



Commission for
Communications Regulation

Dispute Resolution – Final Determination

Non-Confidential Version

Final Determination in the dispute between BT Ireland and Eircom in relation to LLU collocation at Eircom Nutley Exchange

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1 INTRODUCTION

1.1 The Commission for Communications Regulations and the Legislative Framework for Disputes

1. The Commission for Communications Regulations (“ComReg”) was established under section 6 of the Communications Regulation Act, 2002¹. ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the national regulatory authority in the State for the purpose of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”). The functions of ComReg are set out in section 10 of the Act of 2002 and a body of secondary legislation, including statutory instruments that transpose the requirements of various EU directives.
2. The Framework Directive was transposed in to Irish law by the Communications Regulation Act, 2002 and the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (“the Framework Regulations”)².
3. Article 20 (1) of the Framework Directive obliged member states to provide in their national legislation for dispute resolution mechanisms for the purpose of issuing “*binding decisions*” to resolve disputes between undertakings³. Regulation 31 of the Framework Regulations transposes Article 20 (1) of the Framework Directive in to Irish law and provides that:

¹ As amended by the Communications Regulation (Amendment) Act, 2007.

² The Framework Regulations have been amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2006 and the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007.

³ Under Regulation 2 of the Framework Regulations an “undertaking” means a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities.

“In the event of a dispute arising between undertakings in connection with obligations under the Framework Directive, the Specific Directives, these Regulations or the Specific Regulations, the Regulator shall, subject to paragraph (2), at the request of either party, initiate an investigation of the dispute and, as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination, aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute.”

4. Under Regulation 31 (6) of the Framework Regulations, an undertaking to which a determination applies must comply with it.
5. Regulation 31 (8) of the Framework Regulations provides that an undertaking which fails to co-operate with an investigation under Regulation 31 or to comply with a determination thereunder is guilty of an offence.
6. Regulation 31 (9) of the Framework Regulations provides that any obligations imposed on an undertaking by ComReg in resolving a dispute must respect the provisions of *“the Framework Directive, the Specific Directives, these Regulations, the Specific Regulations and section 12 of the Act of 2002”*.
7. Section 12 of the Communications Regulation Act, 2002 describes the objectives of ComReg in exercising its functions under section 10 of the Act of 2002. This issue is addressed in greater detail further down in this Determination.
8. Regulation 31 (11) of the Framework Regulations provides that neither party to a dispute is precluded from bringing an action before the courts and that the dispute resolution procedure is without prejudice to their rights of appeal.

9. Decision Notice D18/03 Dispute Resolution Procedures sets out ComReg’s dispute resolution procedures in managing disputes between undertakings⁴.

1.2 The parties to this dispute

10. Eircom Limited (“Eircom”) is an authorised undertaking under the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2003 (“the Authorisation Regulations”). Eircom has registered in the Electronic Register of Authorised Undertakings maintained by ComReg that it provides data services, internet access Services, publicly available telephony services and other voice services.

11. The following is an extract from the Eircom website:

“Fixed-line services:

We are the principal provider of fixed-line telecommunications services in Ireland. According to quarterly data published by ComReg, we had a 76% market share of the Irish fixed-line market in the quarter ended March 31, 2006, based on turnover. As the incumbent fixed-line telecommunications provider, we have the most extensive fixed-line telecommunications network in Ireland in terms of both capacity and geographic reach, and our competitors rely heavily on our infrastructure. As of June 30, 2006, we had approximately 2.2 million fixed-line access channels in service, of which approximately 1.6 million were public switched telephone network (“PSTN”) lines and approximately 0.4 million were integrated services digital network (“ISDN”) channels.”

“...We also offer other authorised operators (“OAOs”) wholesale services and products, including:

interconnect services; leased lines; partial private circuits; access to our local connection network via unbundled local loops; and ADSL Bitstream access, which supports broadband access;...”

⁴ Response to Consultation & Decision Notice: Dispute Resolution Procedures (Decision No: D18/03, Document No: 03/89, Date: 25 July 2003).

12. BT Communications Ireland Limited (“BT”) is also an authorised undertaking under the Authorisation Regulations. BT has registered in the Electronic Register of Authorised Undertakings maintained by ComReg that it provides data services, internet access services, publicly available telephony Services and other voice services.

13. The following is an extract from the BT website:

“BT in Ireland is a wholly owned subsidiary of BT Group plc, and a fully integrated division of BT Global Services. With over 900 employees, the company is headquartered in Dublin with offices in Cork, Limerick, Galway and Waterford.

BT in Ireland helps organisations large and small, corporate and public, Irish and global to thrive through the provision of networked IT services.

BT in Ireland also operates in the residential and Internet portal markets, offering a full suite of innovative services to consumers, from home phone and internet access, to WiFi and high-speed broadband.”

1.3 Technical Background

14. The ‘Local Loop’ is the connection between a telephone customer’s premises and the exchange from which a service is provided. Typically this connection is in the form of pairs of copper wires. These pairs can be used to provide a variety of telecommunications services including telephony, broadband and leased lines. For operational reasons the copper pairs are not directly connected to the equipment providing the service but are instead connected to or ‘terminated on’ an intermediate piece of exchange equipment called a Main Distribution Frame (‘MDF’).

15. These are terminated on the “line” side of the MDF. The MDF (typically) also has an “exchange” side which has copper pairs which terminate on various piece of equipment. Based on the information provided by Eircom in its various submissions, the main categories of equipment are the exchange itself (for the provision of

telephone service), DSL⁵ equipment (for the provision of Broadband services), transmission equipment (for the provision of leased lines) and Other Operator Equipment (OAO) equipment (for the provision of services by OAOs via copper pairs which have been “unbundled” by way of Local Loop Unbundling (‘LLU’)). These terminations are in practice implemented by terminating the copper pairs on “blocks” accommodating defined numbers of pairs (for example 80, 100, 256 or 512).

16. The “exchange” side of the MDF is broadly capable of terminating the same volume of copper pairs as the “line” side. To access a service a copper pair on the line side serving an individual is connected to a copper pair on the “exchange” side which connects to the equipment providing the particular service.
17. In order for OAOs to provide services from their own equipment the local loop can be “unbundled” with Eircom owning and maintaining the copper pair between the customer’s premises and the MDF and the OAO connecting its equipment to the pair that is terminated on the MDF.
18. In order to do this, the OAO must physically place equipment in the Eircom exchange so that it can connect to the MDF. That is, it must collocate in the Eircom exchange. This collocation includes a requirement for space on the MDF for blocks of terminations to connect to the OAO “exchange” side equipment.

1.4 Background to this dispute

19. On 6th July 2006, BT submitted to Eircom a Full Survey & Offer request form in accordance with the procedure set out in Eircom’s Access Reference Offer (‘ARO’). This form is used to request that Eircom survey an exchange to ascertain the availability of capacity for collocation for LLU. In its request BT, specified that it required 1900 MDF terminations.

⁵ DSL is the technology used to provide broadband services over Eircom’s access network

20. In its response of 4 August 2006 Eircom indicated in a response to BT, that the survey indicated that the status of Nutley exchange for the requested capacity was “No Go” due to “Insufficient MDF Capacity”.
21. On 20 April 2007, BT invoked its right under Clause 3.16 of the Physical Collocation process manual to request a “Special Inspection” on foot of the indication by Eircom that insufficient MDF capacity was available.
22. The Special Inspection Process provides that “*ComReg may be informed of such inspections and can be requested to attend by either party*”. ComReg was requested to attend the inspection by BT and the inspection took place on 3 May 2007.
23. On foot of the inspection on 8 June 2007 BT submitted a series of questions to Eircom regarding the allocation and utilisation of MDF capacity.
24. On 22 June 2007, Eircom provided response to BT’s questions.
25. On 6 July 2007, BT submitted a request for dispute resolution to ComReg to determine whether Eircom was acting in breach of its obligations under D8/04 by refusing to provide BT with the LLU exchange capacity they requested on the Eircom Main Distribution Frame (MDF) in the Eircom Nutley exchange. On 10th July 2007 ComReg wrote to BT acknowledging receipt of the dispute.

1.5 Scope of the dispute

26. The scope of the dispute as notified to the parties and as published by ComReg was as follows :

“The dispute is limited to the LLU collocation obligations, including but not limited to those under D8/04 and BT’s request to Eircom for LLU collocation exchange capacity on the Eircom Main Distribution Frame in Nutley exchange.⁶”

1.6 Submissions of the parties and chronology of the dispute to date

27. On 6 July 2007, BT submitted a request for dispute resolution to ComReg to determine whether Eircom was acting in breach of its obligations under D8/04 by refusing to provide BT with the LLU exchange capacity it requested on the Eircom Main Distribution Frame (MDF) in the Eircom Nutley exchange. On 10 July 2007 ComReg wrote to BT acknowledging receipt of the dispute.

28. In its dispute submission BT stated that with reasonable endeavours sufficient capacity could be made available on the MDF in Nutley exchange and claimed that Eircom’s refusal to supply is unreasonable and in contravention of the Access Regulations⁷.

29. BT claimed that by not taking reasonable endeavours to provide MDF exchange capacity at Nutley exchange, Eircom was in breach of the following obligations:

(a) Decision Notice D8/04 – Section 6 (4.2) Part V – Collocation, which provides ‘without prejudice to the generality of section 4.1, Eircom shall provide to authorized undertakings, access to the following services and facilities:- (v) Collocation’

(b) Decision Notice D8/04 – Section 6 (4.4) which provides ‘Eircom shall negotiate in good faith with authorized undertakings requesting access to LLU services and facilities’.

⁶ As identified by ComReg to the Eircom and BT in letters dated 17 August 2007.

⁷ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)

30. BT stated that Eircom had not sought to engage in constructive dialogue and its response to BT's reasonable observations had been met with a response that could in BT's view be said to be off-hand and unconstructive.
31. On 10 July 2007, ComReg requested BT to provide further information in relation to the dispute. BT responded to ComReg on 13 July 2007 providing information as requested. Further clarification was requested by ComReg on 16 July 2007 to which BT responded on 16 July 2007.
32. On 26th July 2007, ComReg wrote to both BT and Eircom confirming initial acceptance of the dispute and the commencement of the 'dispute clock'⁸. In accordance with the dispute resolution procedures established under Decision Notice D18/03, ComReg provided a copy of the dispute to Eircom and provided 5 working days within which to comment on the suitability of the issue for the dispute resolution process.
33. Eircom responded to ComReg on 2 August 2007 in relation to the initial acceptance of the dispute stating that Eircom did not consider that the matter in dispute to be appropriate for ComReg's intervention at this time. Eircom stated that the parties had not engaged in the bi-lateral process sufficiently; and further the underlying basis for the inability to facilitate BT Ireland's request was not regulatory in nature and was therefore outside the scope of ComReg intervention under the Regulations.
34. Following consideration of the matter, including any comments received from both parties, ComReg wrote to both parties on 17 August 2007 confirming acceptance of the dispute, giving the following reasons:

⁸ Framework Regulations, Regulation 31 (1): the Regulator shall, subject to paragraph (2), at the request of either party, initiate an investigation of the dispute and, as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination.

- a. “ComReg is not satisfied that bilateral negotiations are likely to resolve the dispute in a timely manner to allow suspension of ComReg’s investigation of the dispute for four months under step 2(a) of the dispute resolution procedures. ComReg considers the issues and the time frame for resolution to be exceptional circumstances requiring ComReg’s intervention under Step 2 (b) of the dispute resolution procedures which would satisfy Clause 12.9(b) of the Access Agreement (from the Access Reference Offer) which provides:

Nothing herein contained shall prevent a Party from: (b) Automatically referring the Dispute to the National Regulator without recourse to Level 1 and Level 2 negotiation in accordance with any right (if any) either Party may have to request a determination or other appropriate steps for its resolution. Without prejudice to the foregoing each party undertakes to avail of the Level 1 and Level 2 procedures set out herein, prior to referring the dispute to the National Regulator save in exceptional circumstances.”

- b. The dispute raised by BT appears to fall within the definition of a dispute as per ComReg Decision Notice D18/03 in that the dispute is between undertakings in connection with obligations under the Directives and the Regulations, so that the party initiating the dispute has a grievance which is based on the alleged failure of the other party to comply with its obligations⁹”.

35. In its letter to Eircom on 17 August 2007 ComReg enclosed a copy of the dispute and requested Eircom to respond to the issues raised and explain the rationale for any decision by close of business on 31 August 2007.

⁹ Decision Notice D18/03 provides the dispute resolution procedures shall apply to undertakings engaged, or intending to engage, in the provision of electronic communication services or networks or associated facilities, p7.

36. ComReg published an Information Notice in relation to the dispute acceptance on its website on 17 August 2007.
37. On 30 August 2007 Eircom responded to the BT dispute. In its response Eircom stated that Eircom is committed to meeting the LLU co-location requirements of all Access Seekers and engages fully with them to facilitate their collocation plans, in so far as possible.
38. Eircom also stated that *'as BT would be well aware co-location is not always available throughout Eircom's exchanges. As covered by the Access Reference Agreement Service Schedule 101 for Physical Co-location, "at no time should this product be considered available throughout all of Eircom's exchanges, as it will be dependent on individual exchange characteristics." In addition to Section 3.7.5 of the Process Manual for Eircom Physical Co-location Service which states that where there is "insufficient MDF space" Eircom is required to advise the Access Seeker accordingly.'*
39. Following the response from Eircom on 30 August 2007 ComReg sought further information on 20 September 2007. Eircom responded to this request and provided the information on 4 October 2007.
40. Representatives from ComReg conducted a site visit to Nutley exchange on 10 October 2007.
41. As per Decision Notice D18/03, ComReg is required to comply with its obligation to resolve disputes notified with it within four months, except in exceptional circumstances. As the dispute was formally accepted on the 26th July 2007 the four month period expired on the 26th November 2007.
42. On the 23rd November 2007, both parties were notified that ComReg considered the complexity of the issues to be exceptional circumstances and that ComReg would not

meet the 4 month deadline. ComReg informed both parties of its intention to issue the draft determination on the 10 December 2007.

43. ComReg issued its draft determination on 10 December 2007. Following requests for extensions to the period allowed to respond to this, which were agreed by the parties, responses were submitted on 18 January 2008
44. Eircom's response to the original Draft Determination raised a number of issues. ComReg analysed these issues and issued a revised draft determination to the parties on 22 October 2008.
45. Following a request for an extension to the period to comment on the revised draft the parties submitted comments on 20 November 2008 (BT) and 26 November 2008 (Eircom). These comments have been considered and are reflected in this document.

1.7 Regulatory Obligations relating to the provision of collocation for LLU services

1.7.1 Collocation

46. Under Decision Notice D8/04 "Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops, Designation of SMP and Decision on Obligations" of 15 June 2004 Eircom is designated as having SMP on the market for wholesale unbundled access (including shared access) to metallic loops and sub loops¹⁰. Decision Notice D8/04 imposed obligations on Eircom, including an obligation to provide access to services and facilities including collocation, an obligation to continue to offer access to services in compliance with the ARO and obligation to Negotiate in Good Faith,;

¹⁰ See Section 6(3) of the Decision "*Designation of Undertaking with Significant Market Power*"

Section 4.1 Eircom shall have an obligation to meet reasonable requests by authorised undertakings for access to the local loop and access to collocation, or associated facilities, as provided for by Regulation 13 of the Access Regulations.

Section 4.2 Without prejudice to the generality of section 4.1, Eircom shall provide to authorised undertakings, access to the following services and facilities:-

- I. Full unbundled local metallic path ('ULMP');*
- II. Shared access line sharing;*
- III. Full sub-loop unbundling;*
- IV. Shared sub-loop unbundling;*
- V. Collocation;*
- VI. Associated Facilities*
- VII. Technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services related to LLU; and*
- VIII. Operational support systems or, similar software systems necessary to ensure fair competition in the provision of LLU services.*

Section 4.3 eircom shall continue to offer access to the services and facilities described in this section in accordance with the product descriptions and on the terms and conditions which are specified in the current Version 1.18 of the access reference offer ('ARO') and the related manuals published as Industry LLU Documentation on its official website: www.eircomwholesale.ie.

Section 4.4 Eircom shall negotiate in good faith with authorised undertakings requesting access to LLU services and facilities.

47. ComReg identified to the parties that the dispute is limited to the LLU collocation obligations, including but not limited to those under D8/04. The following regulatory obligations under D8/04, are in ComReg's view, also relevant to be taken into

account when formulating a determination to ensure compliance with obligations as required by Regulation 31 of the framework Regulations. D8/04 provides as follows:

1.7.2 Non-Discrimination:

Section 6.1. Eircom shall have an obligation of non-discrimination as provided for by Regulation 11 of the Access Regulations.

Section 6.2 Without prejudice to the generality of section 6.1, Eircom shall apply equivalent conditions in equivalent circumstances to other authorised undertakings providing equivalent services and shall provide services and information to others under the same conditions and of the same quality as Eircom provides for its own services or those of its subsidiaries or partners.

1.7.3 Price Control

Section 9 eircom shall have an obligation to offer cost oriented prices for LLU services, collocation, and associated facilities on the basis of forward looking long run incremental costs ('FL-LRIC') as provided for by Regulation 14 of the Access Regulations.

1.7.4 Access Reference Offer:

48. As set out above Section 4.3 of Decision D8/04 imposes obligations on Eircom in relation to the provision of services in accordance with the ARO¹¹. Section 7.1 of D8/04 also provides that

¹¹ 4.3 Eircom shall continue to offer access to the services and facilities described in this section in accordance with the product descriptions and on the terms and conditions which are specified in the current Version 1.18 of the access reference offer ('ARO') and the related manuals published as Industry LLU Documentation on its official website: www.Eircomwholesale.ie.

Section 7.1 Without prejudice to ComReg’s powers under Regulation 10 (5) of the Access Regulations, Eircom shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations and shall publish an ARO that is sufficiently unbundled to ensure that authorised undertakings are not required to pay for facilities which are not necessary for the service requested. Eircom shall ensure that the ARO includes a description of the relevant offerings broken down into components according to market needs; and a description of the associated terms and conditions, including prices. The ARO shall contain at least the elements set out in the Schedule to the Access Regulations ¹². Eircom shall continue to offer access in accordance with the terms and conditions (and continue to include the same items) which are specified in the current Version 1.18 of the ARO and the related manuals published as Industry LLU Documentation on its official website: www.eircomwholesale.ie. [Emphasis added]

1.8 Other relevant documents

1.8.1 Annex C, to Eircom’s Access Reference Offer, including but not limited to the following service schedules¹³:

- 101. Physical Co-location
- 102. Unbundled Local Metallic Path
- 103. Line Sharing

¹² Schedule 1 of the Access Regulations specifies the minimum list of items to be included in a reference offer for unbundled access to the twisted metallic pair local loop to be published by notified operators. Section B, in relation to Co-location Services, provides:

1. Information on the notified operator's relevant sites
2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).
3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.
4. Security issues: measures put in place by notified operators to ensure the security of their locations.
5. Access conditions for staff of competitive operators.
6. Safety standards.
7. Rules for the allocation of space where co-location space is limited.
8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

¹³ The revised draft determination referenced specific sections of these documents however other sections are also relevant and therefore the entire document is now referenced

1.8.2 Process Manual for Eircom Physical Collocation Service (IPM)

49. The IPM, which is referred to in the ARO, provides that it is a set of operational processes supporting the interactions between Eircom and other licensed operators for collocation services in Eircom exchange facilities¹⁴.
50. Section 3.6.3 provides that *“On receipt of a request from an Access Seeker (‘AS’), Eircom will prepare a Site Information Pack... The AP [Access Provider] will estimate space availability at the site based on an assumed AS requirement of a total of two footprints and 500 MDF terminations. Duct availability for the AS’ fibre into the cable chamber will also be referenced. This will not preclude an AS from submitting subsequent orders for that site. All indications of space availability are based on desk research, and are subject to conditions for site inspection will be those detailed in section 3.16 (“Special Inspection”)”*.
51. An initial survey can be sought. If the Access Seekers request cannot be fulfilled, the ISR should state explicitly the reasons as set out at paragraph 3.7.5 of the IPM, the following responses are permissible:
- “yes – contiguous space potentially available subject to full survey”
 - “yes – potentially available subject to full survey”
 - “no – insufficient footprint”
 - “no – insufficient MDF space”
 - “no – insufficient footprint and MDF space”
 - “no – insufficient duct space into the cable chamber”.
 - “yes - sufficient power”
 - “yes – potentially sufficient power subject to full survey”
 - “no – insufficient power”
 - “no – No desk top information available”

¹⁴ Section 1, Introduction.

52. Access Seekers can also seek a Full Survey without an Initial Survey Report¹⁵. The IPM provides that after completing the full survey, Eircom will prepare a Full Survey Report. Section 3.8.5 provides that “*The Survey Report will list the modifications and will provide an indicative costing, with the associated timescales for delivery of the modifications...The Survey Report should include information on any known maintenance and upgrading work for the exchange (which may be known by the exchange manager at the time of the survey) that will affect the collocation space or access to it during the next 12 months. Such instances might include, but are not limited to:*

- *Building works to the relevant collocation space*
- *Other building works which might impact the availability of power and air conditioning facilities or reduce the level of access to the collocation space for a limited period.*
- *Existing planned upgrades to power and air conditioning equipment*
- *Plans to upgrade the MDF*
- *Building work on campus which may impact the path of the fibre connection from the exchange to the Access Seeker’s splicing pit*
- *Closure of the exchange.”*

2 Approach of ComReg in formulating a Determination

53. ComReg considers that the issue at stake in this specific instance arises directly from obligations imposed by way of ComReg Decision D8/04 pursuant to the Access Regulations (as set above) and in particular in relation to the obligation on Eircom “*to meet reasonable requests by authorised undertakings for access to the local loop and access to collocation, or associated facilities, as provided for by Regulation 13 of the Access Regulations*”, as set out in Section 4.1 of ComReg Decision No. D8/04. . It should be noted that in reaching its conclusion ComReg has not come to any view as to whether Eircom complied with its obligation to negotiate in good faith. ComReg’s

¹⁵ BT sought a Full Survey and Full Survey Report. It did not seek an Initial Survey or Initial Survey Report.

determination is restricted to opining as to whether BTs request was reasonable under Sections 4.1 and 4.2 of ComReg Document D8/04. Insofar as Good Faith is discussed it is in the alternative, and/or responds to submission from Eircom or is discussed in terms of ensuring compliance for the purposes of Regulation 31 of the Framework Regulations.

54. It is not disputed that Eircom in general has an obligation to provide access by way of collocation in respect of LLU. It is not disputed that BT's request is a request for such access (albeit that Eircom states that this request is in fact a request for a new form of access). Eircom has not met this request. ComReg therefore considers the issue is whether, in the circumstances of this dispute, Eircom is obliged to provide access at Nutley Exchange for the volume of MDF terminations requested by BT and whether it was correct not to meet this request. There does not appear to be disagreement that this is the foremost issue in the dispute¹⁶. Consideration of the central issue in the dispute, that is the obligation to meet reasonable requests for access pursuant to Section 4.1 of ComReg Decision No. D8/04, is set out at paragraphs 94 to 197 below.

55. In order to properly assess the circumstances of this dispute ComReg has adopted the following approach in examining the issues :

- An analysis of the MDF at Nutley exchange including an examination of the capacity allocations for services other than LLU including:
 - i. Allocation of terminations to which there is Soft Dial connected
 - ii. Allocation for Eircom use of terminations without Soft Dial connected
 - iii. Allocation of terminations to support Leased Line services
 - iv. Reservation of space for deferred Eircom activities

- Analysis of whether BT's request for access is reasonable addressing the following matters:

¹⁶ Eircom's response raised issues in relation to its obligation to negotiate in good faith and these are addressed under Section 7 of this document.

- i. Is the request for access a request for a regulated product?
- ii. Access Reference Offer
- iii. Is the request technically capable of being met
- iv. Conclusions on whether the request for access could be technically accommodated
- v. BT Requirements and Alternative Solutions available to BT
- vi. Costs and Cost Recovery
- vii. Other considerations arising from the investigation

56. ComReg's conclusions on whether BT's request was reasonable and whether Eircom had an obligation to meet the request are set out based on the analysis outlined at paragraph 55.

57. Regulation 31(1) of the Framework Regulations states that any determination made by ComReg is "*aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*". Therefore in considering the form of the determination ComReg has also examined the circumstances of the dispute in the context of;

- i. Eircom's obligation to Negotiate in Good Faith;
- ii. Eircom's obligation of Non-Discrimination; and
- iii. Eircom's obligation of Price Control.

58. Regulation 31(1) of the Framework Regulations states that "*In making a determination under this Regulation the Regulator shall have regard to section 12 of the Act of 2002*". Therefore ComReg in considering the form of the determination has also examined the circumstances of the dispute in the context of Section 12 of the Communications Regulation Act 2002. These are discussed at paragraphs 224 to 239. The Determination is then set out after paragraph 247.

3 Analysis of the MDF at Nutley exchange

3.1 Summary of configuration of Nutley MDF

59. The following paragraphs set out the background and relevant details of the Nutley exchange.

60. ComReg notes that, based on Eircom's previous submissions there are currently some ~~XXXX~~ [confidential] copper pairs associated with Nutley Exchange. In its submission of 4 October 2007 Eircom states that all ~~XXXX~~ [confidential] copper pairs are terminated on the MDF. These are terminated on the "line" side of the MDF. The MDF (typically) also has an "exchange" side which has copper pairs which terminate on various piece of equipment. Based on the information provided by Eircom in its various submissions, the main categories of equipment are the exchange itself (for the provision of telephone service), DSL equipment (for the provision of Broadband services), transmission equipment (for the provision of leased lines) and OAO equipment (for the provision of services by OAOs via copper pairs which have been "unbundled" by way of LLU). These terminations are in practice implemented by terminating the copper pairs on "blocks" accommodating defined numbers of pairs (for example 80, 100, 256 or 512).
61. The "exchange" side of the MDF is broadly capable of terminating the same volume of copper pairs as the "line" side. To access a service a copper pair on the line side serving an individual is connected to a copper pair on the "exchange" side which connects to the equipment providing the particular service.
62. In addition, in the Nutley Exchange there are two physical MDFs with some capacity being used for "tie cables" to allow copper pairs terminating on the line side of one MDF access to services which terminate on the exchange side of the other MDF. This allows these two physically separate MDFs to operate as a single logical entity.
63. In general MDF allocations for LLU purposes have been made on the exchange side of the Nutley MDF. However, Eircom has also assigned some space on the line side of the MDF to LLU operators in other exchanges and this may therefore be a viable solution to meeting requests for access.

64. BT has not requested any additional copper pairs to be provided on the line side of the MDF: It has requested space on the MDF on which to mount blocks of terminations so that it can connect by “jumper” to the appropriate copper pair on the “line” side when it places an order for LLU for that pair.
65. ComReg in examining any shortfall in MDF capacity to meet the request by BT has taken account of the manner in which Eircom assigns space on the exchange side of the MDF. Based on the assignment of some space on the line side of the MDF to LLU operators ComReg considers it is also valid for it to consider Eircom’s utilisation of the “line” side of the MDF. Eircom has submitted that any such usage should be only considered in exceptional circumstances. However ComReg notes Eircom is already using the “line” side of the MDF for LLU MDF allocations in Nutley exchange and accordingly ComReg considers it is apparent that Eircom itself must consider that the capacity constraints on the Nutley MDF represent exceptional circumstances and that it is proper to consider this MDF management technique in assessing the capacity that might be made available to meet BT’s request.

4 Allocation of terminations to which there is Soft Dial connected

66. The following analysis of the allocations on the Nutley MDF to support Soft Dial Tone was set out in the draft determination. This was based on the information supplied by Eircom in its submissions of 30 August 2007 and 4 October 2007.
67. As set out at paragraph 60 above copper pairs feeding end-user premises terminate on the line side of the MDF. When an end-user subscribes to a particular telecommunications service this pair (or where appropriate pairs) are connected to the terminations on the exchange side of the MDF associated with that service.
68. In the case of soft dial tone the end user pair is connected to the exchange side termination for PSTN service in advance of PSTN service actually being ordered.

This gives operational efficiencies in the provision of PSTN services. In order to achieve this the exchange side allocation for soft dial tone must be equal to the line side number of pairs for a given cable. That is the exchange side allocation to PSTN must be 100% of the line side capacity.

69. However this approach is inherently inefficient in the utilisation of exchange side MDF capacity. This is because PSTN penetration is less than 100% of the line side number of pairs¹⁷ Any pair on the exchange side which is not utilised for PSTN, either because the end-user doesn't avail of PSTN service or because the pair is used for different service, is surplus to actual PSTN requirements. Eircom cannot know in advance which pairs will be surplus in this fashion and to obtain the efficiencies in respect of PSTN must prospectively reserve capacity for PSTN on the exchange side of the MDF in excess of the overall likely demand for PSTN.
70. In an examination of information supplied by Eircom on 4 October 2007 there were in excess of \times [confidential] terminations on the MDF which were not actively supplying telephone service but which Eircom had jumpered so as to be connected to its own exchange side equipment and which had soft dial tone enabled (stabilised or soft dial tone lines). This represents almost $\times\%$ [confidential] of the then working lines in the exchange.
71. Using an estimate for an organic growth rate of $\times\%$ [confidential] per year in the existing working base, Eircom in managing the MDF space in Nutley Exchange, has ensured that it has fully allocated itself sufficient MDF capacity to meet all of its likely needs for the short to medium term.
72. Eircom submissions do not take issue with ComReg's analysis and examination of the allocation of terminations on the Nutley MDF. For instance no objection is raised

¹⁷ Based on Eircom's confidential submission of 20 August 2007 there were 30,000 copper pairs distributed in Nutley Exchange (i.e. connected on the line side) and less than 14,000 working PSTN lines. Eircom in its submission of 26 November 2008 also highlights declining penetration of fixed lines. Service such as LLU leased lines and ISDN services will also consume line side capacity.

regarding an organic growth rate of \times % [confidential]. In its submission Eircom states that *“The existence of spare Line cards on the frame is also attributable to the frame’s history. These line cards were provided when the demand for service was considerably higher than it is today. The overall penetration of fixed lines has been reducing over the past number of years due to mobile substitution and more recently cable services.”* ComReg considers this statement suggests that in effect ComReg’s figure of a \times % [confidential] for growth, was an over-estimation given that a positive figure for growth would not result in a decline in penetration. Moreover Eircom states that significantly less than 100% of already connected lines, which have service ceased, will be reconnected. The use of a lower growth figure further increases the excess capacity over actual demand which is allocated to Soft Dial tone lines. This also confirms that ComReg’s initial view as set out in the draft determination that there is an excess of MDF capacity allocated to Soft Dial Tone lines.

4.1 Allocation for Eircom use of terminations without Soft Dial connected

73. The following sets out an analysis of the allocations on the Nutley MDF to Eircom use and to which there is no Soft Dial Tone connected. This is based on the information supplied by Eircom in its submissions of 30 August 2007 and 4 October 2007.
74. ComReg notes there are in excess of \times [confidential] terminations assigned on the MDF in Nutley to Exchange side PTSN terminations. Based on the Eircom figures for soft dial tone and working lines there are under \times [confidential] such lines. This means that there are in addition to the soft dial tone lines approximately \times [confidential] terminations reserved for Eircom use on the exchange side of the MDF but which are not in service.

75. Given that the allocation for soft dial tone fully meets Eircom's short to medium term requirements for growth in areas that are already cabled this additional capacity might reasonably be considered to be driven by new housing developments.
76. It is evident from the information submitted on 30 August 2007 by Eircom there were \times [confidential] new housing units planned for the area served by Nutley exchange. This extra reservation would not be fully consumed even if Eircom achieved 100% market share (for wholesale and retail PSTN services) and 100% telephone service penetration in these units. For the purposes of this evaluation ComReg's estimate for fixed line penetration is 82% of households (there is survey data which indicates that this estimate is towards the upper end). Based on this estimate for penetration there would be a surplus of some \times [confidential] terminations in the allocation for Eircom which does not have soft dial tone.
77. ComReg is of the view that there is over dimensioning of the allocation on the exchange side of the MDF for terminations without Soft Dial connected. This significantly contributes to the shortfall in MDF capacity required to meet BT's request for access.

4.2 Allocation of terminations to support Leased Line services

78. The following analysis of the allocations on the Nutley MDF to support leased lines was set out in ComReg's Draft Determination. This is based on the information supplied by Eircom in its submissions of 30 August 2007 and 4 October 2007.
79. From an examination of Eircom's half year results to end December 2007¹⁸ there were a total of 19,160 leased lines, Partial Private Circuits, International Leased lines and interconnect circuits in its network. Based on the MDF information provided by Eircom there are approximately \times [confidential] pairs used for Junction cables linking to other exchanges. In its submission of 4th October 2007 Eircom stated that

¹⁸ Published on its Investor Relations website
http://investorrelations.eircom.net/pdf/BCMIF_results_Dec07_FINAL.pdf

“Typically, Private Wires and Leased lines are carried on Junction Cables”. ComReg is aware that in some cases 2 pairs of copper are required for one private wire or leased line. On this basis ComReg considers the equipment capacity on the line side for junction cables could support at least X[confidential] leased lines, or over X % [confidential] of Eircom’s total installed base of leased lines in an exchange which Eircom states has less than X% [confidential] of the lines in its network.

80. On the exchange side in excess of X [confidential] terminations are allocated to support Leased Lines. Based on the requirement for two copper pairs to support a single leased line ComReg considers this means that the allocation that has been made could support X [confidential] leased lines or almost X% [confidential] of the total installed based on leased lines. Again this is in an exchange which Eircom states has less than X % [confidential] of the working lines in its network.

81. Based on this analysis ComReg is of the view there is significant “over dimensioning” (to the order of at least 2,000 terminations) of the allocation for Junction Cables and Leased Line allocations on the exchange side and the line side of the MDF, which ComReg considers, contributed significantly to the shortfall in MDF capacity to meet BT’s request for access

82. Eircom submits that ComReg’s analysis underestimates the usage of these cables. Firstly Eircom states that these cables are also used to provide “out of area” lines however that this is not the primary usage. Further Eircom states that many leased lines may transit through several exchanges other than the originating or terminating exchange. However no alternative figures for such usage have been suggested or provided by Eircom in this respect. Accordingly ComReg considers its figures are based on a reasoned estimate of the impact of these issues. Each of the above recent points will now be discussed in further detail.

83. It is ComReg’s view that if the existing embedded base of “out of area” lines was large enough to be as significant as Eircom contend, then it would be expected that

this would have operational impacts on the repair of telephone services and the provision of new services such as broadband which are linked to the telephone number. It is ComReg's view that these impacts are such that they would require proper record keeping of the routing of such lines, and would require some accommodation in the process for Bitstream and SB-WLR. ComReg considers however that it is apparent from Eircom's submission that records do not exist.¹⁹ ComReg notes that the processes for Single Billing Wholesale Line Rental ('SB-WLR') and Wholesale Bitstream Access ('Bitstream') do not provide for "out of area" lines. Accordingly it is ComReg's view that the incidence of lines of this type is likely to be so low as to be immaterial to the excess capacity identified in ComReg's original analysis as being allocated to junction cables on the Nutley MDF.

84. In respect of the statement that many leased lines transit a number of exchanges it is ComReg's view that for the significant majority of digital leased lines, interconnect paths and partial private circuits, this is not the case. Based on ComReg's knowledge of the network technologies used by Eircom, ComReg considers these circuits would be served from the local exchange and inter exchange connectivity would not be provided by way of dedicated copper connections on junction cables but by way of Eircom's higher order transmission network.
85. It is ComReg's view that the scenario described by Eircom in respect of leased lines transiting a number of exchanges applies primarily to "analogue" leased lines.
86. Based on Eircom's published results to end June 2008 excluding international leased lines, PPCs and Interconnect paths there were a total of 10,553 national leased lines provided by Eircom. It is ComReg's view that analogue leased lines do not form a significant proportion of this figure and therefore any underestimate by ComReg in the usage of junction cables arising from its initial calculation does not impact on the

¹⁹ Eircom's submission of 26 November 2009 which states in respect of junction cables that "...Each pair would have to be individually tested to determine if it was being utilised"

conclusion that there is significant excess allocation made on the Nutley MDF for junction cables.

87. ComReg did not suggest the removal of the junction cables but a rearrangement of the MDF blocks associated with these cables would group unused terminations in such a way so as to free up space to allow BT's request to be met. ComReg considers that Eircom's submission as regards junction cables being network assets are not directly relevant in this context..
88. Based on this analysis ComReg continues to be of the view there is significant "over dimensioning" (to the order of 2,000 terminations) of the allocation for Junction Cables and Leased Line allocations on the exchange side and the line side of the MDF, which in ComReg's view, contributes significantly to the shortfall in MDF capacity to meet BT's request for access.

4.3 Reservation of space for deferred Eircom activities

89. Eircom's submission of 4 October 2007 states that Eircom "parked" work to replace cable approaching the end of its life in the [confidential] ✕ area awaiting budget. Accordingly, it would appear that Eircom balances the requirement to reserve MDF capacity to allow cable upgrades to occur, with its internal capital investment strategy.
90. ComReg in its draft determination considered that in assessing whether BT's request for facilities at Nutley Exchange is reasonable it was appropriate to consider that Eircom appeared to delay the upgrade of cables, presumably for internal Eircom capital investment phasing reasons. ComReg considered a prompt implementation of this cable replacement would mean space did not have to be reserved and that deferrals significantly contribute to the shortfall in MDF capacity to meet BT's request for access.

91. In its submission on the draft determination Eircom stated that this deferral was for capital investment phasing reasons. Eircom does not appear to take issue itself with ComReg's position that a prompt implementation of this cable replacement would mean space did not have to be reserved and that deferrals significantly contribute to the shortfall in MDF capacity to meet BT's request for access. ComReg notes that Eircom states that there are constraints on the amount of capital funds available for cable replacement. Moreover ComReg considers that to the extent that these constraints arise from decisions by Eircom to allocate capital funds to activities which do not have an underlying regulatory obligation, or from decisions by Eircom on how to structure its corporate finances, this should not prejudice how or when Eircom should discharge its legal and regulatory obligations.

4.4 Conclusions on Allocation of terminations at Nutley Exchange

92. The analysis above is not an exhaustive analysis of the MDF as there are other classes of services for which there are allocations on the MDF including, for instance, those for ISDN and Bitstream (Broadband) services which have not been analysed. However, in ComReg's view the analysis set out in paragraphs is already sufficient to indicate, in the context of overall demand for MDF capacity, there has been over allocation of the MDF capacity in favour of Eircom own use requirements. The totality of these over allocations results in the shortfall in MDF capacity to meet BT's request for access. Based on the analysis above it is ComReg's view that the totality of these over allocations is in excess of the volume of terminations requested by BT.

93. Additionally it is noted that in its submission on the draft determination Eircom set out the steps required to free up MDF capacity recovering the unused MDF allocations for Soft Dial tone, spare line cards and junction cables. In addition ComReg notes that an acceleration of the deferred cable replacement would also free up reserved MDF capacity. ComReg considers these also support a view that the allocations for Eircom own use have some element of headroom that allows such solutions to be proposed.

5 Analysis of whether BT's request for access is reasonable

5.1 Is the request for access a request for a regulated product?

94. ComReg has examined whether BT submitted a formal request for a new form of access and remains satisfied that BT's request for access conformed to the technical description of the existing product. ComReg also remains satisfied that BT used the ordering process for the existing product and notes Eircom did not treat this request as being other than a request for the provision of the existing product of/for collocation.
95. ComReg notes that Eircom accepted the request for access from BT in the context of the existing ARO product description and did not at any time indicate to BT that it was treating this request as other than a request for the existing defined product.
96. On a separate issue, not going strictly as to whether there was a reasonable request for access ComReg considers that if Eircom believed that this was in fact a request for a new form of access then it might be expected that it would have expressly made such a point to BT from the outset. ComReg considers in this regard that such a matter may reasonably be required of Eircom pursuant to its obligation to negotiate in Good Faith as set out in Section 4.4 of D8/04 .
97. It remains ComReg's view that the work to be undertaken to meet the request would not be inconsistent with Eircom's obligations to meet reasonable request for access under Section 4.1 and 4.2 of ComReg Decision D8/04. It is also ComReg's view that BT's request was for a regulated product.
98. Eircom sets out that it owes no obligation to provide access under the ARO if structural alteration is required. Eircom submits that "*structural alteration*" encompasses activities associated with the rearrangement of the use of existing capacity which when completed would not result in any new physical components being in place but which would instead result in a change in the utilisation of existing

components. For example the rearrangement of the terminations so as to group the unused spare line card terminations in continuous blocks. Further Eircom includes in this category works it had intended to carry out in any event (cable replacement).

99. However ComReg does not, in any event, consider that for Eircom to meet the BT request would not require it to modify the Nutley exchange building, or the duct network feeding the exchange or to undertake similar structural alterations. Rather ComReg considers that any works would relate directly to the utilisation management of the existing MDF. Moreover ComReg considers for Eircom to make an accommodation for BT (where the BT request fell, according to Eircom, outside of the ARO processes) would entail Eircom allocating space from existing facilities which would not amount to structural alteration.
100. Eircom in its submission quotes Clause 3.8.5 of the co-location process manual. This sets out that the Survey Report *“will indicate what work (if any) needs to be undertaken to prepare the accommodation for use by the Access Seeker. The Survey Report will list the modifications and will provide an indicative costing, with the associated timescales for delivery of the modifications”*.
101. In any event ComReg does not agree with Eircom’s interpretation of what might constitute a structural alternation as it would appear to contemplate even the preparation work associated with the provision of co-location as referenced in Clause 3.8.5 of the co-location process manual.
102. Eircom also quotes Clause 5 of Schedule 101 of the ARO. This sets out that *“The prices set out in the eircom ARO Price List are also only applicable where the capital expenditure required for exchange site preparation is relatively low. It is therefore appropriate that, where the actual capital expenditure exceeds the upfront capital contribution price produced by the principles for any exchange by more than €20,000, eircom be allowed to recover the actual cost of the site preparation.”*

103. Clause 5 of Schedule 101 of the ARO sets out that *“It is not intended that the prices for collocation or the inputs be applicable in circumstances outside of Service Schedule 101, for example, where eircom are requested to ‘structurally alter or build any new exchange facility or provide space on eircom premises for access seeker structures.’”*. However in ComReg’s view a plainer meaning to what is contemplated by structural alternation must be attributed to that phrase –otherwise as stated already and as apparently contemplated by Eircom, it would necessarily include even the preparation works which appear to be acknowledged in Clause 5 of Schedule 101 of the ARO.

104. Further Service Schedule 101, which is cited by Eircom in support of its view, relates to the “Physical Co-location” product. This product deals with the provision of serviced exchange foot prints. MDF allocations do not form part of this product description. Service Schedule 102 “Unbundled Local Metallic Path Service” states that the MDF allocation forms part of that product and not the product under Service Schedule 101. ComReg in any event considers (without prejudice to its views as set out above) that any of the exemptions/exceptions relied upon Eircom from Service Schedule 101 attaching to structural alterations relate only to the provision of Serviced Exchange Footprints. No issue has arisen that BT’s request cannot be met because of any inability to provide Serviced Exchange Footprints –rather ComReg considers what is at issue in this dispute is the availability of MDF space.

105. In addition Eircom’s position would appear to consider that because BT’s request could not be met without rearranging capacity on the MDF, this constituted a new form of access. However in ComReg’s view the facility requested by BT fully conformed to the existing product description and if delivered this facility would also fully conform to the existing product description. As is set out at paragraphs 112 and 113, below as regards the existing product as set out in the ARO, ComReg is of the view that the ARO is silent on the internal processes to be used by Eircom in meeting requests for MDF capacity.

106. Clause 3.8.5 of the ARO sets out that delivery of the existing product may require works to be carried out by Eircom including modifications. The ARO in any event appears in ComReg’s view to only limit these works in the case of serviced exchange floorspace to those not requiring structural alteration and in the case of MDF capacity is silent on any conditions as to the limits of any modifications to be undertaken by Eircom. Even if the limitations in respect of serviced exchange footprints were to apply to MDF capacity, ComReg considers, as set out at paragraphs 98 to 103, that the modifications that would be required in this case do not, in any event, amount to structural alterations.

107. Ultimately ComReg remains of the view that BT requested the existing collocation product which is subject to regulation and as such the request was properly subject to the obligations as set out in Sections 4.1, 4.2, 4.3 and 4.4 of ComReg Decision D8/04.

5.2 Compliance with the Access Reference Offer Process Discharges Obligations

108. Eircom has submitted that it has complied with the ARO (and it would appear it is suggested that compliance with the ARO might be sufficient to discharge obligations owing by it). ComReg considers three main issues arise in relation to this Dispute and the ARO:

109. (i) The first issue concerns whether Eircom, to accommodate BT, would be acting in contravention of the ARO by giving preference to the BT request over other earlier requests by other operators. It has been suggested that ComReg is seeking to require Eircom to offer to BT a new form of access, one that is “outside” the ARO;
- (ii) ComReg is of the view the second issue relates to Eircom processes and techniques to manage MDF queuing; and
- (iii) ComReg considers the third issue, concerns whether Eircom was compliant with a particular process that was set out in the ARO in relation to collocation, specifically

whether a full account of the refusal to grant access should have been made available by Eircom when a request for accommodation was refused.

110. (i) In relation to the first issue ComReg does not accept that Eircom, in meeting its regulatory obligations by accommodating BT at the Nutley exchange, would be acting in violation of certain provisions of the ARO (specifically the “first come, first served” procedure set out in the ARO).

111. It can be noted, that the ARO, beyond stating that requests for MDF capacity are on a first come first served basis in respect of Line Share²⁰, does not go into specific detail as regards how any queuing system for OAOs requesting access to the MDF ought to be maintained. ComReg notes that Eircom states that this is not the first request that it has denied for this exchange, but in ComReg’s view a previous denial is outside the scope of this particular dispute. Furthermore, in the context of this dispute, ComReg does not consider it reasonable for Eircom to put forward a defence that Access should not be allowed to BT because it has been denied by Eircom to others; there may be different reasons as to why the first request was refused and these reasons in any case might not have been legitimate. The ARO does not provide for a “standby list” of operators who have failed to have their requests for access met due to MDF capacity constraints. ComReg considers that this is not reason to absolve Eircom of its obligation to provide access pursuant to Section 4.1 of ComReg Decision D8/04. ComReg in any event considers Eircom’s assertion that BT is in line behind another OAO is not consistent with by Eircom’s statement that the other LLU operator to whom it refused co-location space in Nutley Exchange accepted the Eircom position and has not challenged that decision (Eircom submission of 18 January 2008). While the ARO states that it operates on the basis of first come first served there is no provision in it for someone who has not been served and has “left the queue” to be served ahead of someone who has maintained their position at the head of the queue requesting to be served.

²⁰ Clause 2.1.3.3 of Service Schedule 103 of the ARO

112. Eircom submits that the ARO sets out how any notional queue for unmet demand will be handled. Eircom refers to Clause 3.1.6 of the Service Schedule 101 of the ARO. As noted however this service schedule does not relate to the product which incorporates MDF capacity. Rather this clause references development of “Exchange Facilities”. Exchange Facilities are not defined within the ARO however “Existing Exchange Facility” is defined as follows in the ARO “*The existing switching and transmission space within an eircom's Telephone Exchange.*” Accordingly ComReg is of the view that as the MDF is not switching or transmission space it is therefore not contemplated by this process.

113. ComReg considers Service Schedule 102 is also silent as to the method of allocation of MDF capacity and how requests for MDF capacity might be handled.

114. Eircom submits that it has been mandated to continue to offer services in accordance with the ARO and its related manuals.²¹ However ComReg considers that where the ARO and associated documents are silent then Eircom must comply with its regulatory and statutory obligations (including but not limited to its obligation to provide access pursuant to Sections 4.1 and 4.2 of ComReg Document D8/04). In any event ComReg does not consider it is, in the instant case, requiring of Eircom, or of any other party, to contravene the ARO or that this Determination otherwise discriminates against particular operators.

115. As already noted ComReg considers that BT’s request for access falls within the definition of Eircom’s existing LLU product, that Eircom treated it as such and that Eircom did not indicate to BT at any point in the process that it was other than a request for an existing product.

116. Separately and while not determinative of the view set out in paragraph 115 ComReg has considered in the alternative, Eircom’s own view that BT’s request was

²¹ Section 4.3 of ComReg decision D8/04 Designation of SMP and Decision on Obligations in the market for Wholesale unbundled access (including shared access) to metallic loops and sub-loops.

for a new form of access. In ComReg's view if Eircom believed that BT's request was for a new form of access then where the ARO processes, would not apply, ComReg is of the view Eircom's obligations as set out in D8/04 including its obligation to meet reasonable requests for access (pursuant to Section 4.1 and 4.2) and its obligation to negotiate in good faith (pursuant to Section 4.4) in respect of such requests, would apply to the request.

117. As set out above ComReg considers the ARO must operate consistently with an operator's obligations to provide access pursuant to Section 4.1 of ComReg Decision D8/04. ComReg considers that this obligation cannot be contracted out of. Where a request for access falls outside of the ARO product description and processes Eircom's obligations to provide access pursuant to Sections 4.1 of ComReg Decision D8/04 still apply. To the extent therefore that there is ambiguity between the ARO and an operator's obligations under Sections 4.1, 4.2 and 4.4 of ComReg Decision D8/04 (as might be the case where the requested access falls outside of the ARO processes) – these take precedence.

118. ComReg considers that a request that fully falls within the ARO processes may be more likely to be reasonable.²² However, where a request falls outside of the ARO processes ComReg does not consider this is sufficient to render the request unreasonable.

119. (ii) In relation to the second issue (processes to manage the MDF), it can be noted that the ARO sets out certain processes and procedures which reference, *inter alia*, how requests to Eircom should be submitted and the steps Eircom take in response to such requests.

120. ComReg considers however the ARO does not detail or particularize internal processes for Eircom to manage its MDF space-where all demands for MDF space

²² As is summarised at Section 6 of this document ComReg has also considered other factors in assessing reasonableness

cannot be met or met immediately. Particular circumstances may mean that ARO processes may not have fully contemplated every conceivable situation as regards requests for access and ComReg considers this is the case here. ComReg is of the view that the regulatory obligation to provide access pursuant to Section 4.1 and 4.2 cannot be contracted out of, or the obligations presumed simply not to apply because a matter is not contemplated by the ARO.

121. In addition ComReg considers that a Determination which addresses a regulatory obligation, but which is not developed or referenced in the ARO, cannot, be said to be in contravention of the ARO²³. Even if this were the case, ComReg considers, a properly determined dispute based on a statutory obligation such as the obligation to provide access is not modified by the provisions of the ARO, indeed the opposite is the case. It is the ARO that should be aligned with other obligations to provide access pursuant to Section 4.1 and 4.2 of ComReg Decision D8/04 .

122. (iii) In relation to the third issue (whether Eircom followed applicable ARO and available procedures as regards the matter of a survey) ComReg does not accept that it did. The ARO process provides by way of the Inter Process Manual that an OAO may directly request a “full survey” to be undertaken by Eircom²⁴.

123. Clause 3.8.5 of the co-location process manual states that *“The Survey Report will review the suitability of the collocation space against the Access Seeker's requirements and will indicate what work (if any) needs to be undertaken to prepare the accommodation for use by the Access Seeker. The Survey Report will list the modifications and will provide an indicative costing, with the associated timescales for delivery of the modifications”*. Eircom submits that *“Clause 3.8.5 clearly only deals with modification to the identified accommodation, where such accommodation exists and an offer is being made.”*

²³ To the extent therefore that there is a conflict between the ARO and an operator's regulatory obligations – the latter take precedence.

²⁴ At clause 3.8.2 of the Process Manual for eircom Physical Collocation Service

124. ComReg notes that the accommodation in question in this dispute relates to the existing MDF. ComReg remains of the view that the requested access could have been provided by making modifications to the existing MDF. As stated elsewhere in this Determination in ComReg's view these modifications do not amount in any event to structural alterations.
125. The Process Manual for Physical Co-location allows that a full survey can be requested separately from an offer and that where this is the case that an access seeker must separately request that an offer be made on foot of the full survey report. ComReg considers that until BT received the output from the full survey it was not in a position to request that an offer be made. At paragraph 13 of its submission on the draft determination ComReg considers that Eircom is therefore mistaken when it states that "*There is a requirement, in the Process Manual, for a Report to be prepared following a Full Survey where an offer is being made*". ComReg considers any requirement for Eircom to produce this report is a precursor to, and not a consequence of, an offer.
126. While the ARO (and the IPM) may not set a boundary on Eircom's obligations, ComReg considers its processes assist Eircom meeting these obligations in a consistent manner. To the extent that Eircom does not adhere to these processes such deviation may also carry the risk that Eircom will fail to meet its obligations as set out in sections 4.1 and 4.2 of ComReg Decision D8/04. ComReg notes Eircom did not, more generally (and ComReg considers it could have) for instance, indicate what modifications might be required, it did not provide indicative costings for these modifications (ComReg notes that it is Eircom's position that such costs would be recoverable from BT and ComReg considers it might therefore be expected that Eircom would have advised any costs it believed were recoverable to BT) and did not provide any indicative timescale for these modifications.

127. ComReg is of the view, as set out above, that Eircom did not fully comply with the ARO processes in respect of BT's request and, in particular with the process requirement to provide costings for works required. To this extent, ComReg considers that Eircom cannot argue that it could not recover costs to render BT's request unreasonable where BT was not given the opportunity to agree or disagree to the payment of such costs.

5.3 Is the request technically capable of being met

128. ComReg is of the view that for Eircom to meet the BT request would not require it to modify the Nutley exchange building, or the duct network feeding the exchange or other similar structural alteration. Rather ComReg considers that any works would relate directly to the utilisation management of the existing MDF. ComReg considers for Eircom to meet BT's request would entail Eircom allocating space from existing facilities and that the works necessary to support this fall short of being structural alterations.

129. Eircom has stated in its submission of 18 January 2008 that its network planners build access network equipment and associated facilities (including exchange MDFs) on the basis of forecast and planned activities and that demand is based on all known requirements at a point in time. Eircom's submission related to implementation based on forecasts refers to own demands (for wholesale or retail products) which are forecast driven, while LLU demands are order driven.

130. ComReg notes that Eircom has a wide range of techniques in relation to management of the MDF. ComReg does not consider that Eircom provided a satisfactory basis as to why it did not consider many of the range of MDF management techniques, which ought in ComReg's view, to have reasonably considered and made available. It can be noted in this regard that it is not contested by Eircom that a range of techniques, exist. Further, Eircom does not dispute in its response of 18 January 2008, that as set out in the original draft determination, this full range of techniques was not considered in the context of the BT access request.

131. Additionally ComReg notes that, changing circumstances resulting in changes in the demand for MDF capacity (such as would arise if a new building development were notified, a new product were introduced such as Broadband or usage of an existing product declined such as is the case with leased lines) reasonably require that plans be reviewed. Such changes in demand can occur for a variety of reasons and change itself cannot be considered to be exceptional.
132. It is also further noted that the clarifications given by Eircom in its submission of 18 January 2008 in the main relate to how MDF allocations are initially planned, and not how MDF management techniques might be considered in the context of capacity constrained MDFs.
133. Eircom sets out that the planning for the MDF is based on forecasts but that Eircom does not receive forecasts from OAOs for LLU requirements. It is the case that Eircom has a regulatory obligation to provide LLU services which in turn give rise to demands on MDFs. If Eircom does not make planning provision for these demands then operators requesting these services are more likely to face a situation where all available space on an MDF has been allocated and their demands cannot be met. ComReg considers that it would be reasonable for Eircom to allow for likely LLU uptake in a similar manner to internal forecasts for other products.
134. Eircom participates in industry fora dealing with LLU and has an account management structure to actively manage the relationship with OAOs availing of LLU. Therefore, ComReg considers it is possible and reasonable for Eircom to make planning provision for MDF capacity for a service it is mandated to provide, even in the absence of a firm order for such a product.
135. In its submission on the draft determination Eircom sets out that a policy of it planning for Eircom having 100% market share is the correct one to adopt in most exchanges. However ComReg would remind Eircom that any approach it chooses to

adopt should not impact on Eircom's ability to meet its legal and regulatory obligations. Accordingly where it is clear that a particular approach is not appropriate and that some provision must be made for other users such as LLU operators then ComReg considers that Eircom may need to apply different planning criteria in order to be in a position to meet its legal obligations. In ComReg's view this is likely to be the case in exchanges where capacity is constrained.

136. Eircom contends these exchanges represent a small minority of Eircom's overall network. It is ComReg's view that Eircom cannot rely on the fact that its generic planning processes do not fit the circumstances of all exchanges to avoid applying different planning processes to these exceptions. ComReg considers in the context of this dispute and this particular exchange this would require Eircom to consider the full range of MDF management techniques so as to recover capacity it knows to be excess to its requirements in order to meet its obligations.

137. ComReg considers Eircom's planning provision need not necessarily extend to actually reserving MDF capacity. The planning provision could extend to deciding in advance how demands at exchanges with capacity constrained MDFs will be handled. In order to better and best meet Eircom's obligations of access and non-discrimination ComReg is of the view planning should be capable of accommodating reactive measures -such as a review of existing reservations and utilisation and a consideration of the full range of MDF management techniques that might be applied to make the requested access available. To the extent that the outcome of these assessments give rise to a requirement for Eircom to allocate capital budget to making the requested access available ComReg considers it is important to note that such expenditure is required to meet regulatory obligations.

138. ComReg considers that the main difference between the forecast and order driven approaches is the time horizon that applies. A forecast demand can take a view that stretches for a number of years while an order driven demand will of necessity have a time horizon measured in months. However once the demand exists it must be

considered against existing plans and where the plan cannot accommodate these demands MDF management techniques might be considered.

139. ComReg does not consider that capacity shortfalls attributable to the Eircom management of the MDF rather than actual demand can be grounds for deeming capacity requests from OAOs for access at Nutley unreasonable.

140. ComReg notes from the Eircom submission of 4th October 2007 that “*an efficient access network design is one that is one that meets the combined real requirements of all operators not the aggregate of the forecast or the desired levels of demand as might be anticipated by each operator. If the network was planned on such a basis we would inevitably build excess and unneeded capacity.*”

141. As has been demonstrated by ComReg’s analysis, set out at paragraphs 59 to 93 above, over the passage of time “planned” demands have been shown to be overstated, to have been superseded or to have such a long time horizon that immediate implementation is either not possible or not necessary.

142. In its submission on the draft determination Eircom states that “*The overall penetration of fixed lines has been reducing over the past number of years due to mobile substitution and more recently cable services. The lines cards provisioned in Nutley were based on forecasted levels of penetration at that time. Spare line cards are accordingly the product of market dynamics and not the result of over allocation or inefficiencies on the part of eircom.*” ComReg considers that this reference is supportive of ComReg’s conclusion as set out in paragraph 141 herein that the current allocations on the Nutley MDF are over allocations when compared to the actual current demand from these requirements as they are in excess of Eircom’s “*real requirement*” and represent “*excess and unneeded capacity*”²⁵.

²⁵ From Eircom’s submission quoted at paragraph 140 above.

143. Therefore ComReg is of the view that Eircom's management of the MDF space in Nutley exchange is not "*an efficient access network design*" in the light of actual demands on the MDF.

144. ComReg considers capacity reservation resulting in sterilisation of capacity for extended periods, possibly for services which are no longer required or for which alternatives exist, which blocks the short term order driven demands, is not a reason to forbear from consideration of the full range of MDF management techniques.

5.4 Conclusions on whether the request for access could be technically accommodated

145. ComReg considers as set out at paragraphs 66 to 77 that Eircom allocated more than the real requirement in the short to medium term for lines with soft dial tone. As set out at paragraphs 73 to 77 ComReg is of the view that Eircom has allocated more than the real requirement of terminations to meet the demand arising from new building development. As set out at paragraphs 89 to 90 Eircom has reserved MDF space for cable replacement, with no real timeline requirement for such replacement, (in particular the reservation of MDF space in 2004 for the V cable replacement and its deferral from 2006 for budgetary approval in 2008). Also, as set out at paragraphs 78 to 88 ComReg considers there is significant over dimensioning of the MDF space required for Junction Cables and Leased lines compared to the real requirement for these facilities. In ComReg's view, it was unnecessary to manage the MDF capacity in such a fashion and capacity constraints could have been avoided. As such ComReg does not consider a difficulty (or an inability to "easily" accommodate another operator), can thus be relied on or cited by Eircom to render a request unreasonable.

146. ComReg notes that Eircom typically has several possible options available to it in relation to a demand concerning a capacity constrained MDF. It is ComReg's view that Eircom unduly limited the range of MDF management techniques in determining that there was insufficient MDF space to meet BT's demand and ComReg further

considers that had a wider range of techniques been considered BT could have been accommodated at this exchange.

5.5 BT Requirements and Alternative Solutions available to BT

147. Eircom submits that ComReg should have taken into account the alternatives available to BT which would avoid Eircom having to carry out works to make space available on the MDF in Nutley Exchange. ComReg has, in the following paragraphs, considered the options as outlined by Eircom as being available to BT which would allow it to achieve its objectives without requiring Eircom to carry out measures to improve the utilisation of the MDF beyond its current level.

148. It is Eircom's assertion that the BT's request for additional MDF capacity is based on BT requiring the additional MDF capacity to facilitate equipment replacement. ComReg considers it is suggested by Eircom that this capacity would be used by BT to install new equipment in parallel with the existing equipment, with both sets of equipment operating at the same time, and that BT customers would be transferred one by one from the old equipment to the new equipment with the minimum of disruption. The alternative proposed by Eircom appears to suggest that BT should not build in parallel but should disconnect the old equipment and replace it with the new. During the course of this replacement the old and the new equipment would not be working in parallel and the BT customers would suffer a service disruption until such time as the replacement was complete. ComReg notes Eircom submits that this parallel construction is not necessary, but submits at the same time, that any alternative would give rise to disruption to BT's customers which, it concedes, would be highly undesirable.

149. When Eircom's own plans for the MDF are examined, ComReg considers it appears that it has reserved MDF capacity to allow the parallel construction of replacement facilities (the reservations associated with cable replacement, known as V cable replacement). In the case of the V cable activity this reservation was made in 2004

and work deferred in 2006 for budgetary approval in 2008. Eircom outlines that such reservation for the cable replacement is not absolutely necessary “*In the event that there is no space to borrow for the changeover, then available space is made by compression of old blocks.*” ComReg considers however that even if it were the case that BT required this MDF space for the purposes of equipment replacement ComReg considers would be unreasonable to apply such a test to BT when Eircom’s own practice is to reserve space for equipment replacement.

150. Separately and in any event, Eircom has been designated as having SMP in the market for wholesale unbundled access and has had obligations of access, non-discrimination and price control imposed. Accordingly ComReg considers it would not be consistent with Eircom’s non-discrimination obligation to apply a test to BT which Eircom itself does not appear to consider such usage a constraint on reserving MDF capacity.

151. That alternatives may have been available to BT would not, in ComReg’s view itself necessarily render BT’s request for access unreasonable and so absolve Eircom of its obligation to provide such access. In any event ComReg considers in the instant case that none of the solutions suggested by Eircom that BT might apply, are likely resolutions to be satisfactory resolutions to the BT request as submitted to Eircom.

5.6 Costs and Cost Recovery

152. An outline of the operation of Eircom’s price control obligation in respect of LLU is set out in Annex 1 which is confidential to Eircom.

153. Eircom states that the costs of making the requested access available to BT are outside of the scope of the current LLU pricing and cannot be recovered. ComReg considers three points arise in relation to pricing:

The request for access falls within the standard product pricing.

The request for access in this matter conformed, in ComReg's view, to the current product description. The costs of the activity required to meet BT's request are associated with management of the MDF and the recovery of costs for this activity are already incorporated in the ULMP monthly charge.

The costs were avoidable

ComReg considers the actions required to facilitate the BT request are very largely attributable to Eircom's prior management of the MDF in making allocations to its own demands, such that a reasonable request for access might otherwise have been met without incurring these costs.

Are costs attributable to LLU

Notwithstanding issues of the request for access falling within the standard product pricing a consideration must be given as to whether these costs are attributable to LLU

5.6.1 The request for access falls within the standard product pricing.

154. The request for access in this matter conformed, in ComReg's view, to the current product description and as such the cost recovery of any MDF management techniques to be applied is provided for within the standard product pricing. See Annex 1 for further detail.
155. The activity required of Eircom to meet the BT request for access, in ComReg's view, relates specifically to the making available of MDF space on an existing MDF.
156. ComReg considers to the extent that the activity required by Eircom to meet the BT access request has a specific higher than cost attributable to it in this specific exchange than the average, then that cost is recoverable against the average pricing allowed. This pricing might under recover for the cost in this specific exchange, but would over recover for exchanges with below average costs.

157. Therefore ComReg is of the view that to the extent that these costs are attributable to LLU they are not separately recoverable from BT but are recovered within the existing LLU pricing. This pricing recovers attributable costs from all users of LLU and in the case of MDF capacity the users of services requiring MDF capacity averaged across the entire Eircom network.

5.6.2 *The costs were avoidable*

158. In its submission on the draft determination Eircom states that it cannot accept that “ComReg’s questioning of its [MDF] allocation decisions is warranted and that these costs are avoidable”. ComReg considers to the extent that any costs arise in connection with providing the requested access it is appropriate to examine the underlying reasons why these costs arise. One potential outcome from such an examination is that the costs are not avoidable, they are attributable to LLU and they are fully recoverable separately from BT. Such an outcome would have an effect on the determination.

159. It should be noted that, based on the information supplied by Eircom in respect of the MDF allocation at Nutley Exchange, it is ComReg’s view that Eircom knew or ought to have reasonably known that potential MDF capacity constraints existed at Nutley exchange and that accordingly Eircom could have or ought to have reasonably known that decisions which reserved capacity for demands which might arise over the long term, or which deferred activities for which capacity was reserved but unused, would cause a situation where new demands for capacity would necessitate some reorganisation of the MDF in order for these new demands to be met.

160. As discussed already ComReg considers, in relation to capacity on the MDF at Nutley Exchange, that Eircom over dimensioned the reservation it has made for soft dial tone and stabilised lines over and above what is required to meet the foreseeable short to medium term actual demand. In addition ComReg notes Eircom has reserved capacity for a cable replacement and then deferred this replacement for its own

internal budgetary reasons. ComReg notes that as a result BT's request could not be met by allocating unreserved MDF space but can only be met by carrying out works to free up some of this reserved but unused space.

161. In its submission on the draft determination Eircom states that *“The overall penetration of fixed lines has been reducing over the past number of years due to mobile substitution and more recently cable services. The lines cards provisioned in Nutley were based on forecasted levels of penetration at that time. Spare line cards are accordingly the product of market dynamics and not the result of over allocation or inefficiencies on the part of eircom.”* Notwithstanding that the original allocation for Soft Dial Tone was made at some time in the past based on information then available, ComReg considers it is apparent from this part of Eircom's submission, that it has known for some time that the market situation has changed and that the basis of these allocations is flawed in the light of current market demands. In order to properly manage the MDF space Eircom had a choice whether to defer the cable replacement or to carry out works to free up MDF space that was allocated but surplus to requirements.

162. ComReg considers that Eircom at any time could have accelerated the cable replacement thus freeing up capacity reserved, for this purpose but did not.

163. As has been set out at Paragraph 83 above it is implicit from Eircom's submission that Eircom does not maintain records of the terminations used by its junction cables. The lack of such records results in an additional cost associated with identifying working pairs in order to recover MDF space which is surplus to requirements. Eircom in its submission of 26 November 2008 sets out that this additional cost is ~~£~~ [confidential] for a 1,000 pair cable. It is ComReg's view that if such records existed then MDF space could have been made available at much less than the costs outlined by Eircom and that these costs are avoidable.

164. Even if costs of the works in making MDF space available were generally recoverable separately from BT under the LLU product pricing (which as set out at Paragraph 157 is not the case) then in the specific circumstances of this dispute, ComReg considers the costs that might arise in meeting the BT request were avoidable on the part of Eircom and as such would not be recoverable in this case.

5.6.3 Are costs attributable to LLU

165. ComReg considers the costs associated with re-arranging the MDF in Nutley Exchange are not attributable to some technical requirement of the LLU product itself. Therefore these costs are not solely recoverable from the LLU product. Given the constraints on the Nutley MDF at some point a new demand, whether driven by LLU or another service, would have necessitated work to free up space. It would appear to be Eircom's position that the demand here should bear the cost broadly associated with it. A logical extension of Eircom's position would be that costs not directly attributable to LLU demand should not be apportioned against LLU. This in turn would mean that none of the investment prompted by Eircom's own PSTN demands would be attributable against LLU. This would include Eircom's duct network. ComReg's notes that, this situation runs counter to the current costing model used by Eircom.

166. In the case of Nutley Exchange the MDF capacity is constrained and in ComReg's view, Eircom has optimised the efficiency of individual services at the expense of the overall efficiency of the MDF. The benefits that accrue from this approach accrue directly to the services which have been optimised as any operational and financial benefits are not transferable to other services using the MDF. For example in the case of the decision to defer the cable replacement Eircom has set out that the postponement of this replacement has an operational cost due to higher than average fault occurrences on the old cable. In ComReg's view Eircom has deferred this for budgetary reasons and ComReg considers that in doing so was in a position to trade the capital cost of the replacement against the operational costs and impact on

customers (both its own and OAO customers using the cable). It is ComReg's view that the benefits from this deferral accrue to Eircom while the impact is a negative impact on the capacity of the MDF for all other services. As such costs associated with arranging the MDF to rebalance the efficiency away from individual services to the efficiency of the MDF as a whole are not attributable solely to LLU.

5.6.4 Other Costing considerations

167. The following paragraphs deal with issues raised by Eircom but which are not directly relevant to the consideration of the manner in which the costs associated with meeting the BT request might be recovered.

168. Eircom argues that the costs of meeting this demand should be scaled so that equivalent costs apply on each MDF across the entire network. Based on Eircom's own submission insufficient MDF capacity was stated to be only an ongoing issue in 2 of 19 exchanges where BT requested access. In ComReg's view therefore the position in Nutley Exchange clearly represents a situation which is not average. Even where Eircom undertakes work in other exchanges to make MDF space available, Eircom has not shown that these costs are commensurate with those in Nutley. Therefore ComReg is of the view that an approach in which the cost of meeting BT's request at Nutley exchange was scaled so that equivalent costs apply on each MDF across the entire network is not justified.

169. Eircom has set out a unit cost per line of meeting BT's request. ComReg does not accept that this approach is consistent with the LRIC model which is used in connection with Eircom's cost orientation obligation. Notwithstanding this position and arguing in the alternative if Eircom's analysis is examined ComReg notes that Eircom acknowledges that LLU fees are based on unit costs averaged over the entire network. In addition Eircom produces a cost per line for the works on the MDF associated with meeting BT's request of \times [confidential]. However Eircom bases this cost on the fact that Nutley has \times [confidential] lines. Eircom asserts that these

lines represent less than \times [confidential] % of all lines. On this basis and given that LLU fees are based on unit costs averaged over the entire network then ComReg considers the maximum cost of the work at Nutley when apportioned across the network is \times [confidential] per line. Therefore Eircom's own analysis of this issue is flawed. ComReg further notes that this is a once off cost. The existing LLU product pricing which is the price which is used to recover the totality of the relevant LLU costs is a recurring price. Therefore even if this approach were to be accepted then it is ComReg's view that the current LLU pricing would allow for the recovery of this cost.

170. In its submission on the draft determination Eircom sets out that cost recovery associated with MDF management does not take account of complexities associated with LLU. Paragraph 169 herein sets out that based on Eircom's estimate of cost and correctly applying Eircom's suggested methodology (which is not accepted by ComReg) the cost of the complexity associated with meeting BT's access request at Nutley exchange is a non-recurring \times [confidential] per line. ComReg's view is that these costs are covered by the existing LLU product pricing which is the forward looking price which is used to recover the totality of the relevant LLU costs.

171. Notwithstanding ComReg's position in relation to costs as already set out at paragraphs 152 to 169, ComReg considers that if Eircom believed that such costs were separately recoverable, it could be expected that Eircom would have indicated to BT possible options (which have subsequently been shown to exist by virtue of Eircom's proposed solutions) or of the possible price of any proposed option. ComReg notes that Eircom in its submission on the draft determination references Clause 3.8.5 of the process manual for physical co-location, and submits that this provides that a full survey report will include indicative costings for modifications required to meet an access request. An access seeker may request that a site offer be made by Eircom of foot of such a full survey report. However Eircom had not provided the indicative costings to BT and therefore had not ascertained whether BT would be prepared to cover the costs of meeting the request. Accordingly, ComReg

considers Eircom was not in a position to rely on an inability to recover costs as a ground for rendering the request unreasonable.

5.6.5 Conclusions on Cost recovery

172. Based on paragraphs 165 to 166, the costs that Eircom states that it would incur in making space available on the MDF to meet BT's request are attributable, in ComReg's view, to a rebalancing of the operational and financial benefits of individual services other than LLU that have been optimised on the Nutley MDF to the overall management of the MDF. ComReg considers this cost therefore is an excess cost over and above that related to the management of the MDF. Because of the price control obligation on Eircom ComReg considers that in this instance these excess costs are not recoverable from the LLU product and from BT in particular, but must be recovered by Eircom elsewhere. This does not effect ComReg's view that the request for access is reasonable.

173. ComReg's view is that the costs of meeting the BT request would not be incurred by Eircom had it not made the allocation decisions it did and notwithstanding changes in market circumstances has maintained these allocation decisions respect of soft dial tone, stabilised lines and deferred cable replacements. And therefore the costs associated with meeting the BT request were avoidable.

174. Based on the analysis set out in Section 4.1 this request was for a facility that conforms to the existing product and based on the analysis set out at paragraphs 154 to 156 this request is therefore subject to the pricing for the existing product which allows for Eircom's cost recovery against the product.

5.7 Other considerations arising from the investigation

5.7.1 Other Issues raised by Eircom

175. ComReg has examined other issues raised by Eircom which on examination are in ComReg's view not material to the central issue in the dispute but which ComReg sets out here for completeness.
176. Eircom expressed concern that ComReg did not fully examine neither BT's behaviour in its engagement with Eircom, nor the level of engagement between the parties prior to the referral to ComReg. Eircom further stated that the matter was referred to ComReg too early.
177. It should be noted that Eircom's position as set out in its submission on the draft determination is that BT failed to engage with Eircom in respect of a new form of access. The draft determination and this final determination set out ComReg's view that the request by BT was not for a new form of access and that the request falls within the existing product description and could and should have been met within the existing processes. In this circumstance ComReg considers that it follows that the issue of whether BT needs to engage with Eircom other than on the basis of the processes set out in the ARO is not relevant because in following these processes (which are set out by Eircom to be followed by BT) to order a standard product on defined terms BT met any obligation BT might have to negotiate with Eircom.
178. ComReg considers the central issue in the dispute is whether Eircom has an obligation to meet the access request by BT under Sections 4.1 and 4.2 of ComReg Decision D8/04 and it is on this basis that the determination is made. It has been Eircom's position that it does not have such an obligation in respect of the access requested. ComReg considers that in this particular case that as the request at issue falls within the definition of the existing product and was accompanied by a complete application. ComReg does not consider that BT acted in bad faith in terms of the request for access submitted to Eircom or in referring the matter for a Determination by ComReg.

179. Without prejudice to this position, in the alternative, even to the extent that Eircom considers that it was not in a position to meet BT's request in full but could still have accommodated a portion of BT's request then alternative solutions should have been put forward by Eircom based on its knowledge of the exchange and other information known primarily or solely to it. While ComReg does not consider that the party that owns and manages the exchange has to bear absolute and sole responsibility for solutions, ComReg considers that in the context of Section 4.4 of ComReg Decision D8/04 in order for a full and proper negotiation to be enabled, that it would be more appropriate and may of necessity demand that, that party assume primary responsibility for the process of solutions focused engagement –at least initially or as required.
180. While ComReg accepts that a referral of a matter to ComReg for dispute resolution request may modify the nature of the engagement between parties and, that it would of necessity, have an impact on the conduct of negotiations between the parties, ComReg notes that Regulation 31 does not constrain a party requesting dispute resolution and ComReg does not consider that BT acted inappropriately in referring the matter to ComReg as such referral was, ComReg considers, within the terms of Regulation 31 of the Framework Regulations for the following reasons:
181. Regulation 31 (1) of the Framework Regulations provides that *“In the event of a dispute arising between undertakings in connection with obligations ... the Regulator shall, ... at the request of either party, initiate an investigation of the dispute”*.
182. In its correspondence of 17 August 2007 confirming acceptance of the dispute ComReg outlined that *“The dispute raised by BT appears to fall within the definition of a dispute as per ComReg Decision Notice D18/03 in that the dispute is between undertakings in connection with obligations under the Directives and the Regulations, so that the party initiating the dispute has a grievance which is based on the failure of the other party to comply with its obligations.”*

183. Regulation 31(3) states “*The Regulator may decide not to initiate an investigation referred to in paragraph (1) where it is satisfied that other means of resolving the dispute in a timely manner are available to the parties or if legal proceedings in relation to the dispute have been initiated by either party*”. This therefore sets out the limited circumstances where ComReg may exercise discretion not to investigate an investigation.

184. In this instance neither party had initiated legal proceedings.

185. In its correspondence of 17 August 2007 confirming acceptance of the dispute ComReg outlined that “*ComReg is not satisfied that bilateral negotiations are likely to resolve the dispute in a timely manner*”. Therefore the other ground for not initiating an investigation was not fulfilled and the issue of whether ComReg should exercise its discretion in this regard did not arise.

5.7.2 Health and Safety

186. ComReg recognises that Eircom has legal obligations as to the health and safety of its staff. These obligations are a valid constraint on Eircom’s freedom of action. However in this matter ComReg does not consider that the health and safety issues raised by Eircom and the request for capacity from BT cannot be reconciled. ComReg remains of the view that an accommodation could have been reached with BT at this exchange, without compromising health and safety, had certain solutions been applied.

5.7.3 Eircom Solutions

187. ✂ [confidential]

188. ✂ [confidential]

189. ✂ [confidential]

190. ComReg considers it is entitled to reference Eircom's submissions unless they are on a without prejudice basis or clearly confidential (and in the latter instance would not make public the specific detail of these). In relation to any proposed solutions not made on a without prejudice basis as in the instant case, it can be seen ComReg does not, in any event reference to a significant degree, the proposed solutions. Moreover in issuing the Determination pursuant to Regulation 31 of the Framework Regulations ComReg does not seek to be overly prescriptive as regards solutions to be provided.

6 Conclusions on whether BT's request for access was reasonable and whether Eircom should have met it under Sections 4.1 and 4.2 of ComReg Decision D8/04

191. Based on the analysis set out at paragraphs 94 to 107 ComReg considers BT's request falls with the LLU market. It should be noted that is not disputed by Eircom that this request for capacity falls within the LLU market.

192. Based on the analysis set out at paragraphs 108 to 151 ComReg is of the view that Eircom had not carried out sufficient analysis of the BT request for Eircom to properly determine that BT's request was unreasonable and to support Eircom's view that Eircom's access obligation did not apply.

193. Based on the conclusions set out at paragraphs 145 and 146 this request was capable of being met technically and operationally and as set out at paragraphs 172 to 174 that the costs of this were recoverable albeit not solely against this specific request.

194. Eircom has submitted it undertook a thorough assessment of the prospect of providing access to BT at this exchange and concluded that it was not necessary, reasonable or appropriate in the circumstances. It is ComReg's view that Eircom did

not have sufficient grounds in this case to determine that BT's request for access was not reasonable.

195. Having considered Eircom's submission on the Draft Determination and for the reasons set out in its analysis ComReg remains of the view that in respect of the BT request for access that it is a reasonable request for an existing LLU service.

196. Therefore ComReg is of the view that Eircom is obliged to meet this access request pursuant to its obligations set out in Sections 4.1 and 4.2 of ComReg Decision D8/04.

7 Regulatory considerations taken into account in formulating a draft determination

197. As has been set out at paragraph 54 ComReg considers the issue in this dispute is whether, in the circumstances of this dispute, Eircom is obliged to provide access at Nutley Exchange for the volume of MDF terminations requested by BT and whether it was correct not to meet this request. ComReg's conclusion in respect of this issue is set out at paragraphs 191 to 196. Having reached this conclusion ComReg must formulate a determination.

198. Regulation 31(1) of the Framework Regulations states that any determination made by ComReg is "*aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*". As has been set out at paragraphs 46 to 48 Eircom has obligations, to meet reasonable requests for access, not to discriminate, a price control obligation and to negotiate in good faith. Therefore in considering the form of the determination in addition to the central issue relating to the access obligation ComReg has also examined the circumstances of the dispute in the context of;

- i. Eircom's obligation to Negotiate in Good Faith;
- ii. Eircom's obligation of Non-Discrimination; and
- iii. Eircom's obligation of Price Control.

However as stated ComReg considers Eircom did not meet its obligations to provide access under Section 4.1 and 4.2 of ComReg Decision D8/04, as ComReg concludes at section 6 of this Determination document.

199. Eircom in its submission raises the issue of obligations imposed on Eircom by way of ComReg decision D2/08 in respect of its position as the designated Universal Service Provider and submits this should have been considered by ComReg in this Determination.

200. ComReg has considered Eircom's submission and ComReg notes that these operational performance targets apply to the network as a whole and to repair as well as service delivery. ComReg also notes that the Nutley exchange represents less than \times % [confidential] of the overall installed base of lines, that a variety of solutions are available to Eircom to meet the BT request only some of which may impact on service delivery timescales and one of which (the acceleration of a cable replacement) would improve repair performance and that the volume of MDF terminations requested by BT is finite. Based on these matters ComReg is of the view that when averaged across the overall network performance a determination which required Eircom to make an offer to BT in respect of the access requested would not materially impact on Eircom's ability to meet its obligations as imposed by D2/08.

201. Regulation 31(6) of the Framework Regulations states that "*In making a determination under this Regulation the Regulator shall have regard to section 12 of the Act of 2002*". Therefore ComReg in considering the form of the determination has also examined the circumstances of the dispute in the context of Section 12 of the Communications Regulation Act 2002. Section 12 of the Communications Regulation Act 2002 is considered further below after ComReg's consideration of Eircom's obligation to negotiate in good faith, non-discrimination and price control. Section 8 sets out the Form of the Determination and Section 9 sets out the Determination itself.

7.1 Obligation to Negotiate in Good Faith

202. As set out at paragraphs 191 and 196 ComReg is of the view that Eircom is obliged to meet this access request pursuant to its obligations as set out in ComReg Document D8/04. It should be noted that in reaching this conclusion ComReg has not come to any view as to whether Eircom complied with its obligation to negotiate in good faith in the circumstances of this dispute. ComReg's determination is restricted to opining as to whether BTs request was reasonable under Sections 4.1 and 4.2 of ComReg Document D8/04.

203. Where it can be concluded that Eircom has an obligation to meet an access request pursuant to Section 4.1 and 4.2 of D8/04, then in such circumstances ComReg considers Eircom's obligation of good faith requires it to make an offer for the requested access pursuant to Section 4.4 of D8/04. Accordingly ComReg considers a determination which required Eircom to make such an offer would be "*aimed at compliance with the requirements of these Regulations and the Specific Regulations*" and for this reason the Determination set out in Section 9 below contains a consideration of Eircom's obligations pursuant to Section 4.4 of D8/04.

204. As stated at paragraph 53 herein, ComReg considers that the main issue in this Determination to concern the obligation on Eircom "*to meet reasonable requests by authorised undertakings for access to the local loop and access to collocation, or associated facilities, as provided for by Regulation 13 of the Access Regulations*", as set out in Sections 4.1 and 4.2 of ComReg Decision No. D8/04. However as also stated at paragraph 53 where ComReg has discussed Good Faith ComReg did not come to any view as to whether Eircom complied with its obligation to negotiate in good faith and insofar as Good Faith is discussed therefore it is in the alternative, and/or responds to submission from Eircom or is discussed in terms of ensuring compliance for the purposes of Regulation 31 of the Framework Regulations.

205. The revised draft determination dealt with a number of issues relating to good faith and the conduct of the parties during the events giving rise to the dispute. ComReg has taken note of Eircom's view that the draft determination focused on "*what ComReg constructs as breaches*". While ComReg does not necessarily agree with Eircom's view as can be seen this determination is concerned primarily with Eircom's access obligations pursuant to Section 4.1 and 4.2 of ComReg decision D8/04.

206. While the analysis included in the draft determination examined the past activities as examples of what might or might not be consistent with obligations it is ComReg's view that further analysis is not strictly necessary for the formulation of the Determination. The requirement in the Determination to make an offer and the setting out of the basis of this offer defines the nature of the required interaction between the parties going forward. To this end ComReg has amended the final Determination to reference as far as possible existing processes to as to more completely define the nature of the required interaction between the parties in complying with the Determination.

207. Therefore in order to make it clear that the determination is "*aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*" the examination of the nature of the past interaction between the parties in the circumstances of this dispute is no longer referenced.

7.2 Obligation to Act in a Non-Discriminatory Manner

208. ComReg draws attention to the wording of non-discrimination obligation, at section 6.2 of Decision D8/04, as follows:

"...eircom shall apply equivalent conditions in equivalent circumstances to other authorised undertakings providing equivalent services and shall provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners."

209. Eircom sets out that the issue of non-discrimination is not relevant or appropriate for this dispute as Eircom does not use LLU services but it states in relation to a non-discrimination obligation that in Eircom's view, it does not require Eircom to prioritise requests from OAOs over its own requirements. ComReg considers that is prudent and appropriate to clarify Eircom's obligations of non-discrimination given that the matters at issue go to the consideration of techniques for MDF rationalisation where a demand originates from another authorised operator and as against a demand from a source other than an OAO. Again as already stated these comments are separate to the determination in respect of Eircom's duty to provide access pursuant to Section 4.1 and 4.2 of ComReg Decision D8/04.

210. The MDF is a shared resource across multiple services and while demands from other activities may arise differently from LLU driven demands, it remains that space on the MDF is the focus - so that where a service places a demand on this shared resource it is equivalent to LLU placing a demand on this resource. As such Eircom's non-discrimination obligation applies to the application of MDF management techniques.

211. ComReg notes that Eircom typically has several possible options available to it in relation to a demand concerning a capacity constrained MDF. It is ComReg's view that Eircom did not consider all possible techniques in determining that there was insufficient MDF space to meet BT's demand and ComReg further considers that had a wider range of techniques been considered BT could have been accommodated at this exchange. ComReg considers that this self limitation by Eircom as to the range of techniques to be considered was not consistent with Eircom's obligation of non-discrimination.

212. Eircom reserves MDF space for plant replacement (in particular cable replacement) and as such a constraint on BT restricting it from seeking allocations for the same purpose would be at variance with the obligation of non-discrimination. This

restriction is what is implied by Eircom's proposal that ComReg consider the alternatives available to BT in the context of BT's request for capacity being required for plant replacement.

213. It is ComReg's view that Eircom must not prioritise its own requirements over other operators. In the context of its obligation of non-discrimination and in this specific instance ComReg considers it would not be acceptable for Eircom to always be in a position to fully meet its own requirements while requiring OAOs to compete for the remaining constrained capacity.

214. In its submission on the draft determination Eircom states that "*...it is incorrect to consider, as ComReg appears to do in para 158-159 of the Draft Determination, that eircom prioritise its own requirements over other operators contrary to its obligation of non-discrimination*". ComReg is of the view that the analysis set out in the draft determination and final determination shows that Eircom has excess MDF capacity reserved for Soft Dial Tone lines, non-Soft Dial Tone lines and junction cables. The analysis shows that Eircom has deferred cable replacement for internal Eircom budgetary reasons requiring the ongoing reservation of MDF capacity. The analysis shows that BT's request for access could have been met in the absence of these allocations. Therefore ComReg remains of the view set out in the draft determination that ComReg does not consider this form of MDF management to be consistent with an obligation of non-discrimination.

215. Eircom submits out in its submission of 26 November 2008 at paragraph 50 that ComReg is incorrect to consider that Eircom prioritises its own requirements over other operators. As has been set out at paragraphs 66 to 77 above Eircom has allocated excess capacity to its own forecasted requirements for Soft Dial Tone and Line cards. It has excess capacity allocated to the termination of junction cables. It has deferred cable replacements for internal budgetary reasons requiring the ongoing reservation of MDF space. As is set out at paragraph 211 Eircom did not consider the full range of MDF management techniques when assessing BT's request for access.

Considering these issues ComReg remains of the view that in the circumstances of this dispute Eircom's approach in dealing with BT's request was not consistent with its obligation of non-discrimination.

216. Eircom's submission also alludes to the impact of the requirement in the draft determination that "*existing capacity reserved for Eircom this shall in the first instance be offered to BT and the impact of any MDF rearrangements required to replace such a reservation will be borne by Eircom*" and outlines that this impact will be borne by all operators. This form of determination ensure that no undue delays accrue to BT in the making of MDF space available. In the case of space reserved for cable replacement Eircom itself has deferred implementation of the cable replacement and so has imposed this same impact on other operators. To this extent there is no net impact on other operators from this form of determination. The alternative is to allow Eircom maintain its reservation, which has been in place longer than operationally necessary, in order to meet Eircom's internal budgetary requirements. ComReg considers that this would allow Eircom to prioritise its own requirements ahead of those of an access seeker to whom it owes an obligation to provide access and would not be consistent with Eircom's obligation of non-discrimination.

217. Eircom in its response to the draft determination submits that the form of the determination actually requires Eircom to breach its non-discrimination obligation. To date Eircom has discharged its non-discrimination obligation by applying a 'first come first served policy'. However this is not the only mechanism that would potentially discharge this obligation, other options could for example take account of the timescale in which the requested access is required as well as the sequence in which the access was requested. Even if Eircom unilaterally applied a "first come first served" principle for MDF space allocation (which as set out at paragraphs 111 to 113 is not specified in the ARO) then the form of the determination is not inconsistent with Eircom's obligations. In respect of MDF capacity the imposed obligations themselves do not detail the mechanism by which Eircom must discharge them.

218. In its submission on the draft determination Eircom sets out that it does not believe that the form of ComReg's draft determination was consistent with Eircom's non-discrimination obligation vis a vis other OAOs. In this regard ComReg notes that to ComReg's knowledge no other OAO has requested a special inspection pursuant to clause 3.16 of the Process Manual for eircom Physical Collocation Service. No other OAO has raised a dispute as regards the making available of MDF space at Nutley exchange. To this extent there is no OAO in an equivalent position to BT at Nutley exchange in that no OAO has it is actively pursuing its request for access in the face of being told by Eircom that there is insufficient MDF capacity. ComReg notes that it published the scope of this dispute on its website. This informed all OAOs, including those which had previously had requests for MDF capacity declined, of the fact that BT had notified a dispute in respect of Nutley Exchange and as such they were on notice that BT was pursuing its request for access. In its submission on the draft determination Eircom states that the draft determination unduly favours BT over Eircom.. Eircom has an *ex ante* obligation to provide access to other undertakings. Given the circumstances of this dispute and ComReg's investigation and findings which indicate that BT's request was for an existing form of access, that the request was capable of being met by Eircom, that Eircom has excess capacity allocated or reserved on the MDF and that the costs of meeting BT's request were avoidable on the part of Eircom ComReg is of the view that the determination properly balances the rights and obligations of both parties and is aimed at ensuring Eircom's compliance with its obligation to meet reasonable requests for access.

219. The form of the determination does not require Eircom to actually provide the requested access in the first instance, only to make an offer to BT for the requested access . In the event that BT does not wish to take up this offer it is open to Eircom to make the offer to other OAOs.

220. To the extent that in not meeting BT's request Eircom did not act in a manner consistent with it obligations it is for Eircom to review its activities to ensure that it meets its obligations. This wider issue of Eircom's general compliance or non-

compliance with Eircom's obligation of non-discrimination is in ComReg's view beyond the boundary of the Determination which focuses on Eircom's obligation to provide access pursuant to Sections 4.1 and 4.2 of ComReg decision D8/04.

221. Based on the considerations set out at the preceding paragraphs ComReg is of the view that a determination that did not require Eircom to make an offer to BT for the requested access based on a consideration of the full range of MDF management techniques available to it would not ensure "*compliance with the requirements of these Regulations and the Specific Regulations*".

7.3 "Obligation of Price Control"

222. Based on the analysis set out at paragraphs 152 to 169 above an offer to BT by Eircom to meet its access request which sought from BT full cost recovery for the associated MDF management activities would not be consistent with Eircom's price control obligation and therefore would not in ComReg's view ensure "*compliance with the requirements of these Regulations and the Specific Regulations*" pursuant to Regulation 31 of the Framework Regulations.

223. Eircom's submission on the draft determination sets out that a determination which did not allow Eircom to recover costs from BT would be discriminatory as against Eircom and OAOs. At Paragraphs 164 and 166 above ComReg sets out that the costs of meeting BT's request were avoidable by Eircom and not attributable to LLU. In light of these a finding which allowed Eircom to recover costs from BT or OAOs would not be proportionate or reasonable.

7.4 Section 12 of the Communication Regulation Act 2002

224. In accordance with Regulation 31(6) of the Framework Regulations ComReg must have regard to section 12 of the Communication Regulation Act 2002. Section 12 sets out the objectives of ComReg in exercising its functions.

225. This dispute concerns the provision of electronic communications networks, electronic communications services and associated facilities and specifically unbundled access networks. ComReg took particular account of sections 12 (1) (a) (i) to (iii) of the Communications Regulations Act 2002 as relevant to this dispute. As noted above these sections provide that the objectives of the ComReg in exercising its functions, in relation to electronic communications, shall be as follows-

- “(i) to promote competition,*
- (ii) to contribute to the development of the internal market, and*
- (iii) to promote the interests of users within the Community”*

226. ComReg considers that in relation to these objectives and in reaching this draft determination that it has taken all reasonable measures which are aimed at achieving those objectives. For example in relation to the promotion of competition, (section 12 (1) (a) (i)), ComReg was cognisant of the provisions of section 12 (2) (a) (i) (ensuring users derive maximum benefit in terms of choice, price and quality): ComReg is of the view that the BT request was reasonable and that it was possible for Eircom to meet this request. ComReg considers that competition will be strengthened and that benefits to consumers should follow in terms of choice, price and quality. BT will be afforded enhanced access to the necessary wholesale inputs to offer competing retail services to Eircom. The availability of choice should in turn allow a competitive dynamic to develop where quality and price became differentiators between these competing retail offerings. In its submission on the draft determination Eircom states *“...it is not the case that ComReg’s proposed determination will strengthen competition because it would distort competition between LLU operators and with other OAOs.”* Annex 1 of the determination sets out that the efficiency of individual services must be balanced against the efficiency of common resources accessed by multiple services. Soft Dial Tone which is a mechanism to improve the speed of delivery of PSTN services and is not a prerequisite for their availability. MDF capacity is a prerequisite for LLU services. Therefore in this case what is potentially

being balanced is the speed of delivery of services using soft dial tone as against the availability or unavailability of another service (LLU). To the extent that the unavailability of LLU to BT is as a result of the reservation of MDF capacity for Soft Dial Tone this distorts competition against LLU as it constrains the availability of LLU while making the MDF space available would not constrain the availability of PSTN services. It should be noted that this balancing is not required in the case of Nutley exchange where Eircom chooses options such as the acceleration of cable replacement or the rationalization of junction cable reservations

227. In considering the provisions of section 12 (2) (a) (ii) (ensuring no distortion or restriction of competition) ComReg is of the view that its analysis shows that Eircom's behaviour in not meeting BT's request for access was not consistent with Eircom's *ex ante* obligations of access. Compliance with these obligations (as *ex ante* competition remedies) ensures that competition can be achieved and that there is limited opportunity or incentive to distort and restrict competition.

228. In considering the provisions of section 12 (2) (a) (iii) (encouragement of efficient investment in infrastructure and promotion of innovation) ComReg's analysis shows that in the context of a capacity constrained MDF Eircom has inefficiently allocated resources to its own future demands. ComReg's determination necessarily contemplates dealing with the inefficiency of the exchange. To this end the determination provides an incentive towards efficient infrastructure investment by Eircom in the future. Secondly unbundled local loop access affords the opportunity for undertakings to offer innovative services which are differentiated for the SMP operator. While WBA access is available in Nutley Exchange a determination which allowed for further unbundled local loop access would encourage innovation with potentially a matching competitive response by other providers of electronic communications services. In respect of the cost of providing this access, as has been set out in the detailed ComReg analysis the recover of the costs of this activity is already provided for in the standard LLU pricing. In its submission on the draft determination Eircom states that the form of the determination "*...does not provide any incentives toward efficient infrastructure investment by eircom in the future but*

rather appears to encourage inefficient investment policies.” At Annex 1 of the Draft Determination and this final determination ComReg sets out that the efficiency of individual services must be balanced against the efficiency of common resources accessed by multiple services. As such the determination encourages the availability of the maximum range of services. It should be noted that this balancing is not required in the case of Nutley exchange where Eircom chooses options such as the acceleration of cable replacement or the rationalization of junction cable reservations. The need to consider any such investment decisions only arise in the context of capacity constrained MDFs. Any impact of the determination, if it exists, on the overall efficiency of the complete range of services is consequently limited.

229. In relation to section 12 (1) (a) (ii), the development of the internal market, ComReg considers an analysis and subsequent determination which took too narrow a view of Eircom’s obligations in respect of LLU would cause a situation where the comparatively low take up of LLU in Ireland compared to other EU countries would be exacerbated. This would run counter to the developments across the EU which saw a substantial increase in take up of LLU. It may also deter companies, that are incorporated or established in other member states of the European Union, from seeking exercise its to right to freedom of establishment and the freedom to provide services, as enshrined in the Treaty of Rome²⁶.

230. In considering the provisions of section 12 (2) (b) (iii) ComReg’s analysis shows that Eircom’s statement that there was insufficient MDF space to meet BT’s access request and the manner in which it failed to consider the full range of MDF management techniques was not consistent with its obligation of non-discrimination. Therefore ComReg considers that a determination which requires that this access be made available would address this issue.

231. In considering the provisions of section 12 (3), (that measures taken by ComReg are proportionate having regard to the objectives set out), ComReg’s analysis recognized

²⁶ The freedom of establishment, set out in [Article 43](#) of the European Union Treaty of Rome and the freedom to provide cross border services, set out in [Article 49](#), are two of the “fundamental freedoms” generally accepted to be central to the effective functioning of the European Union internal market.

that any lack of immediate MDF capacity was attributable to Eircom's prior decisions and management of the exchange. ComReg considers that Eircom's position, in not considering the full range of MDF management techniques available, was not consistent with its *ex ante* obligations. Further the analysis shows that the costs would be recoverable within the overall LLU pricing allowed under Eircom's price control. In the alternative, even if they were not, these costs are again in large measure attributable to Eircom's inefficient management of the MDF in Nutley exchange. In the light of this and of the consideration of the dispute in the context of the other relevant provisions of section 12 of the Communication Regulation Act 2002 as set out above ComReg is of the view that a determination that requires Eircom to make the requested access available to BT would be proportionate. For instance, ComReg considers that the determination does not place any additional regulatory burden on Eircom beyond what is currently required to offer. As an existing LLU product the cost of this activity is recoverable under existing LLU pricing. ComReg is not being prescriptive in terms of how Eircom is to go about meeting its obligations. ComReg has considered the alternatives available to BT before reaching its determination.

232. In considering the provisions of section 12 (4) ComReg notes that on the 26 of March, 2004 the Minister for Communications, Marine and Natural Resources issued a General Policy Direction on Competition to ComReg pursuant to Section 13 of the Communications (Regulation) Act, 2002 (No. 20 of 2002). This Direction provides that:

“ComReg shall focus on the promotion of competition as a key objective. Where necessary, ComReg shall implement remedies which counteract or remove barriers to market entry and shall support entry by new players to the market and entry into new sectors by existing players. ComReg shall have a particular focus on:

- *market share of new entrants;*
- *ensuring that the applicable margin attributable to a product at the wholesale level is sufficient to promote and sustain competition;*
- *price level to the end user;*
- *competition in the fixed and mobile markets;*

- *the potential of alternative technology delivery platforms to support competition.”*

233. Based on the analysis of the circumstances whereby Eircom has declared the MDF at Nutley exchange as full where there is excess capacity in the allocation that Eircom has made for its own use ComReg is of the view that this approach by Eircom constitutes a barrier to market entry as it prevents the implementation of LLU by OAOs in Nutley exchange. Therefore a determination which provides that Eircom make capacity available would conform to the policy direction that “*ComReg shall implement remedies which counteract or remove barriers to market entry... ”*”.

234. On the same date the Minister for Communications, Marine and Natural Resources issued a Policy Direction in respect of Broadband to ComReg pursuant to Section 13 of the Communications (Regulation) Act, 2002 (No. 20 of 2002). This Direction provides that:

ComReg shall use regulatory and enforcement tools, where necessary and subject to relevant requirements under European and National law, to support initiatives to develop broadband and remove regulatory barriers, if any exist, to such initiatives. In encouraging the further rollout of broadband ComReg shall have a particular focus on:

- *the residential and SME sectors;*
- *balanced regional development and;*
- *potential for broadband provision on alternative platforms.*

235. As set out at Paragraph 4.2 of BT’s request for dispute resolution BT’s request for additional LLU capacity at Nutley exchange is an initiative to develop broadband. Therefore provided it met the relevant requirements under European and National law a determination which made such access available to BT would support the initiative to develop broadband and thus conform to the policy direction.

236. In considering the provisions of section 12 (5), (having regard to international developments of electronic communications), ComReg notes the contents of the 13th

Report on the Implementation of the Telecommunications Regulatory Package – 2007
by the European Commission. This report states that

“A solid increase has been registered during 2007 in the number of wholesale unbundled local loops (fully unbundled lines and shared access lines). The growth of wholesale LLU lines, representing 12.8% of the activated PSTN lines in the EU, was 47.7%, from 15.9 million in January 2007 to nearly 23.5 million in January 2008. This increase comprises nearly 5.9 million newly added fully unbundled lines and 1.7 million newly added shared access lines. The number of shared access lines increased from 5 million to 6.7 million lines, while fully unbundled lines went up from 10.9 million to a remarkable 16.8 million.”

237. An analysis and subsequent determination which took too narrow a view of Eircom’s obligations in respect of LLU would cause a situation where the comparatively low take up of LLU in Ireland compared to other EU countries would be exacerbated. ComReg considers this would run counter to the developments across the EU which saw a substantial increase in take up of LLU.

238. In considering the provisions of section 12 (6), (no discrimination in favour of or against particular types of technology), ComReg notes that the SMP designation of Eircom and the imposition of remedies on foot of ComReg decision D8/04 reflect the issues of technology neutrality. A determination which failed to give proper effect to the remedies imposed on foot of this designation would therefore have a negative impact on the market availability of products based on technologies associated with LLU and would not be technology neutral. As has been outlined in the detailed analysis Eircom’s failure to fulfill the BT request for access was not consistent with a number of these remedies. Therefore a determination which requires Eircom to make the requested access available to BT is necessary in order to give effect to the remedies imposed.

8 Form of determination

239. Based on the matters set out at paragraphs 197 to 238 ComReg is of the view that an appropriate determination would involve requiring the access requested by BT to be made available. In defining the detail of such a determination ComReg has considered the following:
240. Given the passage of time since the request was made ComReg is of the view that it would be more proportionate to require Eircom to make an offer to BT, before any works were undertaken by Eircom. Given that Eircom has outlined possible solutions to meeting this request and given that the original absence of an offer was due to Eircom's failure to act consistently with its obligations to provide access ComReg is of the view that 6 weeks is an adequate timescale to allow Eircom to formulate its offer. ComReg is aware there may be multiple solutions to the provision of the requested access and considers a determination which allowed some flexibility in the design and provision of the facilities as more appropriate.
241. Given that BT will have no sight of timescales on which to plan its equipment deployment ComReg considers a period of two months for BT to accept the offer is reasonable.²⁷
242. Considering the issue of a minimum term ComReg is of the view that given the capacity constraints on the Nutley MDF any condition which had the effect of requiring BT to maintain MDF capacity longer than it required would not be conducive to the efficient use of the MDF. The draft determination proposed that a term be set but did not specify what the term should be. In order to give certainty and to align the determination with the existing arrangements between the parties so as to minimize the impact of the determination in requiring new contractual arrangements ComReg is of the view that no additional minimum term beyond that provided for in the Site License agreement existing would be appropriate. This also more completely defines the nature of the required interaction between the parties.

²⁷ The determination instrument in the revised draft determination specified 10 weeks however in the final determination this has been aligned with the reasoning set out here

243. Given the typical phasing of capital investment programs and that there has been some time since BT's original request for access and the necessary uncertainty regarding the outcome of the dispute process ComReg believes that it is reasonable to allow BT an adequate opportunity to align the implementation of the requested capacity (should it decide to avail of it) with its investment program. Therefore ComReg further considers that BT should be afforded a period of up to six months over which it can phase the activities required to take up the offered access.

244. The revised draft determination set out that if "*BT informs Eircom that it will take up the offer then subsequently decides not to avail of the offer it shall pay 12 months standard ARO charges for the offered facility from the date of the expiry of the offer*". ComReg has reconsidered this aspect of the determination and in line with the reasoning set out in paragraph 242 above considers that it is more appropriate to rely on the existing offer and acceptance procedures already in existence so as to minimise the additional impact on the parties.

245. In its submission on the draft determination Eircom suggests that a determination should be based on its proposals of 18 January 2008. However Eircom also sets out its view that it was not open to ComReg to consider these proposals in the context of the dispute. ComReg has considered the circumstances of the dispute and based on its conclusions as set out in this document and based on the considerations to be taken into account in formulating a determination the determination meets the requirement of Regulation 31 of the Framework Regulations that it is "*aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*". ComReg notes that Eircom's proposals were based on Eircom levying a charge for meeting the request for access on BT and as has been set out at paragraphs 172 to 174 above this would not be appropriate in the circumstances of this dispute.

246. In the normal course of events the cost recovery mechanism would be to recover the attributable costs via the standard LLU pricing. However as has been set out at

paragraphs 158 to 164 above in the circumstances of this dispute the costs associated with making this capacity available to BT were avoidable by Eircom. Eircom could have promptly implemented its cable replacement freeing up reserved capacity, Eircom has capacity in excess of likely short to medium term demands allocated for Soft Dial Tone and other PSTN services and Eircom has excess capacity allocated for leased lines on junction cables and a significant proportion of the cost in using this as a solution arises from the lack of proper network records. Therefore in the circumstances of this dispute ComReg considers that it is not appropriate that OAOs should bear the burden of costs that were avoidable by Eircom.

247. In terms of the implementation of any solution to meet BT's request ComReg notes that Eircom has MDF space reserved for itself for the purposes of cable replacement. For its own business prioritisation Eircom has deferred the use of this activity which had the result of crystallizing a MDF capacity shortage. As set out at paragraphs 197 to 238 Eircom's subsequent actions in dealing with BT's request were not consistent with its obligations. Therefore in order to formulate a determination that ensures compliance with obligations ComReg is of the view that BT must be put in the position that it would have been in had Eircom previously acted in accordance with its obligations and did not prioritise internal budgetary considerations ahead of its regulatory obligations to meet requests for access. To do this it is necessary that this prioritisation be reversed and that the space reserved for cable replacement, in the first instance, be made available to meet BT's request. This approach takes account of the fact that Eircom has excess capacity reserved for Soft Dial Tone and other services. In this circumstance requiring BT to wait until Eircom frees up this excess capacity while maintaining a discretionary reservation on MDF capacity would allow Eircom to delay meeting the request for access for a discretionary reason not related to the facility requested.

248. ComReg will monitor compliance with this Final Determination.

249. It is anticipated that ComReg publish this Determination on its website, having regard to the requirements of confidentiality, as set out in ComReg Document No. 05/24.

9 Determination

The Commission for Communications Regulation ('ComReg'), pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007) ('the Framework Regulations') in accordance with Dispute Resolution Procedures (Decision No: D18/03, Document No: 03/89, Date: 25 July 2003), hereby makes the following Determination:

DETERMINATION: In consideration of Eircom Limited's ('Eircom') obligation to meet reasonable requests for access and to provide collocation pursuant to Sections 4.1 and 4.2 of ComReg Decision D8/04, ComReg considers that BT Communications Ireland Limited's ('BT')'s request for access at the Nutley Exchange was a reasonable request for an existing LLU service. ComReg is of the view that Eircom is obliged to meet this access request.

Pursuant to Regulation 31 of the Framework Regulations having regard to Eircom's obligation to negotiate in good faith pursuant to Section 4.4 of ComReg Decision D8/04;

having regard to Eircom's obligation of non discrimination pursuant to Section 6 of ComReg Decision D8/04; and

having regard to Eircom's price control obligation pursuant to Section 9 of ComReg Decision D8/04, Eircom shall

- (1) Within six weeks of the effective date of this final determination, make an offer to BT in relation to the access requested. This offer will include timelines for availability of the requested capacity and will be valid for implementation for a period of six months from the date of the**

availability of capacity. The offer shall be based on the standard Access Reference Offer ('ARO') pricing at the effective date of the final determination with no charge associated with work necessary for rearrangement of the associated Main Distribution Frame ('MDF').

- (2) In designing a solution to provide such capacity Eircom shall take account of the following :
- The date for the availability will be based on the earliest possible date that Eircom can achieve. It shall not be acceptable to delay this date because of any activity not directly related to the provision of the requested capacity except to the extent that within the timescale of the production of the offer, in discussion with BT, an alternative availability date is accepted by BT for full delivery or phased delivery.
 - Where there is existing capacity reserved for Eircom, this shall in the first instance be offered to BT and the impact of any MDF rearrangements required to replace such a reservation will be borne by Eircom.
- (3) BT shall have up to two months of the date of an offer from Eircom to indicate whether it wishes to avail of this offer. If BT does not respond by the end of this period, the offer will lapse. Other than as specified in this Determination the making and acceptance of any offer will be in accordance with the terms and conditions of Eircom's Access Reference Offer.

John Doherty
Chairperson
For Commission for Communications Regulation
The 5th day of March 2009

Annex 1 –Outline of the cost recovery mechanisms associated with LLU on foot of Eircom’s Price Control obligations

1. Eircom is obliged under Paragraph 9 of D08/04 to have cost oriented prices²⁸. Any demand associated with LLU is in respect of facilities for accessing the existing copper loops. Eircom owes an obligation to give access to copper loops. Some activity is required on the part of Eircom to give access to the “line” side copper pairs and the current LLU pricing allows cost recovery for this activity.
2. ComReg considers this price control allows Eircom to recover its costs in providing LLU services provided that the costs are those that would be incurred by an efficient operator in providing these services. This regulatory obligation is to ensure that Eircom does not attempt to recover cost unrelated to the product and also to avoid a situation where Eircom could force costs into this service (and hence higher prices for OAOs) by adopting inefficient work practices.
3. It should be noted the cost recovery for individual copper loops is averaged across the entire Eircom network and therefore across the entire Eircom cost base. The LLU current pricing has provision for recovery of such costs across the totality of Eircom’s network costs. Accordingly the cost recovery attributable to LLU is by way of having a standard price for a single LLU line, the ULMP price. As with any average cost, not every unit has the same underlying costs, some will be higher than the average some will be lower.
4. Eircom in its submission on the draft determination states that ComReg is incorrect to state that the costs for MDF activity are recoverable from the ULMP monthly charge. ComReg notes that based on Eircom’s own product description ULMP includes both

²⁸ Eircom shall have an obligation to offer cost oriented prices for LLU services, collocation, and associated facilities on the basis of forward looking long run incremental costs (‘FL-LRIC’) as provided for by Regulation 14 of the *Access Regulations*.

sides of the MDF. Therefore it is reasonable to assume that Eircom has made provision to recover the MDF costs from the ULMP charging.

5. By way of analogy, Eircom has a standard price for line rental for its own customers irrespective of the costs associated with the individual line. However the total costs are recovered across the total revenues.
6. While there is a cost to managing an MDF, this cost recovery is not achieved on an MDF by MDF basis but across the entirety of Eircom's network with the totality of the cost of managing all MDFs in the Eircom network. It should be noted that the MDF is a shared resource serving multiple services. Therefore cost arising from MDF management activities must be recovered across all services that utilise the MDFs. In the case of LLU this means that the cost of MDF management should not be fully allocated against LLU.
7. In its submission on the draft determination Eircom misinterprets ComReg's position. It is not ComReg's view that LLU operators should not bear the cost of MDF management activity. However it is ComReg's view that LLU operators should bear a proportionate cost and that this cost, to the extent that it is attributable to LLU, should be averaged across the entire Eircom network and should be recovered in the ULMP monthly charge.
8. It is also ComReg's view that where MDF management activity is required to make LLU access possible because the MDF is optimised for other services then this cost is not attributable to LLU but to the services for which the MDF has been optimised.
9. Where an MDF has excess spare capacity an approach which reserves capacity in excess of short to medium term requirements (Soft dial tone or stabilised lines), or which does not rationalise capacity which is now over dimensioned due to decline in demand for a product or change in usage (allocations for leased lines and the use of tie cables to provide connectivity between exchanges), ComReg considers this may

be efficient as it may allow long term operational efficiencies in providing the services which have had such an allocation made for them. However, ComReg considers such an arrangement is likely to be inefficient in terms of the management of the MDF where capacity constraints are significant. Accordingly in these cases it is necessary to balance efficiency associated with individual services with the efficiency of a common resource that is the MDF which underpins multiple services.

Summary of LLU Price Control Obligation

10. In summary as set out in paragraphs 1 to 9 recovery of relevant costs for the delivery of the standard LLU product is to be averaged across the entire network under Eircom's current LLU price control obligation.