatives to systematic supervision requirements that are available to Eircom in order to ensure that the integrity of its network is

¹⁸ Noting that there appears to be words missing in Clause 8.4 of the Duct Mast Licence Agreement published on www.openeir.ie.

¹⁹ Section 9.5 of the WLA Decision Instrument.

²⁰ As described in Eircom document titled 'open eir Services in the Reference Interconnect Offer, Wholesale Bitstream Access Reference Offer, Access Reference Offer and Leased Line Reference Offer, Internal Arrangements for Network Access for the Purpose of eir Services, Statement of Compliance', Version 9.0 dated 14 December 2020.

maintained at all times and sufficient and adequate care is taken by Access Seekers in carrying out works associated with Access to CEI. These include in particular, as discussed below, other approaches to supervision as well as accreditation and audit, which may also be used in combination where justified to provide appropriate and proportionate safeguards.

Accreditation

49. Insofar as accreditation is concerned, based on the product documentation notified to ComReg, ComReg understands that it is Eircom's intention to require that an Access Seeker wishing to avail of the Sub-duct Self-Install product first achieve accreditation, in respect of the Access Seeker, its individual staff as well as any contractors that it may use. ComReg notes also that in many cases for CEI Access, accreditation requirements currently apply to Access Seekers/contractors in order that they can perform certain tasks when availing of Access.²¹ It appears to ComReg that the current accreditation process used by Eircom may easily accommodate requirements to ensure that sufficient and adequate care is taken in respect of the activities for which Eircom currently requires, or proposes to require, supervision, through devising a level of accreditation that is appropriate to the task to be carried out by an Access Seeker or its agents.
50. In all cases where Eircom relies on accreditation, the accreditation required (e.g. training and/or any demonstration of competency) of an Access Seeker or its agents may not be more onerous than the accreditation required by Eircom for its staff or agents²² unless there are clear and objective reasons.
51. In this context, ComReg notes that the accreditation process may provide for different requirements or processes where different circumstances so justify. For instance, provided that it is limited to what is strictly necessary to establish that accreditation requirements are met, for example in respect of a contractor company which has no prior experience of performing work on Eircom's CEI infrastructure, Eircom may as part of the accreditation process put in place a requirement for supervision for specific tasks, for a very limited period, before granting full accreditation that may require that such tasks cannot be commenced or continue in the absence of an Eircom supervisor. ComReg considers for example that a

²¹As described in Eircom document '*open eir Duct Access Product Description*', version 7.0, dated 01/11/2019, which sets out Eircom's offer of Access to Sub-Duct and Direct Duct Access, if an Access Seeker achieves accreditation then that Access Seeker can open lids for field survey work, carry out splicing activities, install equipment in any suitable Eircom box/chamber and that supervised access is not required (except for specific activities).

²² ComReg notes the current training requirements and competency requirements in the "Generic Method Statement EIRD Civils generic PRIVATE.pdf" provided to ComReg February 12, 2021.

requirement for supervision for works in respect of a very limited number of sites within a certain period of time in order that a new contractor company which has never performed work on Eircom's CEI infrastructure on behalf of Eircom or another Access Seeker, achieves full accreditation, would be reasonable. ComReg is of the view that Eircom's requirements with respect to accreditation including the accreditation processes and procedures should be available to Access Seekers in advance of accreditation taking place and must be included in the ARO documentation suite in accordance with Eircom's obligations of transparency under the WLA Decision Instrument.

52. There is no basis to Eircom's suggestion that ComReg's position on supervision is at odds with ComReg's and DECC's ongoing initiative to establish Electronic Communications Security Measures. Eircom already currently allows for Access Seekers, once accredited, to access its Chambers unsupervised. Such operators have the same physical access to Eircom's equipment, cables, Ducts and Sub-Ducts as an Access Seeker performing the installation of its Sub-Duct, fibre cables or equipment. ComReg does expect, and finds entirely appropriate and justified, that Eircom staff and third parties are subject to appropriate security screening in order to comply with Electronic Communications Security Measures if accessing Eircom Chambers or for other activities such as the installation of Sub-Ducts, fibre cables or equipment into Eircom CEI infrastructure.

Audits

53. Other means which Eircom may use to ensure that the integrity of its network is maintained at all times and sufficient and that adequate care is taken by Access Seekers in carrying out works associated with Duct Access, in particular in the form of Sub-Duct Self-Install, include audits of the work done by Access Seekers, provided that such audits are conducted at intervals that are not so frequent as to place an unnecessary burden on Access Seekers or impede their overall work. ComReg notes that Eircom already includes the possibility of audits, at no charge, in its existing offer of Access for Sub-Duct and Direct Duct Access²³ and it was also included in the documentation notified to ComReg for Sub-Duct Self-Install in December 2020 and May 2021. Again, insofar as new Access Seekers or contractors are concerned, full accreditation could be followed by more frequent auditing during an initial period in order that Eircom can be satisfied that quality standards are achieved and maintained.

²³ As described in Eircom document '*open eir Duct Access Product Description*' version 7.0, dated 01/11/2019.

54. ComReg is satisfied that the concerns expressed by Eircom at the poorer standard of workmanship that it has experienced with Access Seekers can be addressed, not only by supervision as suggested by Eircom, but also by accreditation and audit processes. In particular as explained above such processes may be flexed to allow for supervision, in the manner referred to in paragraph 51 above, for limited periods of time in order that Eircom can satisfy itself that a good workmanship standard will be applied, before granting full accreditation.
55. ComReg is of the view that Eircom's requirements with respect to audit including the audit processes and procedures should be available to Access Seekers in advance of audits taking place and must be included in the ARO documentation suite in accordance with Eircom's obligations of transparency under the WLA Decision Instrument and as per Eircom's current terms and conditions for Access to its CEI infrastructure, are not chargeable.

Supervision

56. ComReg accepts that supervision is available to Eircom, where necessary and appropriate and exercised in a manner that is appropriate to the circumstances.
57. ComReg in particular accepts that Eircom is entitled to require supervision, in a manner that would require that work cannot commence or continue in the absence of an Eircom supervisor, where the following risks arise from the specific work to be carried out on Eircom's CEI, in a way that is demonstrable and material, having regard to the works concerned:
 - a) The work may present a risk to national security, public safety or public health; or
 - b) The work presents, taking into account the nature of the work, a serious risk to the integrity of Eircom's network assessed having regard to the location of the CEI concerned in Eircom's network or the proximity of the CEI to certain network equipment that is critical to the functioning of Eircom's overall network.
58. For example, such supervision in exceptional circumstances may be appropriate in respect of work at Eircom's exchanges containing equipment functioning at the highest level of its network hierarchy, for example the locations of Eircom's tertiary exchanges for voice calls.
59. Were Eircom to provide for supervision in those limited exceptional circumstances, such circumstances must be explicitly set out in Eircom's product documentation and the process which will be followed set out in detail. ComReg notes that such

documentation would address the concerns of legal uncertainty raised by Eircom in its submission of 30 April 2021. Furthermore, where supervision for specific tasks is justified in those exceptional circumstances, then such supervision must be available in a timely manner so as not to impede effective Access, subject to Service Level Agreements that adequately incentivise Eircom to deliver an efficient level of performance by the use of effective service credits. This means, in accordance with Section 8.2(viii) of the WLA Decision Instrument, that Service Credits must be sufficient to allow Access Seekers recoup, at a minimum, the direct costs and any other reasonable loss of value that the Access Seekers incur as a result of the circumstances that had triggered the payment of Service Credits.

60. Where Eircom decides to impose supervision requirements in cases other than the exceptional circumstances described above, such requirements are only acceptable to the extent that they are not disproportionate to the lower level of risks involved with the tasks concerned and do not result in unjustifiable impediments to the work of Access Seekers or inefficiencies or unnecessary overheads for Access Seekers taking into account all other measures in place including accreditation and auditing. In this regard, in particular, supervision may not be subject to conditions whereby Access Seekers cannot commence or continue their work in the absence of an Eircom supervisor. This also applies to the actual operation of supervision so that in particular, the relevant timelines made available to Access Seekers by Eircom must be efficient and not create any artificial barriers to Access Seekers for the connection of customers.
61. It also means, having regard to the applicable EoI standard of non-discrimination, that the timelines by which Eircom processes orders for CEI Access and the earliest available start dates provided by Eircom as to when Access Seekers can commence their work must align, and not exceed, the timelines applicable to the on-site provisioning of orders from Eircom's downstream arm for products that requires Eircom self-supply of CEI Access. This includes that orders for installation of equipment by Access Seekers in Eircom's Chambers and for the installation by Access Seekers of drop cables to end-users and the available start dates of such activities have the same timelines as those applying for Eircom's downstream arm in respect of the commencement of connection activities for customers where a physical connection is required.
62. ComReg in this regard rejects Eircom's claim that restrictions on the use of supervision by Eircom remove from Eircom "*the ability to exercise its own judgement of the level of supervision of third parties (including its own contractors)*". ComReg never proposed, and does not impose, restrictions concerned as such with the level of supervision exercised by Eircom over its own contractors. Rather ComReg is

concerned to ensure that requirements imposed by Eircom in respect of the level of supervision of third parties does not affect the effectiveness of the Access provided, having regard to the position applied by Eircom in respect of its own staff or agents for the use of CEI. For instance, Eircom self-supplies Duct Access by installing Sub-Ducts but does not supervise all of its own subcontractors with respect to Sub-Duct installation/blockage activities; rather Eircom carries out quality checks on the work. In these circumstances, requirements for systematic supervision of Access Seekers in respect of all tasks and regardless of the circumstances pertaining to a specific Access and that require that an Eircom supervisor be present for work to commence or continue are unjustified.

63. Finally, in the presence of alternatives that are suitable to ensuring the protection of the integrity of Eircom's network, and having regard to the existing provisions governing obligations, liability, indemnity and insurances, linking a progressive reduction in supervision requirements discussion on changes to the liability clause(s) contained in the ARO is unacceptable.²⁴ This does not mean that no such discussions may take place: rather, putting in place appropriate and proportionate measures suitable to ensuring network integrity cannot be dependent on such negotiations.

3.4 Pricing

64. Eircom's notification of 14 May 2021 included a price notification, and a Pricing Statement of Compliance within the meaning of the WLA Decision Instrument which sought to address the concerns raised by ComReg on 15 January 2021, in respect of Eircom's intention to raise additional charges with respect to Duct Access, having regard to the price control put in place in ComReg Decision D03/16 and re-imposed in ComReg Decision D10/18 (the '**Price Control**'). The Price Control is an obligation of cost orientation in the form of a maximum annual price calculated using the Revised Copper Access Model ('**Revised CAM**').
65. Included in the maximum prices calculated using the Revised CAM are all process costs associated with providing access as well as remediation costs. In particular, maximum Duct Access prices calculated using the Revised CAM include an allowance for the costs of any repair/remediation work (including blockage clearances/re-instatement) which may be required to bring the Duct network to an NGA-ready standard (i.e. to allow it to be used by Access Seekers to deploy NGA

²⁴ Eircom referenced Clause 8.4 of its Master Licence Agreement for Duct Access.

networks), calculated on the basis that such costs are amortised over the duration of the 40-year asset life.

66. Prices notified in connection with Sub-Duct Self-Install on 14 May 2021 include the following:
 - a. A per metre of Duct annual rental charge; and
 - b. Upfront/one off charges.

Rental Charges for the Sub-Duct Product

67. ComReg notes that the notified per metre Duct annual rental price seemingly is below the maximum price allowed under the Price Control. However, ComReg also notes that the notified price is in connection with the Sub-Duct Self-Install product as notified, that is, excluding Duct remediation (in the form of locating and clearing Duct blockages – short of repairs) which Eircom believes, is to be carried out at the Access Seeker's expense.
68. For Eircom, the difference between Eircom's notified rental price and the maximum prices allowed under the Price Control serves to recognise Access Seekers' upfront/one off capital contribution to Eircom's Duct infrastructure and is calculated on the basis of valuing Eircom's Duct network at (Top-Down) historical costs by setting the duct reusable factor in the Revised CAM to 100% (instead of 95% used in the 2016 Pricing Decision).
69. Eircom's submission of 12 February 2021 argued that Access Seeker contributions to the cost of Duct remediation was not inconsistent with the cost orientation of Duct Access rental charges having regard to how they are derived and the "economic principles" underpinning the Price Control. Eircom pointed in particular to the fact that under the Revised CAM, the Duct access rental annuity is derived at 95% from the costs of the Duct using the net book value of previous investment in the Duct network, and at 5% from the costs of the Duct derived using a Current Cost Accounting ('CCA') model of costs. Eircom explained that it uses an allowance system to calculate Access Seeker contribution, whereby costs of refurbishing the Duct(s) exceeding 5% of the CCA value of the route to be accessed are charged to the Access Seeker. Had Duct Access rentals been based on an annuity that valued 100% of the assets at CCA, then, Eircom says, there would be no basis to charge an Access Seeker any contribution to remediation however extensive but, Eircom contends, this is not the case.

70. This however does not reflect how the Revised CAM operates, and how prices consistent with the Price Control can be derived. Duct remediation required for the purpose of installing Sub-Duct, whether for Eircom's self-supply purposes or for the purpose of allowing Access Seekers access to Eircom Sub-Duct or to self-install Sub-Duct is inherently part of Eircom's duct infrastructure, with the associated costs being part of Eircom's regulatory asset base. Under the Price Control, the costs of this infrastructure are recovered across all of the services which currently, or in future, use this infrastructure and with reference to the associated regulatory asset life of 40 years as set by ComReg D03/09,²⁵ which is intended to reflect their useful economic life. To charge Access Seekers with responsibility for Duct remediation costs – in addition to a monthly rental price – which would not be amortised over the relevant regulatory asset life of 40 years – is plainly inconsistent with the modelling of costs for Duct Access in the Revised CAM²⁶ and with Eircom's cost orientation and non-discrimination obligations. Hence, lowering the annual rental charge does not address this inconsistency.
71. Furthermore, for the purpose of the Revised CAM, ComReg determined that a level of Duct renewal was required to bring the Eircom Duct network to a standard to allow Access Seekers to access this infrastructure and compete for fibre services in downstream markets. Under the Revised CAM, Duct Access prices are accordingly set with reference to a combination of Eircom's existing Duct assets which could be reused to deploy NGA networks (valued based on their net book value from the Eircom's accounts) and new Duct assets (valued on a Bottom-up Long-run Average Incremental Cost Plus ('**LRAIC+**') basis), for those assets which could not be reused for NGA purposes.²⁷ This is consistent with the 2013 EC Recommendation²⁸ and the economic principles therein of ensuring efficient reuse of civil engineering assets, which are unlikely to be replicated, and promoting competition and investment.
72. In the Revised CAM, ComReg determined that a level of Duct renewal was required to bring the Duct infrastructure to an NGA-ready standard allowing Access Seekers using the infrastructure compete for fibre services in downstream markets. The level of Duct renewal capex required for an NGA-ready duct network is derived on the basis of a 5% Bottom-up LRAIC+ valuation and as an average over the entire Eircom

²⁵ ComReg Decision D03/09, Review of the regulatory asset lives of Eircom Limited, ComReg Document 09/65, 11 August 2009.

²⁶ Paragraph 5.30 of ComReg Decision D03/16.

²⁷ Paragraphs 4.161 and 4.162 of ComReg Decision D03/16.

²⁸ <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-consistent-non-discrimination-obligations-and-costing-methodologies>

Duct network used to provide these services. A Bottom-up LRAIC+ valuation is based on the current cost of deploying a new Duct network and would include the costs of trench excavation, laying Ducts, building chambers and reinstating all surfaces along the entire route length. Consequently, the 5% Bottom-up LRAIC+ valuation is the equivalent to replacing 5 metres of Duct related infrastructure along every 100 metres of track length.

73. Hence, the rationale relied on by Eircom in both its submissions of 12 February 2021 and 30 April 2021 to justify imposing excess charges for Duct remediation with reference to “economic principles” underpinning the regulation of CEI pricing is flawed.
74. Accordingly, any charges in connection with Duct remediation in addition to the annual rental charge under the Price Control may only be justified on the basis of evidence that the overall efficient costs to Eircom of Duct remediation exceed those provided for in the Price Control. The Revised CAM includes further business as usual investment each year, part of the Top Down valuation, as well as a significant allowance included in the installation costs for Sub Duct. To date, in its notification or otherwise, Eircom has provided no evidence (for example by reference to Eircom’s Rural FTTH and Ireland’s Fibre Network (**‘IFN’**) deployments) that the level of costs for Duct remediation included in the Revised CAM is insufficient to recover efficient costs incurred by Eircom.
75. Finally, the annual per metre Duct access rental charge notified on 14 May 2021 is a price for Sub-Duct Access, rather than for Duct Access, as defined under ComReg Decision D10/18. In particular, the notified price covers costs associated with Access to an Eircom Sub-Duct (in situ or newly installed by Eircom upon request). However, the Sub-Duct Self-Install product by definition does not include Access to a Sub-Duct. As such, all contributions in the Revised CAM in respect of the Sub-Duct itself – which includes the capitalised labour costs associated with installation of the Sub-Duct, materials and operating costs (including a contribution to Eircom’s corporate overheads) are to be excluded when deriving a cost-oriented price for Sub-Duct Self-Install from the Revised CAM.
76. ComReg noted in particular that the maximum Duct Access prices include an allowance for the costs of any repair/remediation work (including blockage clearances/re-instatement) which may be required to bring the Duct network to an NGA-ready standard, calculated on the basis that such costs are amortised over the duration of the 40-year asset life. As such, Eircom’s suggestion that an Access Seeker bears the costs of any duct remediation work is inconsistent with the premise of the Price Control, and the maximum prices allowed for Duct Access. It is also

inconsistent with the cost accounting treatment applied to similar costs incurred by Eircom as part of its own NGA deployments.

Upfront/One Off Charges

77. Eircom's notification of 14 May 2014 sets out the following upfront/one off charges, in connection with Sub-Duct Self-Install.
- a. Assess OAO Sub-Duct Self-Install Design Plan order – the costs of network engineering staff assessing the Access Seeker's Duct route plan which are not recovered from the Revised CAM rental prices – charge of €44.69 for routes up to 200m and €7.45 for each additional 50m
 - b. Site Visit (if required) – Where open eir and the Access Seeker agree that issues identified during the design assessment require a joint site visit then the network design engineer will attend at the agreed time and will bill the Access Seeker – charge of €156.40
 - c. Cancel Sub-Duct Self-Install Order – Where the Access Seeker decides, after submitting a Sub-Duct Self Install order to open eir, not to proceed – charge of €85.25
 - d. OAO Equipment in UUB Order - the costs of network engineering staff assessing and approving OAO equipment in UUBs – charge of €67.03
 - e. OAO Late Cancel Supervision Appointment Fee – where an Access Seeker cancels a scheduled supervision request less than one full working day before the scheduled visit – charge of €77.08
 - f. Cease Sub-Duct Self-Install Circuit ID Order – An Access Seeker removing its Sub-Duct from the open eir Duct and UUBs will be liable to a charge for the supervision that open eir will do to ensure that this activity does not give rise to damage to the CEI or other cables using that CEI. Charges of €211.98 for routes up to 200m and €38.54 for each additional 50m
 - g. Accreditation – proposed charge of €2,199 for the preparation and delivery of a two-day training course.
78. ComReg notes that the Price Control includes in the maximum price allowed a contribution to costs for activities undertaken by Eircom staff (engineering or other) in order handling, analysing and validating designs, including any justified supervision of Access Seeker interventions. As such, such one off/upfront charges are inconsistent with the Price Control.

Pricing of Multi-way sub-duct

79. ComReg's comments of 15 January 2021 also raised concerns in respect of Eircom's proposal to charge through its annual licence fees²⁹ multi-way Sub-Duct as a multiple of single Sub-Ducts, which did not appear to be consistent with the capacity-based approach to derive the price per metre under the Price Control.
80. Under the capacity-based approach, the Revised CAM derived the contribution to Duct costs as a cost per metre of Sub-Duct by dividing the total cost relating to the Duct infrastructure by the total length of underground cables or Sub-Ducts. No distinction is drawn based on the cross-sectional area of underground cables or Sub-Ducts (whether the Sub-Duct is a multi-way or single Sub-Duct).
81. ComReg notes that this matter has been addressed by Eircom in the notification received on 14 May 2021 and that the proposal to charge for multi-way Sub-Duct as a multiple of single Sub-Ducts has been removed from proposed ARO.³⁰ For the avoidance of doubt, ComReg remains of the view that the contribution to Duct costs from the Duct Access Self-Install product should be based on the per capacity-based approach, as set out in ComReg D03/16 and the Revised CAM, with no distinction drawn by Eircom with regards to the operator's self-installed Sub-Duct (multiway or single Sub-Duct).

²⁹ Eircom Draft ARO, 15 December 2020, Service Schedule 109, Paragraph (5), (iii) and Product Description, Section 3, page 10.

³⁰ Eircom Draft ARO, 14 May 2021 Price List, Schedule 112, and Product Description, Section 3, page 9.

4 Powers of ComReg

4.1 Basis of obligations in the WLA Decision Instrument

82. Under Regulation 8 of the Access Regulations, ComReg may, following the market analysis process set out in Regulation 27 of the Framework Regulations, designate an operator with SMP and impose obligations set out in Regulations 9 to 13 of the Access Regulations.

83. Regulation 8 of the Access Regulations applies to the imposition, amendment or withdrawal of obligations:

“(1) Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 9 to 13 as the Regulator considers appropriate.”

84. In ComReg Decision D10/18, ComReg found Eircom to have SMP in the Relevant WLA Market (as defined in D10/18) and imposed the suite of obligations provided for in the Access Regulations, including among others:

- (i) As recalled in paragraphs 6 and 10 above, obligations of access pursuant to Regulation 12(2) and Regulation 12(3) of the Access Regulations in Sections 7 and 8 of the WLA Decision Instrument;
- (ii) Obligations of transparency pursuant to Regulation 9 of the Access Regulations, including under Section 10.2 of the WLA Decision Instrument, an obligation to make publicly available and keep updated an Access Reference Offer (ARO), updates being subject to prior notification and publication as set out in Section 10.9, 10.10, 10.11, 10.12 and 10.13 of the WLA Decision Instrument; under Section 10.5 of the WLA Decision Instrument, Eircom is required to ensure that the ARO (i) includes a description of the offer of contract for Access broken down into components according to market needs; (ii) a description of associated terms and conditions including prices; and (iii) a description of the technical specifications, processes and network characteristics of the Access being offered.
- (iii) Obligations of price control pursuant to Regulation 13 of the Access Regulations including under Section 12.6 of the WLA Decision Instrument, a

price control in the form of a cost orientation obligation for CEI, prices being determined by reference to the Revised CAM.

4.2 Power to issue directions

85. Section 10 of the Communications Regulation Act 2002 (as amended) (the '**Communications Regulation Act**') confers on ComReg the following relevant functions:

“(1) (a) to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks,

...

(1) (d) to carry out investigations into matters relating to the supply of, and access to, electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks,

...”

86. Under Section 10(3), ComReg has all such powers as are necessary for or incidental to the performance of its functions under the Communications Regulation Act or any other Act.

87. Section 12 of the Communications Regulation Act confers on ComReg, amongst others, the following relevant objectives:

“(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,

(2) In relation to the objectives referred to in subsection (1) (a), the Commission shall take all reasonable measures which are aimed at achieving those objectives, including-

(a) in so far as the promotion of competition is concerned-

- (i) ensuring that users, including disabled 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,
- (iii) encouraging efficient investment in infrastructure and promoting innovation...

88. Regulation 18 of the Access Regulations provides ComReg with the power to issue directions as follows,

“The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an operator or undertaking to do or refrain from doing anything which the Regulator specifies in the direction.”

89. In addition, under Regulation 9(3) of the Access Regulations, ComReg may issue directions requiring an operator subject to an obligation of transparency *“to make changes to a reference offer to give effect to obligations imposed under these Regulations and to publish the reference offer with such changes”*. Regulation 9(4) further provides that ComReg may specify in a direction pursuant to Regulation 9(3) *“the precise information to be made available, the level of detail required and the manner of publication”*.

90. Finally, Regulation 13(4) of the Access Regulations provides that where an operator has an obligation under Regulation 13 regarding the cost orientation of its prices, ComReg *“may issue directions requiring an operator to provide full justification for its prices and may, where appropriate, require prices to be adjusted.”*

91. Having regard to its powers as set out above, ComReg has decided, for the reasons set out in Section 3, that it is appropriate and proportionate at this time to issue a set of directions to Eircom under Regulations 9(3), 10(4), 13(4) and 18 of the Access Regulations. As set out in Section 3, prior to making this Direction, ComReg has taken into account Eircom’s comments, including Eircom’s comments that prior public consultation and notification to the European Commission are required on the basis, in particular, that the Direction imposes new legal obligations on Eircom. As set out in ComReg’s letter of 6 May 2021, however, ComReg is satisfied that the Direction is not a measure which falls within the scope of Regulation 12 and Regulation 13 of the Framework Regulations. The Direction does no more than specifying further the requirements that Eircom must comply with when meeting its obligation to provide Duct Access under ComReg Decision D10/18, and the

obligation on Eircom to provide Duct Access is an obligation which has been consulted upon and notified to the European Commission.

92. The Requirements to be the subject of directions are discussed further in Section 5 below. The Direction is set out in Annex 1.

5 Requirements

5.1 Scope of Direction

93. In light of ComReg's concerns as set out in Section 3 above, in order to ensure that the products available to Access Seekers for accessing Eircom's CEI including Eircom's Duct network are effective and fit-for-purpose, it is necessary and appropriate to further specify the requirements to be complied with relating to Eircom's obligation of Access as set out in Section 7.2(xiii) of the WLA Decision Instrument and Eircom's obligation to provide Access in a fair, reasonable and timely manner as set out in Section 8.1 of the WLA Decision Instrument, further to Regulation 18 of the Access Regulations.
94. Furthermore, for the reasons set out more particularly in Section 3.4 above, Eircom's approach to pricing of Sub-Duct Self-Install, and the resultant prices for Sub-Duct Self-Install notified to ComReg on 14 May 2021, are not consistent with the applicable Price Control. Having regard to those concerns, it is necessary to direct Eircom to re-notify proposed prices for Sub-Duct Self-Install and in accordance with Regulation 13(4) of the Access Regulations, direct that Eircom provides full justification of the derivation of the prices by reference to the Revised CAM, having regard to ComReg's comments in Section 3.4.
95. In specifying these requirements, considered in further detail below, ComReg has taken full account of Eircom's representations of 30 April 2021 and Eircom's notification of the Sub-Duct Self-Install product documentation on 14 May 2021.

5.2 Specification of requirements for Access to CEI

96. In order to ensure that Access Seekers may avail of a Duct Access Self-Install product in a fair, reasonable, and timely manner, it is necessary to issue a Direction to Eircom in order to ensure that the Sub-Duct Self-Install product is made available without any further delay and is fit for purpose, and in particular includes no unfair or unreasonable restrictions notably in respect of supervision.
97. As explained in detail in Section 3, ComReg's concerns in respect of supervision requirements apply in exactly the same way in the case of Sub-Duct Self-Install (as notified in December 2020) as for other existing forms of Access to CEI involving Ducts. ComReg does not accept in this regard Eircom's submission of 30 April 2021 that ComReg has not provided any justification for the application of the Direction beyond Sub-Duct Self-Install to Access to CEI more generally.

98. In further specifying the requirements to be complied with by Eircom relating to Eircom's obligation to provide Access to CEI, ComReg has taken into account the proposals made by Eircom in its submission "*to facilitate the timely launch of the Sub-Duct Self-Install product*", namely:
- “● *open eir retains the right to supervise all activities on its network (as it currently does in relation to its own activities, and activities of any third party contractor*
 - *There will be no direct cost to the Access Seeker*
 - *In the event that the open eir supervision resource does not attend at the scheduled time an Access Seeker may proceed with their planned works in accordance with the agreed method statements and in line with their whereabouts notification*”.
99. While ComReg believes as set out in Section 3 that there are alternative, less burdensome, requirements to supervision which allow Eircom to maintain network integrity, ComReg does not object to supervision requirements which are fully justified and proportionate to the risks arising and applied in such a manner that they do not result in unjustifiable impediments to the work of Access Seekers or inefficiencies or unnecessary overheads for Access Seekers and ComReg has reflected Eircom's proposals in its Direction, as explained in further detail below.
100. While Eircom's proposals were limited to supervision requirements in the context of Sub-Duct Self-Install, Eircom also notes in its submission of 30 April 2021 that for Eircom, “[t]he launch of the Sub-Duct Self-Install product represents a significant change in practice whereby Access Seekers staff and/or sub-contractors may work extensively in the open eir duct network. It is only right that Eircom should be concerned that increased levels of network disturbance may impact negatively on network integrity. Supervision ensures that works undertaken by Access Seekers are to a good standard of workmanship directly mitigating the risk to network integrity.” ComReg does not see in this context that there could be any basis for maintaining supervision requirements for Access to CEI involving access to Eircom's Ducts that go beyond what Eircom accepts is sufficient for the purpose of Sub-Duct Self-Install which Eircom perceives involves a greater risk to network integrity.
101. It is accordingly appropriate to extend the scope of the direction to all supervision requirements affecting Access to CEI.

Sub-Duct Self-Install (Duct Access)

Provision of Sub-Duct Self-Install

102. As set out in Section 2 above, Sub-Duct Self-Install is a product which Eircom notified initially on 15 December 2020 on foot of an Access request and the option

as part of Duct Access for an Access Seeker to install itself its Sub-Ducts in Eircom's Ducts is clearly contemplated in ComReg Decision D10/18. In these circumstances, ComReg is of the view that it is imperative to ensure that Sub-Duct Self-Install is made available to Access Seekers as soon as possible. ComReg is of the view that requiring Eircom to ensure that Sub-Duct Self-Install be available from 13 August 2021 is reasonable, allowing Eircom sufficient time to make the further amendments to the ARO that are required on foot of this Direction and publish same one month in advance, on or before 15 July 2021, following notification to ComReg on 1 July 2021.

Unblocking of Ducts

103. Insofar as unblocking is concerned, for the reasons set out in Section 3, ComReg accepts that it is appropriate and more efficient that Access Seekers availing of Duct Access unblock Ducts, as proposed by Eircom. This is subject, however, to the condition that the reasonable costs of such activities are borne by Eircom and Eircom shall set out in the ARO detail of the process adopted by Eircom in this respect, including as the case may be the steps to be followed by Access Seekers to obtain the reimbursement of reasonable costs incurred.
104. By contrast, where an Access Seeker is not able to lay Sub-Ducts because a Duct requires remediation, repairs must be undertaken by Eircom, and in a fair, timely and non-discriminatory manner.
105. ComReg is of the view, accordingly, that it is necessary and appropriate to require that the product documentation in the ARO relating to Sub-Duct Self-Install is amended to the extent required in order to address in clear and sufficient detail the following:
 - a. Any requirement for Unblocking of Eircom Ducts to be performed by Access Seekers shall exclude remediation of Ducts by way of repairs, and such activities shall be performed by Eircom.
 - b. Eircom shall cover the reasonable costs of unblocking activities performed by Access Seekers.
106. For the avoidance of doubt, no provision may be included in the ARO or ARO Price List the effect of which would be directly or indirectly to impose charges on Access Seekers for unblocking, repair or reinstatement of Eircom Ducts.
107. Finally, ComReg reminds Eircom that in accordance with Section 8.2(viii) of the WLA Decision Instrument, repair of Duct must be accompanied by Service Level

Agreements that adequately incentivise Eircom to deliver an efficient level of performance by the use of effective Service Credits with respect to Duct repair. In circumstances upon which Service Credits must be paid by Eircom to Access Seekers, these must allow Access Seekers to recoup, at a minimum, the direct costs and any other reasonable loss of value that the Undertakings incur as a result of the circumstances that had triggered the payment of Service Credits.

Supervision (Duct Access, Direct Duct Access, Sub-Duct Access, including Access to Chambers)

108. Duct Access (including Sub-Duct Self-Install as notified in December 2020 and on 14 May 2021), Direct Duct Access and Sub-Duct Access products offered by Eircom that include Access to Chambers all have attached to them a requirement of supervision in respect of the following activities:

Duct Access (Sub-Duct Self-Install)

- a) Sub-duct installation in Eircom Duct by Access Seekers or their contractors.
- b) Direct Duct Access, where fibre cables are installed in Duct without the use of a Sub-duct, including installation of single stranded drop cable³¹.
- c) Core drill break-in to Eircom underground Chambers.
- d) Dig down by Access Seekers to buried Eircom underground Chambers.
- e) Any civils work carried out on Eircom plant by Access Seekers in connection with providing their Sub-duct, including unblocking of Ducts.

Sub-Duct Access and Direct Duct Access³²

- a) Core drill break-in to Eircom underground Chambers.
- b) Dig down by Access Seekers to buried Eircom underground Chambers.
- c) Fleeting³³ of Access Seekers' cable(s).

³¹ The installation without sub-duct of short runs of singled stranded drop cable in Eircom Duct between the Access Seeker's final distribution point and the boundary of the customer's premises.

³² These are supervised activities referred to in Eircom's existing offer for Access to Sub-Duct and Direct Duct Access as documented in the Eircom document '*open eir Duct Access Product Description*' version 7.0, dated 01/11/2019.

³³ Fleeting is a process where fibre cable can be installed from a point in the network where fibre can be blown in 2 directions. This can give Access Seekers the longest possible run of fibre, without fibres needing to be joined together via a process known as splicing.

109. As set out in Section 3, ComReg does not agree that the requirements for supervision for Eircom's offer of Access to CEI have been justified in respect of the above activities. Unjustified requirements on Access Seekers result in inefficient processes, unnecessary increases in costs and operational overhead and in addition impose unreasonable restrictions on Access to Eircom's CEI. Having regard to Eircom's practice to date insofar as supervision is concerned, ComReg considers that it is appropriate and necessary to clarify that Eircom may not subject Duct Access, Direct Duct Access and Sub-Duct Access, including Access to Chambers to requirements for supervision (as defined above or otherwise), where such requirements could impede the work of Access Seekers or result in inefficiencies or unnecessary overheads for Access Seekers. In addition, any processes relating to supervision must be carried out in a manner that is in alignment with Eircom's EoI obligations.
110. For the avoidance of doubt, Eircom may put in place appropriate and proportionate measures aimed at ensuring the protection of its network. Eircom may, in particular, subject the carrying out of works for Duct Access, Direct Duct Access and Sub-Duct Access, including Access to Chambers, to prior accreditation and to audits, in which case accreditation requirements and process, and audit conditions and processes, should be set out clearly in writing as part of the relevant product documentation. Eircom may also impose appropriate and proportionate supervision requirements. Appropriate and proportionate requirements means that unless supervision requirements are limited to circumstances where there are serious risks to the integrity of Eircom's network arising from granting Access, work by Access Seekers can continue and commence in the absence of an Eircom supervisor. Any supervision requirements shall be clearly set out in all relevant product documentation relating to Duct Access, Direct Duct Access and Sub-Duct Access, including Access to Chambers. No direct or indirect charges may be raised relating to supervision from its existing offer of Access to CEI and from its offer of Access for Sub-Duct Self-Install.
111. In order to avoid any uncertainty, it is appropriate to direct Eircom to amend the ARO as defined in Section 2.1 of the WLA Decision Instrument (including the ARO itself, Product Descriptions, Industry Process Manuals, Service Level Agreements, Technical Manuals and Master Licence Agreements as appropriate), as provided for in Regulation 9(3) and (4) of the Access Regulations, in order to reflect the requirements set out above in respect of the offer of Sub-Duct Self Install and insofar as supervision is concerned, Duct Access more generally as well as Direct Duct Access and Sub-Duct Access, including Chambers.

112. ComReg notes that any such amendments, and further amendments where for example, accreditation, audits requirements or supervision activities by Eircom are modified or added to, are subject to the obligations of transparency under Section 10 of the WLA Decision Instrument.

5.3 CEI Access Pricing

113. The provision of Access to CEI is subject to an obligation of cost-orientation as set out in Section 12.2 and Section 12.6 of the WLA Decision Instrument. Under Section 12.6, prices for CEI Access may not exceed the cost-oriented prices derived from the Revised CAM. For the reasons set out in Section 3.4 above, the prices notified to ComReg on 14 May 2021 in respect of Sub-Duct Self-Install are not consistent with the applicable Price Control.

114. It is accordingly necessary to require Eircom to re-notify prices for Sub-Duct Self-Install that are consistent with the Price Control.

115. In particular, Eircom shall ensure that notified prices reflect the fact that the maximum annual per metre Duct rental price derived from the Revised CAM is the maximum price permissible for the recovery of all costs associated with Eircom's Duct network, so that:

- a. No additional upfront/one-off charges additional to the annual per metre rental charge for Duct Access may be imposed by Eircom, including any charges related to supervision or other process charges;
- b. No excess charges may be raised in relation to Duct remediation;
- c. The costs of Duct remediation (repair and unblocking) are to be borne by Eircom.

116. In deriving the price for Duct Access from the Revised CAM, Eircom shall also ensure that the price is cost-oriented and accordingly does not include any costs attributable to the costs associated with Sub-Ducts.

117. Furthermore, Eircom shall ensure that notified prices for multi-way subduct installation are calculated in accordance with the Revised CAM, and not as multiple of single ducts, as Eircom had suggested in its comments of 12 February 2021.

118. In order that ComReg may assess Eircom's proposed prices under the Price Control, it is also necessary and appropriate to require Eircom to accompany notified prices with full justification of their cost orientation in accordance with Regulation 13(4) of the Access Regulations setting out details of their derivation under the Revised

CAM, having regard to the principles underpinning the Revised CAM recalled in Section 3.4 above.

119. ComReg reserves the right upon review of notified prices and their justification, to issue a further direction requiring Eircom to adjust its prices, where appropriate.

6 Conclusion

120. Eircom is required under ComReg Decision D10/18 to provide Access to CEI, including among other forms, by way of Duct Access, whereby Access is provided to Eircom's Ducts for the installation of Access Seekers' Sub-Ducts. In the absence of such a product in the ARO and following a request from industry, Eircom has developed the Sub-Duct Self-Install product, notified initially to ComReg in December 2020 and following the concerns expressed by ComReg on 15 January 2021 and subsequently by way of the draft Direction shared with Eircom on 1 April 2021, re-notified on 14 May 2021.
121. Having considered Eircom's comments made on 12 February 2021 and 30 April 2021, and reviewed the suite of product documentation setting out amendments to the ARO and ARO Price List notified by Eircom on 14 May 2021, for the reasons set out above, ComReg has found that its concerns in respect of the provision by Eircom of Access to CEI have not been fully addressed to its satisfaction by the amendments notified on 14 May 2021 so that it is necessary to issue to Eircom the Direction set out in Appendix 1.
122. ComReg considers that the issuing of this Direction on Eircom is both necessary and proportionate, taking full account of Eircom's comments and proposals, to remove unnecessary restrictions that would adversely impact competition and ultimately End Users.

Appendix: 1 Direction

DIRECTION TO EIRCOM LIMITED IN RELATION TO ACCESS TO CEI

1 DEFINITIONS

- 1.1 For the purpose of this Direction, the definition of capitalised terms set out in the Decision Instrument at Appendix 20 of ComReg Decision D10/18 (ComReg 18/94) (**'the WLA Decision Instrument'**) shall apply.

2 ACCESS TO CEI

- 2.1 Pursuant to Regulation 18 of the Access Regulations, for the purpose of further specifying the requirements to be complied with relating to Eircom's obligation imposed by Section 7.1 and Section 7.2 (xiii) of the WLA Decision Instrument, and Eircom's obligation imposed by Section 8.1 and Section 8.2 of the WLA Decision Instrument, Eircom is hereby directed as follows:

Sub-Duct Self-Install

- 2.1.1 In addition to current products and services allowing for Duct Access, Eircom shall make available from 13 August 2021 a Sub-Duct Self-Install Duct Access product allowing Access Seekers to install by themselves Sub-Ducts into Eircom's Ducts.
- 2.1.2 In providing Sub-Duct Self-Install Duct Access, Eircom may leave unblocking of Ducts to Access Seekers save that Eircom shall, upon request from an Access Seeker, undertake repair of Ducts where repair is required to allow an Access Seeker to install its Sub-Duct in a Duct.
- 2.1.3 For the purpose of Section 2.1.2 above, and further to Section 8.1 of the WLA Decision Instrument, Eircom shall ensure that the repair of Eircom Ducts required for the purpose of Sub-Duct Self-Install Duct Access is done in a fair, reasonable and timely manner, and repair for the purpose of this Section 2.1.3 and Section 2.1.2, include the following:
- (i) Activities required to remediate a Duct's structure where damage to the Duct's structure has the effect of preventing an Access Seeker installing its Sub-Duct into the Eircom Duct;
 - (ii) Civil works including in particular Duct excavation and opening activities, required to clear a blockage that cannot be cleared otherwise where that blockage is preventing an Access Seeker from installing its Sub-Duct into the Eircom Duct.

- 2.1.4 Further to Section 8.2 of the WLA Decision Instrument, Eircom shall ensure that the Service Level Agreement concluded in respect of Sub-Duct Self-Install Duct Access makes provision for Service Credits with respect to Duct repair that adequately incentivise Eircom to deliver an efficient level of performance and allow Access Seekers to recoup, at a minimum, the direct costs and any other reasonable loss of value incurred as a result of the circumstances that had triggered the payment of Service Credits.
- 2.1.5 Eircom shall ensure that clear procedures are in place for the payment by Eircom of the reasonable costs associated with unblocking activities of Eircom Ducts performed by an Access Seeker.

Requirements related to network integrity including supervision

- 2.1.6 Any requirements in respect of Access to CEI imposed by Eircom on Access Seekers with the view to ensuring that the integrity of the Eircom network is adequately protected, such as accreditation, audits and supervision requirements shall be reasonable and proportionate having regard to the task concerned and the circumstances pertaining to the Access.
- 2.1.7 In particular:
- a) insofar as accreditation requirements are concerned, any accreditation requirements imposed by Eircom in respect of Access to CEI shall be no more onerous than the requirements applied by Eircom in respect of its own staff or agents with respect to the use of CEI;
 - b) insofar as supervision requirements are concerned for any form of Access to CEI, Eircom shall not prevent Access Seekers from commencing or continuing work in the absence of an Eircom supervisor, including without limitation in respect of the following:
 - (i) Sub-Duct installation in Eircom Duct by Access Seekers or their contractors.
 - (ii) Direct Duct Access, where fibre cables are installed in Duct without the use of a Sub-duct, including installation of single stranded drop cable.
 - (iii) Core drill break-in to Eircom underground Chambers.
 - (iv) Dig down by Access Seekers to buried Eircom underground Chambers.
 - (v) Any civils work carried out on Eircom plant by an Access Seekers in connection with providing their Sub-duct, including unblocking of Ducts.

(vi) Fleeting of Access Seekers' cable(s).

- c) Eircom shall ensure that any supervision is effected in a manner that is fair, reasonable and timely.

2.1.8 The limitations set out in Section 2.1.7(b) do not apply in respect of the following tasks:

- a) The task involves work that presents a risk to national security, public safety or public health; or
- b) The task involves work that presents, taking into account the nature of the work, a serious risk to the integrity of Eircom's network due to the location of the CEI concerned in Eircom's network or the proximity of the CEI to network equipment that is critical to the functioning of Eircom's overall network,

2.1.9 Where Eircom avails of the exception provided for under Section 2.1.8 Eircom shall ensure that further to Section 8.2 of the WLA Decision Instrument a Service Level Agreement is concluded which makes provision for Service Credits that adequately incentivise Eircom to deliver an efficient level of performance in respect of supervised Access and allow Access Seekers to recoup, at a minimum, the direct costs and any other reasonable loss of value incurred as a result of the circumstances that had triggered the payment of Service Credits.

2.2 For the avoidance of doubt, Access required under Section 7.2 (xiii) of the WLA Decision Instrument includes Duct Access (including without limitation Sub-Duct Self-Install), Direct Duct Access, Sub-Duct Access, and Access to Ingress and Egress points, CEI Connection Services and Chambers, when utilised for the purpose of Duct Access, Direct Duct Access and Sub-Duct Access.

3 CHANGES TO EIRCOM'S ACCESS REFERENCE OFFER

3.1 Pursuant to Regulation 9(3) and Regulation 9(4) of the Access Regulations, having regard to Eircom's obligations as set out in Section 10.2 and 10.5 of the WLA Decision Instrument, Eircom is hereby directed to make changes to its ARO for the purpose of giving effect to the requirements specified further in Section 2 above, and to publish the ARO with such changes on or before 15 July 2021, unless otherwise agreed with ComReg or at ComReg's discretion.

3.2 In particular, Eircom shall make the following changes:

3.2.1 Amend the product description and terms and conditions for CEI to reflect the requirements set out in Section 2 above;

3.2.2 Insofar as Sub-Duct Self-Install Duct Access is concerned, set out in Eircom's Industry Process Manuals, Product Descriptions and the ARO Price List as

appropriate details of the manner in which Eircom will cover the reasonable costs incurred by Access Seekers in relation to unblocking of Ducts;

3.2.3 Amend existing supervision requirements in respect of Access to CEI in accordance with Section 2 including, were Eircom to avail of the discretion afforded by Section 2.1.8, details of the specific circumstances justifying enhanced supervision;

3.2.4 Remove any direct or indirect charges for supervision;

3.2.5 Describe in sufficient detail the requirements and applicable processes with respect to accreditation and audit.

3.2.6 Further to Section 10.10 and Section 10.12 of the WLA Decision Instrument, ComReg hereby determines that Eircom shall notify ComReg of the changes to the ARO made for the purpose of this Direction no later than 1 July 2021, unless otherwise agreed with ComReg or at ComReg's discretion.

3.3 ComReg may, where required and as appropriate, issue further directions for the purpose of ensuring that the ARO reflects the obligations of Eircom as further specified in Section 2.

4 NOTIFICATION AND JUSTIFICATION OF PRICES

4.1 Having regard to:

- (i) Eircom's obligation to ensure the cost-orientation of prices for Access to CEI under Section 12.2 of the WLA Decision Instrument,
- (ii) Eircom's obligation under Section 12.6 of the WLA Decision Instrument to ensure that the rental charge for CEI is no more than the price equal to the costs of providing CEI calculated using the Revised Copper Access Model,
- (iii) The ARO Price List and Pricing Statement of Compliance notified to ComReg on 14 May 2021,

Eircom is hereby directed pursuant to Section 10.12, Section 10.13 of the WLA Decision Instrument and Regulation 13(4) of the Access Regulations to re-notify within the timelines specified in Section 3.2.6 above, the prices to apply to Sub-Duct Self-Install, and provide a Pricing Statement of Compliance that the notified prices are derived from the Revised CAM and fully justified by reference to the principles set out in Section 4.2 below.

4.2 For the purpose of Section 4.1 above, the price to apply to Sub-Duct Self-Install shall be justified by reference to the costs and principles governing the Revised Copper Access Model as follows:

- (i) The price control consists of a maximum price equal to the costs incurred by an efficient operator providing CEI calculated using the Revised Copper Access Model;
 - (ii) Under the Revised Copper Access Model, the costs of Eircom's duct network are recovered across all of the services which currently, or in future, use this infrastructure and with reference to the associated regulatory asset life of 40 years as set by ComReg Decision D03/09;
 - (iii) The price calculated using the Revised Copper Access Model includes an allowance for the costs, amortised over 40 years, of any remediation work (including blockage clearances/re-instatement) which may be required to bring the Duct network to an NGA-ready standard, and all such costs are to be recovered by the annual per metre Duct rental price;
 - (iv) The price calculated using the Revised Copper Access Model covers process costs such as costs associated with order handling, analysis and validation of designs, including any justified supervision of Access Seeker interventions;
 - (v) No direct or indirect charges for supervision are permissible under the Price Control;
 - (vi) Costs that are not incurred in respect of a specific form of Access such as Sub-Duct costs in the case of Sub-Duct Self-Install may not be included in the price for that form of Access;
 - (vii) Costs of Sub-Ducts are determined using a capacity-based approach, whereby no distinction is drawn based on the cross-sectional area of underground cables or Sub-Ducts (whether the Sub-Duct is a multi-way or single Sub-Duct).
- 4.3 ComReg, on receipt and review of Eircom's notification pursuant to Section 4.1 above, and further to Regulation 13(4) of the Access Regulations, may issue a further direction to Eircom requiring the price for Sub-Duct Self-Install to be adjusted where necessary to ensure its cost-orientation.

5 STATUTORY POWERS, OPERATION AND PUBLICATION

5.1 This Direction is issued by ComReg:

- (i) Pursuant to and having regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended);
- (ii) Pursuant to Regulation 18 of the Access Regulations;
- (iii) Pursuant to Regulation 9(3) and Regulation 9(4) of the Access Regulations;

- (iv) Pursuant to Regulation 13(4) of the Access Regulations;
 - (v) Having regard to ComReg Decision D10/18 and the WLA Decision Instrument including in particular Section 7.1, Section 7.2 (xiii), Section 8.1, Section 8.2, Section 9(5), Section 10(2), Section 10(5), Section 10(10), Section 10(12), Section 10(13), Section 12(2) and Section 12(6);
 - (vi) For the reasons set out in ComReg 21/60.
 - (vii) A draft of the Direction having been provided to Eircom on 1 April 2021 and the opportunity given to Eircom to provide comments, and comments having been received from Eircom on 30 April 2021.
- 5.2 This Direction is addressed to Eircom Limited, of 2022 Bianconi Avenue, Citywest Business Campus, Dublin 24, D24 HX03 and shall be effective immediately on notification to Eircom. It shall remain in force until further notice.
- 5.3 ComReg may at its entire discretion publish an Information Notice in relation to this Direction and may also at its entire discretion publish this Document ComReg 21/60 on its website having afforded Eircom the opportunity to identify confidential information in accordance with ComReg's Confidentiality Guidelines.

**SIGNED FOR AND ON BEHALF OF THE COMMISSION FOR COMMUNICATIONS
REGULATION**

**ROBERT MOURIK
COMMISSIONER**

8 June 2021