

**Communications Regulation and
Digital Hub Development
Agency (Amendment) Act 2023**

Case: ADJ-2025-1(ECS)

ADJUDICATION PANEL: MS. MAUREEN O'NEILL - CHAIRPERSON
DR. FRED LOGUE
MR. JOHAN KEETELAAR

(The "Division")

BETWEEN:

COMMISSION FOR COMMUNICATIONS REGULATION

- v -

EIRCOM LIMITED

DECISION of the Division delivered on 10 April 2026

A. Introduction and Background

1. This adjudication arises from a Referral Report dated 29 August 2025 prepared by an Authorised Officer of the Commission for Communications Regulation ("ComReg") pursuant to section 70 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the "2023 Act") for the purposes of referral to an adjudicator under Sections 70, 71 and 117(1)(b) of the 2023 Act (the "Referral Report").
2. The Referral Report followed an investigation by ComReg into the compliance by Eircom Limited trading as Eir and Open Eir ("Eircom") with the regulatory

obligations imposed upon it by ComReg Decision D10/18 dated 19 November 2018 (ComReg Document No. 18/94) “Market Review, Wholesale Local Access (WLA) Provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products” (“ComReg Decision D10/18”) and in particular, Eircom’s compliance with the price control and transparency obligations concerning access to Eircom’s civil engineering infrastructure, in particular duct access.

3. Eircom had been notified of Findings of Non-Compliance pursuant to Regulation 19 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. 334 of 2011) (the “Access Regulations”) on 18 February 2022 and had been given the opportunity to state its views or remedy non-compliance.
4. In the Referral Report the Authorised Officer records that he suspects that Eircom has committed the following regulatory breaches:
 - a. That during the period 15 January 2020 to 5 May 2022 (inclusive), Eircom Limited trading as Eir and Open Eir (‘Eircom’), in breach of its obligation of cost-orientation under Section 12.2 (as further specified in Section 12.6) of the WLA Decision Instrument in Appendix 20 to ComReg Decision 10/18 imposed charges being charges other than, and additional to, the minimum fixed rental charges published in the applicable Price List; and
 - b. That during the period 19 May 2019 to 5 May 2022 (inclusive), Eircom, in breach of Section 10.5 of the WLA Decision Instrument in Appendix 20 to ComReg Decision 10/18, offered and applied charges for Duct Access, the amount or price of which was not published.
5. The matter was referred for adjudication under section 71 of the 2023 Act on 29 August 2025 (the “Referral”) and the Referral was served on Eircom under section 83 of the 2023 Act on 8 September 2025.
6. Eircom made written submissions on the Referral Report pursuant to section 83(c) of the 2023 Act on 22 October 2025 disputing the suspected regulatory breaches.

In its submission, it also raised as a preliminary issue whether the Referral should be allowed to proceed at all due to alleged delay in making the referral on the part of ComReg and submitted that the Adjudicators should exercise their inherent power to dismiss the Referral on the grounds of delay and want of proportionality in prosecuting the matter.

7. The matter was listed for case management on 21 January 2026 following which it was directed that the Division would hold a hearing on the preliminary issue of whether the Adjudicators have the power to dismiss the case on a summary basis. Two rounds of written submissions were exchanged between the parties and oral submissions were made at the hearing held on 23 March 2026 (the “March Hearing”).
8. In summary, the Division decides that it has discretion over whether to hear Eircom’s application to dismiss the Referral (the “Application”) as a preliminary matter or whether to direct a unitary hearing, and in exercise of that discretion, it has decided that:
 - a. It will not hold a preliminary hearing to deal with the Application; and
 - b. It will consider the Application along with all other matters at the substantive hearing of this adjudication (the “Substantive Hearing”).

B. Legal Framework

9. The regulation of electronic communications is primarily governed by Directive (EU) 2019/1972 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p.36) (the “EECC”). The EECC is given effect in Irish law through the European Union (Electronic Communications Code) Regulations (S.I. 444 of 2022) (the “2022 Regulations”).
10. The EECC recast four directives, including the Access Directive (2002/19/EC) and the Framework Directive (2002/21/EC) which had been transposed into Irish law by the Access Regulations 2011 (S.I. No 334 of 2011) and the Framework Regulations (S.I. No 333 of 2011). Under this framework ComReg may impose certain obligations on any undertaking which it has designated as having significant

market power. Eircom is such an undertaking. Under this framework, ComReg issued ComReg Decision D10/18, which required Eircom, *inter alia*, to provide other operators with access to specific products and services in relation to Wholesale Local Access as outlined in Appendix 20 of that decision.

11. With the adoption and transposition of the EECC, the 2022 Regulations replaced the Access Regulations. Part 7 of the 2023 Act now provides for ComReg's powers of investigation and enforcement. By way of transitional provision, section 117 of the 2023 Act provides that where an operator has been notified and given an opportunity to state its views or remedy non-compliance in accordance with Regulation 19(1) of the Access Regulations an authorised officer which suspects that an operator has committed or is committing a regulatory breach may with the consent of ComReg refer the matter for adjudication.
12. Part 7 of the 2023 Act provides for administrative sanctions and related procedures. In essence, the legislation empowers ComReg to refer suspected regulatory breaches for adjudication pursuant to sections 70, 71 and 117 of the 2023 Act. Chapter 3 of Part 7 of the 2023 Act provides for the appointment of a panel of independent adjudicators by the Minister for Climate, Energy and Environment (the "Minister") and following referral, for the establishment of a division of three adjudicators to make binding decisions in relation to a suspected breach and, if a breach is found, in relation to administrative sanctions. The Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (Part 7) Regulations 2023 (S.I. 500 of 2023) (the "2023 Regulations") make further provisions for the appointment of adjudicators and the operation of adjudication procedures.
13. Under Section 85(1) of the 2023 Act, following a referral, the Adjudicator may do a number of things including under point (a) exercise any of the powers under section 81 and under point (d) conduct an oral hearing.
14. Neither the 2023 Act, the 2023 Regulations nor any other secondary legislation make provision for time limits for a referral following the issuance of a Notification of Findings of Non-Compliance under Regulation 19 of the Access Regulations.

15. ComReg, in exercise of its powers under Section 86(17) of the 2023 Act, has made and published rules providing for the conduct of an oral hearing under section 86 (ComReg Document No. 25/03b) (the “Rules for Adjudication Oral Hearings”).
16. Under section 6 of the Guidelines for Adjudication Proceedings (ComReg Document No. 24/14a), adopted and published by ComReg pursuant to section 89(2) of the 2023 Act (the “Adjudication Guidelines”), an adjudicator may conduct a case management hearing or hearings if it would assist in determining the adjudication proceedings in a manner which is fair, expeditious, and likely to minimise the overall costs of the adjudication proceedings.
17. In addition, under section 6.2 of the Adjudication Guidelines the adjudicator may give directions with the same objective in relation to (a) the manner in which the adjudication proceedings including any time limits to be observed for any step not otherwise specified in the Adjudication Guidelines, the 2023 Act or the 2023 Regulations and (t) for the hearing and determination of any issues as preliminary issues in advance of any substantive hearing.

C. Issue to be decided

18. The issue to be decided is whether the Division should direct a preliminary hearing of Eircom’s application that the Referral should be dismissed or whether this issue ought to be heard at the Substantive Hearing.
19. In the exchange of written submissions and in the March Hearing, the issue to be decided evolved beyond what was originally directed, i.e. whether the Adjudicators have the power to dismiss the case on a summary basis and ultimately the Division was asked by Eircom, in essence, to decide whether it was required to decide the preliminary issue raised by Eircom before proceeding to hear the substantive issues raised in the Referral Report or whether the issue could be heard and decided as part of a unitary trial as argued by ComReg.
20. For the avoidance of doubt, this ruling concerns only the issue of whether there should be a preliminary hearing or a unitary hearing. While the parties made written submissions on the question of the Division’s power to dismiss a claim for delay and/or fundamental breach of fair procedures, the question of whether the Division

has this jurisdiction and if it does whether it should exercise that jurisdiction, remains open for decision at a later stage in the proceedings.

D. Submissions of Eircom

21. In its written submission on the Referral Report, Eircom claimed that it was prejudiced by what it characterises as a very lengthy delay by ComReg following Eircom's response to the Notification of Non-Compliance in March 2022 and the introduction of the right to refer a case on 9 June 2023 with the Referral only being made on 29 August 2025.
22. Eircom further claimed that ComReg (as a National Regulatory Authority, "NRA") should be subject to a duty to exercise powers in a "timely manner", that Article 41 of the Charter of Fundamental Rights ("CFR") refers to a right to have one's affairs handled within a reasonable time and the right to a fair hearing within a reasonable time under Article 47 CFR. Eircom further alleged a breach of the principle of proportionality.
23. In Eircom's written submissions filed on 6 February 2026, it submitted that the Division must be able to provide undertakings with a swift and summary remedy to afford it effective judicial protection, and that the Division has to have the ability to hear a preliminary application founded on delay rather than being only able to deal with it as part of the Substantive Hearing. Otherwise, it was submitted, Eircom would be subjected to the very burden in respect of which it is entitled to object.
24. In the same written submissions, Eircom provided detailed arguments supporting its position on the substantive issue regarding alleged delay.
25. In its replying submissions filed on 27 February 2026, Eircom submitted that a preliminary hearing is the appropriate juncture in relation to issues of delay since a substantive hearing would not give an obvious opportunity for ComReg to explain the alleged delay, explain the regulatory purpose that it proportionally achieves in requiring Eircom to meet what it describes as a "stale and low value claim in terms of any market impact". Eircom further submitted that the judicial norm is for a preliminary application to consider dismissal for delay to enable an effective remedy.

26. In oral submissions, counsel for Eircom submitted that, if the Division refused its application to hold a preliminary hearing and deferred the issue to the Substantive Hearing, it would in essence amount to a refusal of its application because the very existence of the proceedings is a violation of its rights. Counsel submitted that it was not an issue that involves discretion in the sense of carrying out a balancing exercise as to whether to hear it now or at the Substantive Hearing.

E. Submissions of ComReg

27. In ComReg's written submission filed on 20 February 2026, it submitted that the Division should direct that any application to dismiss be left to the Substantive Hearing since, except in the rarest of cases, the appropriate stage at which a determination can be made regarding the effect of alleged delay is once the evidence of the adjudication has been heard. In these submissions ComReg also provided an outline of its position on the substantive application regarding delay.

28. In ComReg's replying submissions filed on 6 March 2026, ComReg submitted that the Division had discretion over whether to direct that the Application be heard at the Substantive Hearing or at a preliminary hearing and that the default position was that all matters would be dealt with at the Substantive Hearing.

29. In relation to how the Division should exercise this discretion, ComReg submitted that the nature of the test and how it will be applied is relevant to determining whether to proceed by way of preliminary or substantive hearing and requires the Division to consider whether Eircom can be afforded a fair substantive hearing and whether the balance of justice (taking into account any alleged prejudice) is in favour of allowing the proceedings to progress or dismissing the proceedings.

30. ComReg further submits that the Division will have to have regard to whether a preliminary procedure was conducive to progressing the proceedings in a fair and expeditious manner that is likely to minimise costs (referring to section 6.2 of the Adjudication Guidelines) and to take into account the factors that consider when determining whether to direct a preliminary hearing which include (a) default preference for a unitary trial; (b) whether the preliminary issue addresses a discrete area of law; (c) whether any facts are disputed or whether they are agreed or conceded; and (d) whether it would save time and costs and which form of hearing

would be most convenient. Based on these considerations, ComReg submits that a unitary hearing should be directed.

31. ComReg's oral submissions at the hearing were broadly similar to its written submissions.

F. The Division's Assessment of the Application

32. As outlined above, the initial issue to be decided by the Division evolved beyond what was originally directed, i.e. whether the Adjudicators have the power to dismiss the case on a summary basis. The decisions now before the Division are, if the Adjudicators have such power, (a) whether the Division is required to decide the preliminary issue raised by Eircom before proceeding to hear the substantive issues raised in the Referral Report, and (b) if not, and the Division has a discretion in this regard, how should it exercise that discretion in relation to the Application.

33. In light of the Division's decisions in respect of (a) and (b), the Division does not, at this time, need to reach a decision on the question of whether the Adjudicators have the power to summarily dismiss a matter referred to them for adjudication.

34. The Division acknowledges Eircom's request that, should the Division not be minded to decide whether the Adjudicators have the power to rule that a referral will not proceed to preliminary hearing due to delay, that a question on the point be referred to the High Court under section 111 of the 2023 Act. However, the Division does not consider that this is necessary. For the reasons set out below, the Division considers that deferring the Application until the Substantive Hearing will not prevent vindication of any of Eircom's rights and that the Division's decision is, on balance, fair and proportionate.

a. If the Division has the power to dismiss a referral by way of a preliminary application, does the Division have a discretion as to when to hear such application?

35. As set out above, Eircom's position is that the Division has no discretion as to when it hears the Application. Eircom asserts that, as EU law rights are engaged, the Division must hear the Application immediately and in advance of the Substantive

Hearing. Eircom relies primarily on Case C-378/17, *Minister for Justice and Commissioner of An Garda Síochána* EU:C:2018:979 (*WRC*), to support its position. Eircom argues that, as the Application asserts EU law rights and obligations, it must be heard now, i.e. in advance of the Substantive Hearing, other than in the case of a vexatious application. Eircom relies on EU law rights and says that *WRC* is authority for the proposition that those rights must be applied at the point at which they arise.

36. The Division accepts that *WRC* is authority for the position that, where EU law is engaged, it is required, within the scope of the jurisdiction conferred on it by the 2003 Act, to give full effect to EU law. However, the Division does not accept that *WRC* establishes any rule governing the sequencing of issues that have to be determined by the Division during the course of its adjudication of a referral made pursuant to Part 7 of the 2023 Act.

37. In *WRC*, the breach of EU law rights had been established by the Workplace Relations Commission (“WRC”) and it was at that point that the Court of Justice of the European Union found that those rights must be applied, rather than having to engage in an entirely different procedure (before the High Court) for those rights to be vindicated. The reference to the “moment of its application” in the *WRC* judgment was in the context of where a body such as the WRC had to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (*WRC*, paras. 26 and 35). The issue in this case is not one where there is a conflict between national law and EU law and therefore the *WRC* judgment has only limited relevance to the issue we have been asked to decide.

38. It is well established that, in the absence of harmonised EU procedural rules governing the conduct of proceedings, it is for the national legal order to determine the manner in which such proceedings are conducted, subject to the principles of equivalence and effectiveness (Case 33/76, *Rewe Zentralfinanz v Landwirtschaftskammer für das Saarland*, EU:C:1976:188). As regards the latter principle, we also note that Article 47 CFR enshrines the right to an effective

remedy before an impartial tribunal (Case C-84/22, *Right to Know*, EU:C:2023:910, paragraph 66).

39. Turning to the national legal order, the Division acknowledges that there are various rules of court that allow for an application for dismissal to be made to the court in advance of trial, for example Order 122, Rule 11 and Order 19, Rule 28 of the Rules of the Superior Courts. However, those rules do not require an application to be decided as a preliminary matter and a court has discretion to direct that the application be heard at the substantive trial.
40. In any event, the Division notes that there are no equivalent rules which govern adjudication proceedings pursuant to Part 7 of the 2023 Act. While section 86(16) of the 2023 Act provides that the Minister may make regulations on the conduct of oral hearings, the Minister has to date made no such regulations.
41. The Rules for Adjudication Oral Hearings provide, at section 3.1.1, that “[a]djudicators shall conduct an oral hearing fairly in accordance with the principles of procedural fairness and constitutional and natural justice”.
42. The Adjudication Guidelines provide, at section 6.6, that “[a]djudicators will conduct oral hearings in accordance with:
 - (a) section 86 of the 2023 Act;
 - (b) the Rules for Adjudication Oral Hearings adopted by the Commission pursuant to section 86(17) of the 2023 Act; and
 - (c) natural and constitutional justice”.
43. The Adjudication Guidelines also provide, at section 6.2, that, in issuing directions during adjudication proceedings,

“having heard the parties, an Adjudicator may issue such directions as the Adjudicator considers necessary or appropriate to facilitate the conduct of the adjudication proceedings in a manner which is fair, expeditious, and likely to minimise the overall costs of the adjudication proceedings [...]”.
44. In the absence of any specific rules on the procedures to be followed by the Division in respect of an application to dismiss a referral for adjudication under the 2023

Act, the Division considers that it has wide discretion to decide whether to modularise proceedings and hear an application as a preliminary issue, or to hear such application as part of the substantive hearing, subject only to the principle of equivalence and effectiveness and requirements for fair procedures under national and EU law and taking into account all of the circumstances of the case. No authority was cited under national or EU law which provides a basis for Eircom's submission that the Division is obliged to determine an issue as a preliminary matter.

45. The Division accepts that proceedings are ones governed by EU law to which the CFR applies (*Three Ireland (Hutchison Limited) and another v Commission for Regulations or Utilities and others* [2022] IECA 300, para. 95).

46. As a matter of EU law, the principle of effectiveness requires that national procedures do not render the exercise of EU law rights impossible or excessively difficult (*Palmisani*, Case C-261/95). For the reasons set out in further detail below, Eircom has not persuaded the Division, even on a *prima facie* basis, that deferring our consideration of the Application until the Substantive Hearing would deprive it of an effective remedy or render the exercise of any EU law right impossible or excessively difficult.

b. If the Division has the power to dismiss a referral by way of a preliminary application and a discretion as to when to hear such an application, when would be the appropriate time to hear the Application?

47. Having reached the view that the Division has discretion as to when to hear and determine the Application, we now turn to when it would be reasonable, fair and appropriate to hear and decide the Application taking into account all the circumstances of the case.

48. In approaching this question, and in particular considering the factors that should be taken into account in reaching its decision, the Division is conscious of the different and somewhat overlapping approaches, and authorities for such approaches, have been advocated by the parties. The Division has considered the issue from a number of perspectives. We have reached the view that, regardless of which line of authority is taken, applying the circumstances of this case, the most

appropriate course of action is for the Division to hear and determine the Application at the Substantive Hearing.

49. Firstly, the Division notes that the general principle in civil litigation in this jurisdiction is that all issues of fact and law are considered in a unitary trial. In this regard, the Division notes para. 14-01, p.722 of *Delany and McGrath on Civil Procedure*, (5th ed., Round Hall, 2023) and the case law cited:

“The traditional model of litigation is one of a unitary trial whereby all issues, whether of fact or law, proceed to a determination at the same time as this is generally considered to be the most convenient and just course”.

50. As pointed out by the Supreme Court (McKecknie J) in *Campion v South Tipperary County Council* [2015] IESC 79, [2015] 1 IR 716, this remained the case notwithstanding modern innovations designed to make litigation more efficient and that in the vast majority of cases this is the best mechanism by which justiciable issues can be decided (para. 22).

51. In considering the circumstance in which a trial of preliminary issues will be ordered, *Delany and McGrath on Civil Procedure*, (5th ed., Round Hall, 2023) goes on to state that such a procedure,

“will only be ordered in limited circumstances where a discrete and precise issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts and the determination of which may dispose or substantially dispose of the entire action or otherwise be likely to lead to a substantial saving in time and costs” (at para. 14-19, p. 727).

52. In this regard, the Division notes, for example, Simons J’s comments in his judgment in *Breaden v Cúnamh and the Adoption Authority of Ireland* [2019] IEHC 632, at paras. 57 and 58, that the Courts will usually leave until trial an action to strike out on the grounds of delay which would render a trial unfair so that evidence can be heard.

53. The Courts take a similar approach in the context of criminal law proceedings. In this regard, we note Supreme Court judgments emphasising that delay based objections will ordinarily require an assessment of the proceedings as a whole and are frequently best determined at the substantive hearing rather than by way of preliminary determination (*Kennedy v Director of Public Prosecutions* [2012] IESC 34; *Director of Public Prosecutions v CC* [2019] IESC 94; *Director of Public Prosecutions v JD* [2022] IESC 39).
54. The Division acknowledges that there may be exceptions to the general principle preferring a unitary trial, in particular where proceedings may be disposed of more expeditiously by hearing an issue in advance of the main hearing.
55. Eircom's position is that, absent a vexatious application, the Division should, and indeed must, depart from the general principle set out above in preference of a unitary trial, based on its assertion of EU law rights and the application of the case law in respect of dismissal for prosecutorial delay.
56. Eircom relies on the Supreme Court's judgment in *Kirwan v Connors* [2025] IESC 21 (*Kirwan*), in support of its argument that the Referral should be dismissed because of delay, and in particular that ComReg delayed in over two years in making the Referral. In *Kirwan*, the Supreme Court reformulated the principles applicable to applications to dismiss civil proceedings for want of prosecution by reference to thresholds based on the length of prosecutorial delay.
57. Eircom refers to Hogan J's judgment in *Kirwan* in stating that a two-year yardstick, derived from Order 122, rule 11 of the Rules of Court, justifies dismissal for delay absent good reason or excuse and without any need to prove prejudice (para.75 of Eircom's written submissions of 6 February 2026).
58. However, the thresholds set down by the Court in *Kirwan* to be applied in considering whether a period of delay is sufficient to warrant dismissal for want of prosecution, are on a sliding scale by reference to the passage of time. Two years is at the initial level and at this stage a claim will only be dismissed in limited circumstances. We refer in this regard to O'Donnell CJ's judgment, at para. 26, which was quoted at para. 13 of ComReg's replying submissions:

“After two years of total inactivity, a claim may be dismissed for want of prosecution. It is likely that a claim will only be dismissed at this point if in addition to the period of inactivity a plaintiff can point to some additional prejudice or other factor pointing towards dismissal”.

59. The alleged delay relied on by Eircom is under three years, and there is no suggestion of bad faith, abuse of process or deliberate misconduct on the part of ComReg. Further, counsel for ComReg disagrees that there has been any delay and at the March Hearing expressly stated that it would be important for the Division to hear from ComReg in respect of the passage of time (Transcript, March Hearing, p. 55).
60. In addition, *Kirwan* recognises that where a case concerns a matter of public interest, that may be sufficient to permit it to proceed despite a long delay. For example, at para. 26 of his judgment in that case, O’Donnell CJ agrees with the judgment of Murray J. that, even in the most egregious of cases where there has been a cumulative period of complete inactivity for more than five years, if the court is satisfied that public interest demands that the case should be litigated to conclusion it may proceed despite the delay.
61. The Division acknowledges that there is a question of whether the *Kirwan* line of case law is relevant at all in this case, as *Kirwan* concerns private law proceedings and a want of prosecution, i.e. a delay in progressing proceedings already instigated, rather than a delay in issuing proceedings (see ComReg’s replying submissions, at para. 13). Leaving aside this question and in any event, it seems clear to the Division that the position under *Kirwan* is that, where inactivity is of limited duration (less than 4 years) and unaccompanied by abuse or demonstrable prejudice, the case for summary dismissal is relatively weak.
62. On the other hand, the Division accepts that the issue has the potential to dispose of the entire case and that this is a strong argument in favour of it exercising its discretion to determine the matter as a preliminary issue.
63. However, weighed against this is the fact that there appears to be disputed material facts. For example, as noted above, at the March Hearing ComReg confirmed that

it will contest Eircom's allegations of delay (Transcript, March Hearing, p. 55). Even the extent of the alleged delay is disputed, with Eircom claiming that delay should be reckoned from 28 October 2022 and ComReg pointing out that Eircom itself accepted that it would be inappropriate for ComReg to take further enforcement steps while proceedings before the High Court (Record No. 2021 / 288 MCA) were pending.

64. It is also the case that Eircom itself did not attempt to progress a joint statement of agreed facts, at the very least in relation to the material facts which it wishes to rely on in relation to the Application. Consequently, the Application is made in the absence of an appropriate factual framework. In the Division's view, the lack of agreed facts weighs strongly against deciding the issue at a preliminary stage.
65. It is further the case that Eircom has also alleged not only a breach of an obligation to act in a timely fashion, but also an infringement of the principle of proportionality. This latter part of Eircom's preliminary objection necessarily involves consideration of the suspected non-compliance and a balancing exercise in relation to the prejudice Eircom says that it has suffered from the alleged delay. This means that it is likely to be difficult to separate the preliminary issue from the substantive issue of non-compliance alleged in the Referral Report.
66. In the Division's view, deciding the issue in advance of the Substantive Hearing would risk considering facts and evidence in a vacuum, with a real risk that this would lead to an incomplete assessment of the relevant matters and/or duplication of evidence, including witnesses, and submissions.
67. In further consideration of the principle of proportionality, it may well be that Eircom's rights may be vindicated with a measure that is less impactful on the objectives of the EECC. For example, if following the Substantive Hearing the Division were to find that there had been a regulatory breach by Eircom, it could take any prejudice suffered into account in relation to a decision on sanctions, or on costs.

68. Finally, it appears to the Division that separating the preliminary issue from the substantive issue could unnecessarily prolong proceedings, with increased costs for all involved, by requiring two separate trials and decision-making procedures.
69. Eircom has not convinced the Division, even on a *prima facie* basis, that it has or will suffer demonstrable prejudice by reason of the alleged delay. In its written submissions on the Referral Report, Eircom made general reference to the retirement of key employees since 2022 and the degradation of relevant corporate memory (at para. 129). In the March Hearing, counsel for Eircom was invited by the Division to further outline the prejudice that Eircom would face if the hearing of the Application was deferred to the Substantive Hearing. Counsel for Eircom again referred generally to fading of corporate memory, personnel changes, and changes to the market and the regulatory position. Eircom's position seems to be that, as a matter of principle, it should not have the burden of preparing for the Substantive Hearing (Transcript, March Hearing, p. 13, 24, 25).
70. However, the Supreme Court has repeatedly made clear that stress, anxiety, inconvenience and expense are inherent in being subject to proceedings and do not, of themselves, justify the prohibition or fragmentation of those proceedings. What must be demonstrated is a real and substantial risk that the fairness of the hearing will be impaired (*M (P) v Director of Public Prosecutions* [2002] 2 IR 560; *Kennedy v Director of Public Prosecutions* [2012] IESC 34).
71. While we acknowledge that Eircom stated that further evidence would be adduced at a hearing of the matter, it seems to us that, if there is compelling prejudice at issue, this should have been raised during submissions, in particular as the Division expressly indicated at the March Hearing that prejudice was something that the Division would factor into a decision on whether to hear the Application in advance of the Substantive Hearing.
72. Furthermore, given the circumstances of this case, in particular that these proceedings relate to the enforcement by an NRA of an alleged regulatory breach, there is a public interest consideration that the Division must take into account. In that regard, the Division notes the comments of Noonan J in *Fingleton v Central Bank* [2016] IEHC 1, at para.148 that, in his view, "the public interest is well served

by a credible system of financial regulation and enforcement such as that provided for by the Act". The same consideration applies to the public interest in ensuring that the objectives of the EECC are met through enforcement.

73. In considering the question by reference to the test proposed by Eircom, the Division is not satisfied that there are compelling reasons to justify departing from the judicial norm of holding a unitary trial. In reaching this conclusion, the Division has taken into account all the circumstances of this case, in particular,

- a. The default position is a unitary trial and one must be confident that determining a preliminary issue will in fact achieve the intended benefit;
- b. that the length of reckonable delay is itself disputed and even in the worst case scenario it is at the lower end of significance (having regard *inter alia* to *Kirwan*);
- c. The material facts are disputed and Eircom has not attempted to agree those facts or even demonstrated *prima facie* the factual basis for why it says it cannot have a fair trial supporting its claim that the mere existence of the proceedings are contrary to Article 47 CFR; and
- d. there is a public interest in the enforcement of communications regulation by ComReg, in relation to which Eircom's rights, in so far as they may have been infringed, may be vindicated in a way that does not unnecessarily undermine this objective.

74. For the avoidance of doubt, it is worth reiterating that the Division is making no decision on Eircom's Application. It is merely deferring hearing the Application until the Substantive Hearing, at which time if the Application is upheld, Eircom's rights will be vindicated, either through dismissal of the Referral at that time, if the Division has the power to do so, or an alternative remedy.

75. The Division has been clear that it will facilitate holding the Substantive Hearing within a short period. In these circumstances, we are satisfied that the prejudice relied upon by Eircom, that of inconvenience and expense of preparing for the Substantive Hearing, balanced against the public interest in advancing the Referral as expeditiously as possible, does not render it unfair or disproportionate to defer the hearing and determination of the Application.

G. Conclusion

76. The Division therefore dismisses Eircom's application for a trial of a preliminary issue.
77. The parties were notified of the Division's decision on 2 April 2026 and advised that they would be provided with a fully reasoned written decision, which is now provided.
78. A remote case management hearing will be held at 11am on Tuesday 14 April 2026 for the purposes of giving directions to progress both the preliminary issue of dismissal and the substantive issue of suspected non-compliance to a full hearing.
79. The Division's provisional view is that matter of the costs of Eircom's application should be reserved. Any party wishing to make submissions in this regard may do so at the next case management meeting.