



Determination of a dispute between NBI and Eircom

Concerning NBI's request for Duct Access.

Determination

Decision D08/22

Reference: 22/89

Date: 27 October 2022

Redacted Information

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Contents

Chapter 1	4
Executive Summary	4
Chapter 2	7
Background to the dispute	7
2.1 The parties to the dispute	7
2.2 Scope of the dispute	7
Chapter 3	9
Regulatory Framework	9
3.1 Regulation 31 of the Framework Regulations	9
3.2 Relevant obligations	10
Chapter 4	13
Submissions of the parties	13
4.1 Summary of relevant NBI submissions (pre-draft Determination)	13
4.2 Summary of relevant Eircom submissions (pre-draft Determination)	14
4.3 Summary of NBI's response to the draft Determination	14
4.4 Summary of Eircom's response to the draft Determination	15
Chapter 5	17
Analysis	17
5.1 NBI's Access request	17
5.2 Next steps and applicable timeframes	19
Chapter 6	23
Conclusions	23
Annexes	24
Annex: 1 Determination Notice	25
Annex: 2 WLA Decision Instrument Definitions	28
Annex: 3 Submissions preceding the draft Determination	29
Annex: 4 Submissions in response to the draft Determination	30

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 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,⁴ 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

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 Parties' Submissions preceding the draft Determination, see Annex 3 of this document.

‘RAP Request’ (that is, a Regulatory 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 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 Market⁶ 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 for the purpose of resolving the dispute, the steps set out in Section 8.10(i) of the WLA Decision Instrument is hereby deemed to have been completed.
 - (d) Eircom is required to confirm in writing to NBI that the request for Access is within the scope of the obligations in the WLA Decision Instrument within 15 working days of the Determination.
 - (e) As the step set out in Section 8.10(i) is deemed to have been completed, Eircom is required to complete the steps at Section 8.10 (iii) within 30 working days and 8.10 (iv) within 85 working days of the Determination.
- 1.8 The remainder of this document (‘**the Determination**’) is structured as follows:
 - (a) Chapter 2 – Background to the dispute
 - (b) Chapter 3 – Regulatory Framework

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.

⁶ As defined at Section 4 of the WLA Decision Instrument.

- (c) Chapter 4 – Submissions of the parties
- (d) Chapter 5 – Analysis
- (e) Chapter 6 – Conclusions

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 Location⁷.
- 2.2 NBI is authorised pursuant to Regulation 4(1) of the Authorisation Regulations⁸ as a provider of Electronic Communications Networks (ECN) and ECS in Ireland. In November 2019, NBI signed a Project Agreement⁹ 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

⁷ 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.

⁸ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No 335/2011).

⁹ <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 has defined the scope of the dispute as:
- Whether or not the request for access described in the dispute and the documents submitted by NBI within 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 Determination.
- 2.8 ComReg published a draft determination¹⁰ of the Dispute on 28 September 2022 and invited submissions from NBI and Eircom prior to the final determination of the Dispute.

¹⁰ ComReg document 22/80 dated 28 September 2022

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 Undertakings¹¹ providing ECN or ECS in the State, in connection with existing obligations under the Access Regulations.¹² 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.

¹¹ “Undertaking(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations (see Annex 2 of this document).

¹² 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)¹³.
- 3.8 In Decision D10/18, ComReg found that access to Civil Engineering Infrastructure ('CEI')¹⁴ 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 Undertakings¹⁵ 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.

¹³ Market Review Wholesale Local Access (WLA) provided at a Fixed Location; Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products.

¹⁴ "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).

¹⁵ 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 (pre-draft Determination)

4.1 NBI made submissions on 2 August 2022 and on 19 September 2022¹⁶.

4.2 NBI submitted 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 claimed 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 stated 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 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.

¹⁶ At Annex 3 of this document.

4.2 Summary of relevant Eircom submissions (pre-draft Determination)

- 4.6 On 12 September 2022, Eircom provided ComReg with its submission. Eircom set out its position that NBI's Access request is not a valid request pursuant to D10/18. Eircom noted 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 stated 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.”¹⁷

- 4.8 Eircom stated its intent to comply with its regulatory obligations and outlined 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.”

4.3 Summary of NBI's response to the draft Determination

- 4.9 On 12 October 2022, NBI provided its comments to the draft Determination (Annex 4.1). The comments that are relevant to the determination of the Dispute are summarised below.

- 4.10 In its comments, NBI noted ComReg's view that the product sought by NBI would be a new product distinct and separate from Eircom's currently available SDSI product. In the context of avoiding delays, NBI pointed to the similarities between its requested product and the currently available product from Eircom and stated that:

¹⁷ Eircom submission to ComReg dated 12 September 2022 (Annex 4.2).

“ providing duct access in the form requested by NBI would in practice be very similar to Eircom’s existing SDSI product, which is already available; and

... the existing SDSI product information would for the most part be sufficient for the purposes of a new product...”.

- 4.11 NBI expressed the view that rather than the 55 working days from the Final Determination which ComReg’s draft Determination allowed Eircom, given the extent of information already provided to Eircom and the time that has passed since its initial statement of requirements was sent to Eircom:

“ 15 working days would be a more reasonable and appropriate period in the circumstances.”

- 4.12 NBI indicated that *“NBI’s view is that, in light of the delays already incurred and the discrete nature of the access being requested, a period shorter than 55 working days would be reasonable, fair and timely to address the issues raised”*. In footnote 3 of its submissions, NBI refers to Regulation 12(3) of the Access Regulations which it says: *“...permits ComReg to impose obligations relating to fairness, reasonableness and timeliness on SMP operators when meeting reasonable requests for access”*.

4.4 Summary of Eircom’s response to the draft Determination

- 4.13 On 12 October 2022, Eircom provided its comments to the draft Determination (Annex 4.2).

- 4.14 Eircom restated its position that NBI should have reformulated its Access Request as one for a new product and suggests that this position is supported by ComReg’s conclusion that the product sought by NBI would be a new product distinct from the product already available. Eircom stated:

“NBI could have avoided this entire dispute and this entire dispute resolution procedure if it had properly reformulated its request as one for a new product, which ComReg has now confirmed is the course of action it should have taken....”

- 4.15 According to Eircom, the appropriate outcome to the Dispute is that *“NBI should correct and reformulate its request as a new product request, which sets out all the features of the new product sought.”* Eircom noted further that different industry notification periods product amendments and new products, two months and six months respectively, adding that:

“a request for an amendment will only set out the changes sought, while a request for a new product will detail all the requested new product features.”

4.16 Eircom disagreed that Eircom should complete step 8.10(iv) within 55 working days of the Final Determination. Eircom stated that:

“...Eircom challenged the validity of the notice¹⁸, so it is not understood how ComReg can “deem” the step at section 8.10(iii) to have been completed...”

4.17 Eircom further pointed out that in the context of treating NBI’s product request as a new product, the process *“...is likely to necessitate seeking further information and clarification from NBI”*. Eircom was critical of the absence of any corresponding obligation on NBI to respond promptly, *“to enable Eircom to comply with the statutory time-frames”*. Finally Eircom pointed to the importance of other Access Seekers being able to consider any information exchange.

4.18 For Eircom, *“ComReg’s analysis means that Eircom is not permitted to point out to NBI if it has wrongly formulated its request as an amendment, that it has done so, nor ask that the request be correctly reformulated. It appears Eircom is to make an evaluation of its own as to whether NBI’s request is a request for an amendment to an existing product, or a new product, and based on that evaluation proceed to follow the steps set out in section 8.10 (regardless of how NBI formulated the request)”*.

¹⁸ Eircom has furnished case-law to support its proposition that a “notice” must be sufficiently clear and unambiguous in order to constitute a valid “notice”. However, ComReg does not consider NBI’s Request to be a “notice” as contemplated by Eircom.

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 a request may require, as a consequence, that Eircom publish the price at which the form of Access is to be made available and as a result, amend the applicable ARO Price List, does not make the request a pricing amendment for the purpose of Section 8.10.
- 5.6 Eircom in its submissions takes issue with the fact the draft determination "*omits the reference to a pricing or non-pricing amendment as if that distinction doesn't exist, when it clearly does on a plain reading of section 8.10 of D10/18*" and also that ComReg "*in effect ignores the fact that section 8.10 stipulates that requests for Access must be for either "a new product service or facility" or a "non-pricing amendment to an existing product, service or facility"*". Eircom further contends that the distinction between a new product or an amendment to an existing product is more than "*a technical distinction; of necessity a request for an amendment will only set out the changes sought, while a request for a new product will detail all the requested new product features.*"
- 5.7 However, the distinctions drawn in the WLA Decision Instrument between new product, non-pricing amendments and pricing amendments, do not have the relevance to the Dispute that Eircom suggests.
- 5.8 First, the distinction between a new product and an amendment to an existing product is not as clearcut as Eircom suggests, and pricing and non-pricing amendments are not exclusive of each other. ComReg notes in this regard that Section 10.11 of the WLA Decision Instrument provides that amendments or changes to an existing product may be "*so significant that the product... amounts to a new product*" and also makes clear that material non-pricing amendments or changes are those "*which impact on product functionality or technical specifications, the process supporting a product, service or facility, and the pricing and terms and conditions associated with a product, service or facility*" (emphasis added). Second, it is also clear from Section 10.12 that any obligations in respect of pricing amendments or prices for a new product do not substitute for the obligations related to the non-pricing related amendments which they accompany, but rather are additional to those. Eircom's submission that "*different industry notification periods apply to product amendments (two months) and new products (six months)*" is correct but omits to note that these notification periods may be varied with ComReg's agreement or at ComReg's discretion. Furthermore, notification periods are relevant to the closing stages of the completion of an

Access Request, the scope of this Dispute relates to the acceptance of an Access Request.

- 5.9 In light of this ComReg does not accept Eircom's contention in the context of this Dispute that *"of necessity a request for an amendment will only set out the changes sought, while a request for a new product will detail all the requested new product features."* ComReg notes in particular that it is readily apparent that many features of the existing SDSI product are features of the product requested by NBI and that it is the extent or nature of the variations or changes requested by NBI which makes it a product that is a new product as compared to the existing SDSI product or the SDSI product the subject of ComReg Direction 21/60R. ComReg accordingly does not accept that there is any *"burden"* being imposed on Eircom that is associated supposedly with *"re-formulating NBI's 'amendment' request as a new product request"*. Furthermore the fact that there is an Access request that amounts to a request for a new product does not exclude that there are also pricing elements which Eircom is to consider in light of its obligations under the WLA Decision Instrument including in particular the price control.
- 5.10 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 submit Access requests, or unreasonably delay Eircom's consideration of the Access request, bearing in mind Eircom's obligations to negotiate in good faith and its obligation to grant Access in a fair, reasonable and timely manner. 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. Having determined that NBI has furnished a valid Access request to Eircom, ComReg does not consider that it is necessary in the particular circumstances of this Dispute, to require that NBI reformulate its request as suggested by Eircom.

5.2 Next steps and applicable timeframes

- 5.11 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.
- 5.12 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.

5.13 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.

5.14 The timeframes Section 8.10(i) to (iv) are a maximum time to comply with the obligation Eircom may complete the steps in a shorter time where appropriate.

5.15 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 have been met and do not need to be included in the Determination of this Dispute.

5.16 Regarding Section 8.10(ii) of the WLA Decision Instrument, Eircom has previously assigned the reference number 'CRD-902' to the Access request. Eircom has nonetheless, submitted that it should be permitted the opportunity to "*confirm or not*" to NBI that the Access request is within the scope of Eircom's obligations under D10/18. However, in determining this Dispute, ComReg concludes that the Access request is within the scope of Eircom's obligations under the WLA Decision Instrument. Therefore, in accordance with that conclusion, Eircom is required to

meet its obligations at Section 8.10(ii) of the WLA Decision Instrument and confirm to NBI that the Access request is within the scope of those obligations.

- 5.17 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. Nonetheless, ComReg acknowledges Eircom's submission that it has not yet complied with its obligations at Section 8.10(iii) of the WLA Decision Instrument and finds accordingly, given that ComReg has determined that NBI's Access request is valid, Eircom is now obliged to comply with its obligations under Section 8.10(iii) of the WLA Decision Instrument within 30 days of the date of this Determination.
- 5.18 Regarding Section 8.10(iv) of the WLA Decision Instrument, which requires Eircom to confirm whether it agrees to provide the requested product within 85 days of the request, this is also a step that has yet to be completed by Eircom. While NBI has submitted that 15 working days would be a reasonable and appropriate period in the circumstances, ComReg does not believe that it may vary, by way of this Determination, the requirements set out in the Decision Instrument, in contrast to making a finding, on the facts of a dispute, that certain or all of the steps required to be completed, are deemed to have been completed.
- 5.19 ComReg determines accordingly that along with complying with its obligations under Section 8.10(iii), Eircom is required to proceed to consider the reasonableness of NBI's Access request in accordance with its obligations, and within the timeframe, set out at Section 8.10(iv) of the WLA Decision Instrument.
- 5.20 Therefore, in accordance with the timeframes in Section 8.10, and taking into account ComReg's conclusions at paragraphs 5.14 to 5.15 above, the steps at Section 8.10(ii) to (iv) of the WLA Decision Instrument shall be completed within 85 working days from the date of the Determination.
- 5.21 Eircom has submitted that ComReg should require NBI to "*reformulate*" its request as a request for a new product which it states will reduce the risk of a subsequent dispute between the parties which it envisages would arise if NBI were to complain about Eircom's consideration of the Access Request as a new product request, or if there were a delay by NBI in responding for requests for information, thus impeding Eircom in meeting its obligations under Section 8.10 of the WLA Decision Instrument. ComReg does not agree with Eircom's logic in respect of either of those envisaged scenarios. First, the risk set out by Eircom that a delay by NBI in responding to requests for information may impede Eircom in meeting its obligations under Section 8.10 of the WLA Decision Instrument is no different in this instance, as it would be for any Access Request by any operator. Second, NBI is a party to the Dispute and will be aware of ComReg's views as expressed in the Determination. Third, it is clear from NBI's submissions that it is extremely anxious that its Access request be considered by Eircom at the earliest opportunity. It does

not appear likely to ComReg that NBI would delay unnecessarily in responding to any requests for information by Eircom.

Chapter 6

Conclusions

6.1 ComReg makes the following conclusions -

- (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 for the purpose of resolving the dispute, the steps set out in Section 8.10(i) of the WLA Decision Instrument is hereby deemed to have been completed.
- (d) Eircom is required to confirm in writing to NBI that the request for Access is within the scope of the obligations in the WLA Decision Instrument within 15 working days of the Determination.
- (e) As the step set out in Section 8.10(i) is deemed to have been completed, Eircom is required to complete the steps at Section 8.10 (iii) within 30 working days and 8.10 (iv) within 85 working days of the Determination.

Annexes

Annex: 1 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 6 of ComReg Decision D08/22 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 Decision D08/22;

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

“**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 for the purpose of resolving the dispute, the steps set out in Section 8.10(i) of the WLA Decision Instrument is hereby deemed to have been completed.
- 4.1.4 Eircom is required to confirm in writing to NBI that the request for Access is within the scope of the obligations in the WLA Decision Instrument within 15 working days of the Determination.
- 4.1.5 As the step set out in Section 8.10(i) is deemed to have been completed, Eircom is required to complete the steps at Section 8.10 (iii) within 30 days and 8.10 (iv) within 85 working days of the Determination.
- 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 27 October 2022, the date of its notification to the Parties.

**ROBERT MOURIK
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 27 DAY OF OCTOBER 2022**

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.

“**WLA Market**” means Wholesale Local Access Market as defined at Section 4 of the WLA Decision Instrument.

Annex: 3 Submissions preceding the draft Determination

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Annex: 4 Submissions in response to the draft Determination

Please see separate document 22/89b.