



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Draft Determination of a dispute between NBI and Eircom

Concerning NBI's request for Duct Access.

Draft Determination

Reference: 22/80

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Chapter 1

Executive Summary

- 1.1 On 2 August 2022, NBI Infrastructure DAC (**'NBI'**) submitted a request to the Commission for Communications Regulation (**'ComReg'**) for resolution of a dispute with Eircom Limited (**'Eircom'**) under Regulation 31 of the Framework Regulations¹. The dispute arises in the context of a request made by NBI to Eircom for Duct Access².
- 1.2 Regulation 31(2) of the Framework Regulations requires that within four months from the date on which the dispute was notified, ComReg make a Determination aimed at ensuring compliance with obligations, including in particular obligations imposed under the Specific Regulations³ to resolve the dispute.
- 1.3 ComReg accepted the dispute on 26 August 2022 and set out the scope as follows:

Whether or not the request for access described in the dispute and the documents submitted by NBI, constitute a valid access request by NBI to Eircom pursuant to the Wholesale Local Access Market Decision Instrument, ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018 and if so, the steps that should be followed by the parties to progress the request, and any applicable timelines.
- 1.4 Based on the parties' submissions⁴, in or around 13 August 2021, NBI submitted to Eircom a request for the development of an appropriate duct blockage clearance and repair process when availing of Duct Access, a form of Access which Eircom is required to provide as part of its obligations of Access in the Wholesale Local Access Market as set in the **WLA Decision Instrument**. NBI's initial Statement of Requirements was followed by an 'Amended Statement of Requirements' submitted by NBI to Eircom on 26 January 2022 and, following engagement with Eircom, on 8 April 2022, a 'RAP Request' (that is, a Regulatory

¹ Framework Regulations (S.I. No. 333 of 2011), Authorisation Regulations (S.I. No. 335 of 2011), Access Regulations (S.I. No. 334 of 2011), Universal Service Regulations (S.I. No. 337 of 2011) and Privacy and Electronic Communications Regulations (S.I. No. 336 of 2011).

² As defined in section 2.1 of the Wholesale Local Access Market Decision Instrument at Appendix 20 of ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018 (the **'WLA Decision Instrument'**), "Duct" means an 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; "Duct Access" means Access to Eircom's Duct.

³ 'Specific Regulations' shall have the same meaning as under Regulation 2 of the Framework Regulations (see Annex 2 of this document).

⁴ At Annex 3 of this document.

Access Product Request) for a change to Eircom's existing Sub-Duct Self-Install ('SDSI')⁵ product.

- 1.5 On 28 April 2022, NBI was informed by Eircom that the Duct Access requested by NBI represented, in Eircom's view, a request for Access to a new Duct Access product. As the RAP Request sought a change to an existing Duct Access product, rather than a request for Access to a new Duct Access product, Eircom indicated that the request would not be progressed further.
- 1.6 Contrary to Eircom's view, NBI maintains that the Duct Access requested is a change to an existing Duct Access product and that the request should be progressed.
- 1.7 Having considered the submissions of the parties, ComReg proposes to reach the following conclusions as set out in the draft Determination Notice at Annex 1:
 - (a) NBI has made a valid Access request for a Duct Access product on the basis that it is a written request for a product that falls within the scope of Eircom's obligations in the WLA Market under the WLA Decision Instrument.
 - (b) Eircom is required under the WLA Decision Instrument to determine whether NBI's request is a reasonable request for Access, in accordance with the process set out in Section 8.10 of the WLA Decision Instrument.
 - (c) In light of the engagement to date between Eircom and NBI and the information furnished to Eircom in respect of NBI's requirements, and for the purpose of resolving the dispute, the steps set out in Section 8.10(i) to Section 8.10(iii) of the WLA Decision Instrument are hereby deemed to have been completed.
 - (d) As the steps set out in Section 8.10(i) to Section 8.10(iii) are deemed to have been completed, Eircom is required to complete the step at Section 8.10(iv) within 55 working days of the Determination.
 - (e) For the avoidance of doubt, Eircom is not prevented by this Determination from seeking further information from NBI as it deems necessary for the purposes of completing its assessment.
- 1.8 The parties to the dispute and other interested parties will have 10 working days following publication to submit comments on the draft Determination.

⁵ 'Sub-Duct Self Install', 'SDSI' or the 'SDSI product is a type of Duct Access offered by Eircom pursuant to the obligations in the WLA Decision Instrument.

1.9 The remainder of this document (**‘the draft Determination’**) is structured as follows:

- (a) Chapter 2 – Background to the dispute
- (b) Chapter 3 – Regulatory Framework
- (c) Chapter 4 – Submissions of the parties
- (d) Chapter 5 – Analysis
- (e) Chapter 6 – Conclusions
- (f) Chapter 7 – Next Steps

Chapter 2

Background to the dispute

2.1 The parties to the dispute

- 2.1 Eircom is a fixed and mobile telecommunications company that provides retail and wholesale Electronic Communications Services (**'ECS'**) in Ireland. Eircom has been designated as having Significant Market Power (**'SMP'**) on a number of wholesale markets, including in particular by ComReg Decision D10/18 (ComReg Document 18/94) in respect of the market for Wholesale Local Access (WLA) provided at a Fixed Location and the market for Wholesale Central Access (WCA) provided at a Fixed Location⁶.
- 2.2 NBI is authorised pursuant to Regulation 4(1) of the Authorisation Regulations⁷ as a provider of Electronic Communications Networks (ECN) and ECS in Ireland. In November 2019, NBI signed a Project Agreement⁸ with the Minister for the Environment, Climate and Communications committing it to roll out a full-fibre network to those areas of the country that had been identified as unserved by commercial broadband providers under the National Broadband Plan.

2.2 Scope of the dispute

- 2.3 In its submission of 2 August 2022, NBI stated that the dispute, as submitted, related to an alleged denial by Eircom of NBI's request for the development of an appropriate duct blockage clearance and repair process as a change to the existing SDSI product under which NBI would be able to undertake all such works when using the SDSI product under a Major Infrastructure Programme (**'MIP'**). NBI defined the scope of the submitted dispute as:

“Eircom’s refusal to (a) facilitate NBI’s access to the SDSI product, whether under the MIP or otherwise and (b) develop the requested duct blockage

⁶ The WLA and WCA markets correspond to Markets 3(a) and 3(b) respectively of the European Commission's 2014 Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁷ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No 335/2011).

⁸ <https://www.gov.ie/en/publication/16717-national-broadband-plan-contract/>

clearance and repair process for an operator using the SDSI product, whether under the MIP or otherwise.”

- 2.4 As set out at Section 3.1, while ComReg’s jurisdiction under Regulation 31 of the Framework Regulations must be exercised with the view to ensuring compliance with existing obligations, it is grounded in resolving a dispute between Undertakings. In performing its function under Regulation 31 of the Framework Regulations, ComReg accordingly must be first satisfied that there is a dispute either: between Undertakings providing ECN or ECS in the State. in connection with existing regulatory obligations or; between such Undertakings and other Undertakings benefiting from obligations of access or interconnection.
- 2.5 ComReg, having reviewed NBI’s submission, and having sought clarifications from NBI on the dispute, is satisfied that NBI has raised a dispute for the purpose of Regulation 31 of the Framework Regulations between two Undertakings providing ECN or services in the State.
- 2.6 ComReg informed the parties on 26 August 2022 that it had defined the scope of the dispute as:
- Whether or not the request for access described in the dispute and the documents submitted by NBI with the dispute, constitute a valid access request by NBI to Eircom pursuant to the Wholesale Local Access Market Decision Instrument, ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018 and if so, the steps that should be followed by the parties to progress the request, and any applicable timelines.
- 2.7 The existing regulatory obligations relevant to this dispute are set out at Section 3.2 of this draft Determination.

Chapter 3

Regulatory Framework

- 3.1 This chapter provides a brief overview of the legal framework for managing disputes and for the regulation of Access by Undertakings⁹ providing ECN or ECS in the State, in connection with existing obligations under the Access Regulations.¹⁰ This overview is limited to the scope of those regulations specifically applicable or related to the circumstances of this dispute.

3.1 Regulation 31 of the Framework Regulations

- 3.2 Regulation 31 of the Framework Regulations provides for ComReg’s statutory role in resolving disputes between undertakings in connection with existing obligations under the Specific Regulations. ComReg considered the circumstances presented by the parties in their initial submissions and is satisfied that these meet the requirements set out at Regulation 31(1) of the Framework Regulations.
- 3.3 As set out at Regulation 31(2) of the Framework Regulations, ComReg will, at the request of either party, initiate an investigation of the dispute and as soon as possible but, except in exceptional circumstances, within four months make a Determination aimed at ensuring compliance with the obligations of the Specific Regulations to resolve the dispute.
- 3.4 In accordance with Regulation 31(3) of the Framework Regulations, ComReg published Dispute Resolution Procedures in ComReg Document No. 10/18 R.
- 3.5 In determining this dispute, ComReg has regard to its functions and objectives at Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations.
- 3.6 In the following sections ComReg outlines the obligations relevant to this dispute.

⁹ “Undertaking(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations (see Annex 2 of this document).

¹⁰ European Communities (Electronic Communications Networks and Services) (Access) Regulations, 2011 (“the Access Regulations”).

3.2 Relevant obligations

3.2.1 ComReg Decision D10/18

- 3.7 This dispute is concerned with the obligations imposed on Eircom in respect of the market for the provision of WLA under ComReg Decision D10/18 published on 19 November 2018 (ComReg 18/94)¹¹.
- 3.8 In Decision D10/18, ComReg found that access to Civil Engineering Infrastructure ('CEI')¹² is an important aspect of facilitating entry in telecommunications markets. By allowing use of the SMP Undertaking's network at the highest rung of the 'ladder of investment', Access (as defined in section 2.1 of the WLA Decision Instrument) to CEI allows other Undertakings¹³ to build out their own network infrastructure avoiding the very significant costs of duplicating CEI where it is not economically efficient to do so. On this basis, the WLA Decision Instrument imposed an obligation on Eircom to provide Access to CEI (section 7.2(xiii) of the WLA Decision Instrument) including Duct Access.

3.2.2 Obligations

- 3.9 Regulation 31(2) of the Framework Regulations requires that ComReg make a determination aimed at ensuring compliance with specific obligations to resolve the dispute.
- 3.10 The current obligations in relation to the WLA market are set out in the WLA Decision Instrument.
- 3.11 Section 7 of the WLA Decision Instrument imposes on Eircom obligations regarding Access. In particular Section 7.1 relates to reasonable requests and Section 7.2(xiii)a. relates to the provision of Duct Access.

“7.1 Pursuant to Regulation 12(1) of the Access Regulations, Eircom shall meet all reasonable requests from Undertakings for the provision of Access to Wholesale Local Access including Associated Facilities.

¹¹ Market Review Wholesale Local Access (WLA) provided at a Fixed Location; Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products.

¹² “Civil Engineering Infrastructure” or “CEI” shall have the same meaning as under Section 2.1 of the WLA Decision Instrument (see Annex 2 of this document).

¹³ Other Undertakings are those Undertakings availing of access to CEI which are not Eircom or its subsidiaries.

7.2 *Without prejudice to the generality of Section 7.1 of this Decision Instrument and pursuant to Regulation 12(2) of the Access Regulations, Eircom shall provide and grant Access to Undertakings for the following particular products, services and Associated Facilities:-*

[...]

(xiii) *Civil Engineering Infrastructure and in particular the following:*

a. *Duct Access and Pole Access;”*

3.12 Section 8 of the WLA Decision Instrument imposes on Eircom obligations regarding Conditions of Access. In particular Section 8.10 of the WLA Decision Instrument sets out the timing obligation on Eircom to consider a written request for Access, as follows.

“8.10 Following a written request from an Undertaking (including a written request from Eircom itself) for Access to a new product, service or facility or a non-pricing amendment to an existing product, service or facility Eircom shall, from the date of receipt of such a written request (unless otherwise agreed with ComReg) within:

(i) *three (3) working days confirm in writing to the Undertaking that has made the written request that the request has been received;*

(ii) *fifteen (15) working days confirm in writing to the Undertaking that has made the written request whether or not the request falls within the scope of Eircom’s obligations contained in this Decision Instrument and provide a unique reference to identify the request;*

(iii) *thirty (30) working days confirm in writing to the Undertaking that has made the written request whether or not the Undertaking has provided it with sufficient information to process the request including the Undertaking’s view on the priority of the request relative to other written requests pertaining to the Relevant Market that have already been submitted by that Undertaking. During the thirty (30) working day period Eircom may seek clarification from the Undertaking;*

(iv) *eighty five (85) working days:*

a. *confirm in writing to the Undertaking that has made the written request whether it agrees to provide the requested product, service or facility or amendment thereto;*

- b. where the product, service or facility or amendment thereto proposed by Eircom differs from the original request, provide the Undertaking that has made the written request with a written description of such differences, in sufficient detail to allow the Undertaking to be reasonably aware of differences in the key features, functionality and geographic scope of the product, service, facility or amendment thereto, any limitations of the product, service or facility or amendment, together with the objective reasons for such differences.*

Chapter 4

Submissions of the parties

4.1 Summary of relevant NBI submissions

4.1 NBI made submissions on 2 August 2022 and on 19 September 2022¹⁴.

4.2 NBI submits that:

“National Broadband Ireland (NBI) requested Eircom Limited (Eircom) to develop a process to enable it to use the Sub-Duct Self-Install (SDSI) product within the ambit of the Major Infrastructure Programme (MIP) that NBI has in place with Eircom to use the Civil Engineering Infrastructure (CEI) product set for the deployment of the National Broadband Plan (NBP) fibre network.

NBI’s request was for the development of an appropriate duct blockage clearance and repair process as a change to the SDSI product under which NBI would be able to undertake all such works when using the SDSI product under the MIP.

There has been a de facto denial by Eircom of NBI’s request for access on the basis of significant delays on the part of Eircom in addressing the request and a failure by Eircom in addressing substantive issues raised by NBI.”

4.3 NBI claims that Eircom:

“is obliged to meet NBI’s reasonable request for the development of a duct blockage clearance and repair process as a change to the SDSI product in order to facilitate appropriate and effective duct access.”

4.4 NBI states that Eircom’s refusal to meet the request is not in accordance with its obligations under Section 5.1, 6.1, 7.1, 7.2 (xiii), 7.3, 7.4 and 7.7 and of the WLA Decision Instrument (D10/18).

4.5 NBI has provided copies of exchanges of correspondence between the period 13 August 2021 to 29 July 2022. This includes a Statement of Requirements of 13 August 2021, a Statement of Requirements of 26 January 2022 and the RAP Request.

¹⁴ At Annex 3 of this document.

4.2 Summary of relevant Eircom submissions

4.6 On 12 September 2022, Eircom provided ComReg with its submission. Eircom sets out its position that NBI's Access request is not a valid request pursuant to D10/18. Eircom notes that:

“the request does not constitute a request for “a non-pricing amendment” to an existing product under section 8.10 of the WLA Decision. This is because implementing the NBI Access Request would necessarily involve pricing amendments to Eircom's SDSI product of 30 July 2021.”

4.7 Therefore, the Access request is in Eircom's view not valid. Eircom states further that:

“NBI has therefore known since the very early stage of this Dispute that Eircom was treating the NBI Access Request as invalid, and NBI chose not to take any other course of action, for example to submit a valid request.”¹⁵

4.8 Eircom states its intent to comply with its regulatory obligations and outlines that:

“it has been open to NBI to submit a valid request for access at any time since it was notified by Eircom that the NBI Access Request submitted on 8 April 2022 was not valid, and it chose not to do so but instead chose to commence this Dispute Resolution Procedure.”

¹⁵ Eircom submission to ComReg dated 12 September 2022 (Annex 3.2).

Chapter 5

Analysis

- 5.1 With reference to the scope of the dispute set out at paragraph 1.3 above, the analysis in this chapter relates to two issues. First, whether the request for Access described in the dispute and the documents submitted by NBI, constitutes a valid Access request by NBI to Eircom pursuant to the WLA Decision Instrument. Second, if the request for Access does constitute a valid Access request pursuant to the WLA Decision Instrument, what next steps should be followed by the parties and what timeframes should apply.

5.1 NBI's Access request

- 5.2 It is apparent from the exchange between the parties that in essence, NBI is seeking access to Eircom's Duct network by way of a Duct Access product whereby, during the activity of NBI installing of its own Sub-Ducts within Eircom's Ducts, NBI, rather than Eircom, is to undertake any duct blockage clearance and repair process. NBI's requirements have been stated by NBI in a 'Statement of Requirements' submitted by NBI to Eircom on 13 August 2021, an 'Amended Statement of Requirements' submitted by NBI to Eircom on 26 January 2022 and the RAP Request submitted on 8 April 2022.
- 5.3 While NBI's requirement that it be able to undertake duct blockage clearance and repair means that it is seeking access to a product that differs in a fundamental way from the SDSI product, whether as currently available from Eircom or as directed by ComReg in ComReg Direction 21/60R (where repair is always undertaken by Eircom), it is a written request for a form of Access that falls within the scope of Eircom's obligations under the WLA Decision instrument. As such, it is a valid request which Eircom is required to consider noting Eircom's obligations at Section 7.1 of the WLA Decision Instrument to "*meet all reasonable requests from Undertakings for the provision of Access to Wholesale Local Access including Associated Facilities*".
- 5.4 Section 8.10 of the WLA Decision Instrument sets out the steps to be followed by Eircom on receipt of an Access request. ComReg notes that those requirements apply regardless of whether the Access request is a request for a new product or a change to an existing product and this distinction is irrelevant to the consideration of an Access request under Sections 7.1 and 8.10 of the WLA Decision Instrument. The parties' differing views in this respect do not affect Eircom's obligations to consider NBI's request. Nonetheless, ComReg notes that NBI's Access request does not require that Eircom replace or substitute an

existing Duct Access product with the Duct Access sought in the request. In that respect, ComReg considers that the product sought by NBI would clearly be a new product distinct and separate from Eircom's currently available SDSI product.

- 5.5 ComReg notes further that NBI's Access request is clearly not a request for a pricing amendment; it is a request for Duct Access whereby NBI may undertake duct blockage clearance and repair process while installing its Sub-Duct in Eircom Ducts. The fact that meeting this request may require Eircom to publish a new price and amend the applicable ARO Price List does not make the request a pricing amendment for the purpose of Section 8.10.
- 5.6 ComReg recognises that Eircom may put in place procedures stipulating how and in what form Access requests shall be submitted. However, any such procedures are not determinative of the validity of an Access request, and may not make it excessively difficult to make Access requests, or unreasonably delay Eircom's consideration of the Access request, bearing in mind Eircom's obligations to negotiate in good faith. Whilst ComReg is not making a substantive finding in respect of Eircom's procedures generally, for the purpose of resolving this dispute and in the particular circumstances of this Access request, significant time already has elapsed and much information has been provided since NBI provided Eircom with its initial Statement of Requirements.

5.2 Next steps and applicable timeframes

- 5.7 The obligations at Section 8.10(i) to (iv) of the WLA Decision Instrument provide four steps that Eircom must follow when a written request for Access pursuant to Section 7.1 of the WLA Decision Instrument is received.
- 5.8 The text of Section 8.10 is set out at paragraph 3.12 above. ComReg notes that whether NBI's Access request is considered to be a request for Access to a new product, service or facility or; a request for a non-pricing amendment to an existing product, has no implications in term of the steps at Section 8.10 (i) to (iv) of the WLA Decision Instrument to be followed.
- 5.9 In summary Section 8.10(i) to (iv) requires as follows:
- (i) Within 3 working days from the receipt of a written Access request Eircom must confirm in writing that the Access request has been received.
 - (ii) Within 15 working days from the receipt of a written Access request, Eircom must confirm in writing if the Access request is within the scope of the obligations in the WLA Decision Instrument and provide a unique reference to identify the Access request.

- (iii) Within 30 working days from the receipt of a written Access request, Eircom must confirm in writing whether it has received sufficient information to process the Access request and have the requestor confirm the priority of the Access request in relation to the requestor's other Access requests. Eircom may seek clarifications from the requestor within the 30 working days.
- (iv) Within 85 working days from the receipt of a written Access request, Eircom must either:
 - (a) confirm in writing whether it agrees to provide the requested Access; or
 - (b) propose in writing to provide Access that is different to the requested Access giving a sufficiently detailed description of the differences between the requested Access and the proposed Access and objective reasons for such differences.

- 5.10 In terms of the timeframes to be applied, the correspondence between the parties provided in their submissions to this dispute indicate that Eircom has acknowledged that the Access request was received. ComReg therefore considers that the obligations at Section 8.10(i) of the WLA Decision Instrument has been met and does not need to be included in the Determination of this dispute.
- 5.11 Regarding Section 8.10(ii) of the WLA Decision Instrument, Eircom has previously assigned the reference number 'CRD-902' to the Access request. In determining this dispute, ComReg concludes that the Access request is within the scope of the obligations in the WLA Decision Instrument. Therefore, the obligations at Section 8.10(ii) of the WLA Decision Instrument have been met and may also be set aside in the Determination of this dispute.
- 5.12 Regarding Section 8.10(iii) of the WLA Decision Instrument, there has been extensive correspondence between the parties since 13 August 2021, such that Eircom has detailed information as regards NBI's Access request. ComReg accordingly is of the view that no further additional time is required to allow Eircom seeks further information although Eircom may, as part, and within the timelines of the outstanding steps outlined below, seek any further clarification as it deems necessary.
- 5.13 Regarding Section 8.10(iv) of the WLA Decision Instrument, this is a step that has yet to be completed by Eircom. In determining this dispute, it is ComReg's view that the next step to be followed is for Eircom to proceed presently with considering the reasonableness of NBI's Access request and meet the obligations at Section 8.10(iv) of the WLA Decision Instrument.

- 5.14 In accordance with the timeframes in Section 8.10, and taking into account ComReg’s conclusions at paragraphs 5.10 to 5.12 above, the obligations at Section 8.10(iv) of the WLA Decision Instrument shall be completed within 55 working days (i.e. 85 days minus 30 days to reach a total of 55 working days) from the date of the Determination.

Chapter 6

Conclusions

6.1 ComReg makes the following conclusions -

- (a) NBI has made a valid Access request for a Duct Access product, that is, it is a written request for a product that falls within the scope of Eircom's obligations in the WLA Market under the WLA Decision Instrument.
- (b) Eircom is required in the first instance to determine whether NBI's request is a reasonable request for Access, in accordance with the requirements of Section 8.10 of the WLA Decision Instrument.
- (c) In light of the engagement to date between Eircom and NBI and the information furnished to Eircom in respect of NBI's requirements, and for the purpose of resolving the dispute, the steps set out in Section 8.10(i) to Section 8.10(iii) of the WLA Decision Instrument are hereby deemed to have been completed.
- (d) As the steps set out in Section 8.10(i) to Section 8.10(iii) are deemed to have been completed, Eircom is required to complete the step at Section 8.10(iv) within 55 working days of the Determination.
- (e) For the avoidance of doubt, Eircom is not prevented by this Determination from seeking further information from NBI as it deems necessary for the purposes of completing its assessment.

Chapter 7

Next Steps

- 7.1 Any submissions in respect of the draft Determination are required by 5pm on 12 October 2022 to provide comments on this draft Determination.
- 7.2 The task of analysing responses received will be made easier if all comments are referenced to the specific paragraph or chapter numbers used in this draft Determination.
- 7.3 ComReg may publish responses, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No.05/24¹⁶.
- 7.4 Respondents are requested to clearly identify confidential material within their submissions and place any such confidential material in a separate document to their response, with this also being provided by the date referred to in paragraph 7.1 above.
- 7.5 Respondents are requested to provide a copy of any submissions in an unprotected electronic format.

¹⁶ Response to Consultation - Guidelines on the treatment of confidential information (Date: 22nd March 2005, Document Number: 05/24).

Annexes

Annex: 1 Draft Determination Notice

1 STATUTORY POWERS GIVING RISE TO THIS DETERMINATION NOTICE

1.1 This Determination is made:

- (i) Pursuant to Regulation 31 of the Framework Regulations;
- (ii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations;
- (iii) Having had regard to Article 26 of the European Electronic Communications Code (Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018);
- (iv) Having taken account of the submissions received from the Parties and following publication of a draft of this Determination by way of ComReg 22/80 on 28 September 2022; and
- (v) Having regard to the analysis and reasoning set out in Chapters 1 to 7 of ComReg XX/XX and in ComReg Decision D10/18.

2 DEFINITIONS

2.1 In this Determination, capitalised terms shall have the same meaning as those terms in the WLA Decision Instrument.

2.2 In addition:

“**NBI**” means National Broadband Ireland Infrastructure DAC, an Undertaking authorised pursuant to Regulation 4 of the Authorisation Regulations;

“**ComReg Decision D10/18**” means ComReg Document No. 18/94, entitled “Market Review - Wholesale Local Access (WLA) provided at a Fixed Location & Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products: Response to Consultation and Decision”, dated 19 November 2018;

“**Determination Notice**” or “**Determination**” means this determination;

“**Dispute**” means the dispute between NBI and Eircom brought by NBI to ComReg for resolution, the scope of which is set out in ComReg XX/XX;

“**Effective Date**” means the date set out in Section 6 of this Decision Instrument;

“**Parties**” mean NBI and Eircom; and

“WLA Decision Instrument” means the Decision Instrument at Appendix 20 of ComReg Decision D10/18.

3 SCOPE AND APPLICATION

- 3.1 This Determination resolves the Dispute brought by NBI as regards whether or not the request for Access described in the Dispute, and the documents submitted by NBI with the Dispute, constitutes a valid access request by NBI to Eircom pursuant to the Wholesale Local Access Market Decision Instrument, ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018 and if so, the steps that should be followed by the parties to progress the request, and any applicable timelines.
- 3.2 The Determination is binding upon the Parties and their subsidiaries and any related companies, and any Undertaking which they each own or control, and any Undertaking which owns or controls either of them, and their respective successors and assigns, who shall comply with it in all respects from the Effective Date. For the purpose of this Determination, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014.

4 RESOLUTION

- 4.1 The Dispute is hereby determined as follows:
- 4.1.1 NBI has made a valid request for a Duct Access product on the basis that it is a written request for a product that falls within the scope of Eircom’s obligations in the WLA Market under the WLA Decision Instrument.
- 4.1.2 Eircom is required under the WLA Decision Instrument to determine whether NBI’s request is a reasonable request for Access, in accordance with the process set out in Section 8.10 of the WLA Decision Instrument.
- 4.1.3 In light of the engagement to date between Eircom and NBI and the information furnished to Eircom in respect of NBI’s requirements, and for the purpose of resolving the Dispute, the steps set out in Section 8.10(i) to Section 8.10(iii) of the WLA Decision Instrument are hereby deemed to have been completed.
- 4.1.4 As the steps set out in Section 8.10(i) to Section 8.10(iii) are deemed to have been completed, Eircom is required to complete the step at Section 8.10(iv) within 55 working days of the Determination.
- 4.1.5 For the avoidance of doubt, Eircom is not prevented by this Determination from seeking further information from NBI as it deems necessary for the purposes of completing its assessment.

- 4.2 ComReg’s right to make further directions as required to ensure that this valid request for Access is processed in accordance with the Determination is expressly reserved.

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation from time to time (in force prior to or after the Effective Date of this Decision Instrument).

6 EFFECTIVE DATE

- 6.1 The Effective Date of this Determination shall be [x], the date of its notification to the Parties.

**ROBERT MOURIK
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE XX DAY OF XXXX 202X**

Annex: 2 WLA Decision Instrument

Definitions

“**Civil Engineering Infrastructure**” or “**CEI**” also known as passive access infrastructure means 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.

“**Duct**” means an 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.

“**Duct Access**” means Access to Eircom’s Duct.

“**End User(s)**” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End Users and who is not acting as an Undertaking.

“**Specific Regulations**” means these Regulations, Authorisation Regulations, Access Regulations, Universal Service Regulations and Privacy and Electronic Communications Regulations.

“**Sub-Duct**” means the tube or tubes inserted in a Duct through which a cable is installed.

Annex: 3 Correspondence and Submissions

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