The Competition Authority
An tÚdarás Iomaíochta

MERGER DETERMINATION M/05/ 050

Competition Act 2002

Merger Determination of The Competition Authority (M/05/050)

Proposed acquisition of Meteor Mobile Communications Limited by eircom Group plc

18 November 2005

Introduction

1. On 12th August 2005, in accordance with Section 18(1)(b) of the Competition Act 2002 ("the Act"), The Competition Authority was notified on a mandatory basis of a transaction whereby eircom Group, plc would acquire Meteor Mobile Communications Limited for €420 million. The notified transaction is herein described as "the proposed acquisition".

The Parties

The Acquirer

2. eircom Group, plc ("eircom") is the incumbent fixed line telecommunications provider in Ireland and is also an Internet Service Provider ("ISP"). It provides a range of fixed line voice, data and Internet services to residential and corporate customers, such as fixed line voice telephony services and fixed line data services. eircom also provides wholesale services to other network operators and service providers, such as interconnect services, termination of calls, wholesale line rental ("WLR"), and wholesale broadband ("bitstream").
3. eircom principally provides telecommunications services in Ireland, although it does provide some very limited telecommunications services outside Ireland in the United Kingdom and the United States through certain of its subsidiaries and related companies. For the financial year ended 31 March 2005, eircom had worldwide turnover of € 1.602 billion, 99.7% of which was generated in Ireland.

The Target

4. Meteor Mobile Communications Limited ("Meteor") is a mobile network operator that began operating commercially in 2001. Meteor provides retail services including mobile access and basic voice services, including international roaming calls, premium rate services and basic and value added short messaging services ("SMS"). Meteor also provides wholesale interconnection and wholesale international roaming services.
5. Meteor is a wholly owned subsidiary of Western Wireless Corporation of Bellevue, Washington, USA. It operates solely in Ireland although it does earn a limited amount of revenue from non-Irish sources through international roaming agreements. For the financial year ended 31

December 2004, Meteor had worldwide turnover of approximately € 86.2 million.

Procedural History

Further Information Request

6. On 7th September 2005, The Competition Authority requested further information from the undertakings involved pursuant to Section 20(2) of the Act. The Competition Authority specified that the requirement be complied with by 21st September 2005. At the request of the undertakings involved, The Competition Authority met and spoke with their representatives on several occasions to grant reasonable limitations on the information and documents sought.
7. On 21st September 2005 at the request of the target's representatives, The Competition Authority granted an extension of time for compliance with the request to 28th September 2005. Representatives of the target provided The Competition Authority with information and documents sought in the Section 20(2) request on the 28th September 2005.
8. On 16th September 2005 at the request of the acquirer The Competition Authority granted an extension of time for compliance with the request to 7th October 2005. The representatives of the acquirer provided The Competition Authority with information and documents sought in the Section 20(2) request on 27th September, 4th October, and 7th October 2005.
9. On 28th October 2005, representatives of the acquirer submitted proposals to The Competition Authority which the acquirer intended to become binding on a combined eircom/Meteor entity. Representatives of the acquirer submitted revised proposals based on consultation with The Competition Authority on 8th, 15th, 16th, and 17th November 2005.

Submissions Received

10. The Competition Authority received submissions from the following third parties with regards to the proposed acquisition.
    - ALTO
    - BT Ireland
    - Commission for Communications Regulation ("ComReg")
    - 02 Ireland
    - Smart Telecom
    - Vodafone Ireland
    - Tele2
    - Another third party who requested confidentiality and so is not identified
11. The Competition Authority also spoke with several other telecommunications providers.

Relevant Product Markets

Fixed Line Telecommunications Markets

12. eircom is the incumbent provider of fixed line telecommunications services in Ireland. eircom offers retail services and products to residential and business customers in the form of fixed line voice and data services (including broadband services). eircom also provides other alternative operators ("OAOs") with wholesale services and products on both

regulated and commercial bases. Examples include interconnect services, carrier pre-selection, wholesale line rental, bitstream, and unbundled local loops.

13. The most recent ComReg quarterly review stated that eircom retains an 84% market share in the fixed line narrowband access market, which includes fixed voice calls and dial-up Internet.[1] The most recent survey performed by ComReg indicated that Smart Telecom had the largest market share for an OAO, followed by BT Ireland. The remainder of market share is divided up among many operators such as Cinergi, Tele2, and TalkTalk.[2] eircom holds approximately 78% of the market for DSL broadband.[3]

14. eircom as the incumbent fixed line telecommunications provider is heavily regulated. Under the new regulatory framework ("NRF"), ComReg must impose regulatory obligations in markets where it finds that eircom has significant market power ("SMP").[4] eircom has been designated as having SMP in fourteen markets that ComReg has analyzed. These fourteen markets are listed below:

Retail	**Wholesale**
Residential fixed line public telephone network access Non-residential fixed line public telephone network access Residential publicly available local and national telephone services provided at a fixed line location Residential publicly available international telephone services provided at a fixed location Non-residential publicly available local and national telephone services provided at a fixed location Non-residential publicly available international telephone services provided at a fixed location Minimum set of leased lines up to and including 2 MB/s	Call origination on the public telephone network provided at a fixed location Call termination on the individual public telephone networks provided at fixed location (together with other fixed line operators) Transit services in the fixed public telephone network Wholesale unbundled access Wholesale broadband access Wholesale terminating segments of leased lines Wholesale trunk segments of leased lines

15. In each of these markets, ComReg has imposed the full range of obligations available to it under the regulatory framework: transparency, non-discrimination, access, accounting separation, cost-orientation and cost accounting. Under the obligations imposed by ComReg, eircom is

[1] ComReg, *Quarterly Key Data Report*, Doc. No. 05/73, 20th September 2005, Figure 2.1.2

[2] ComReg, *Trends Survey Series*, Wave 3 2005, Residential Communications Survey Report, Doc. 05/86b, 18th November 2005.

[3] *Quarterly Key Data Report*, Figure 2.8.3.

[4] 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").

required to provide a variety of wholesale products to OAOs to allow the OAOs to provide services to their customers. Below is an overview of the main wholesale products eircom is required to provide that are relevant to the review of the proposed acquisition.

Product	Description
Carrier Pre-Select ("CPS")	CPS allows customers to pre-select an OAO to carry their outgoing calls.
Wholesale Line Rental ("WLR")	WLR allows OAOs to rent lines from eircom and re-sell those lines to customers.
Single Bill ("SB-WLR")	This facility allows OAOs to provide both line rental and CPS (call services) to their customers with a single bill (as they would receive from eircom).
Bitstream	Wholesale broadband product that OAOs can re-sell to customers.
Local Loop Unbundling ("LLU")	Process involving the physical disconnection of a line from eircom's network to and reconnection to an OAO's network. It involves the OAO putting equipment into eircom's exchange and physically switching each line (the local loop) to the OAOs equipment.
Line Share	Unbundling of half of the local loop – the half used for broadband. At present this can only be combined with an eircom line rental.

Mobile Telecommunications Markets

16. As stated above, Meteor provides retail mobile voice services, supplementary (premium) mobile services, SMS and wholesale interconnection and wholesale international roaming services.

17. The mobile market currently has four licensed mobile network operators: Vodafone, 02, 3 Ireland, and Meteor. According to ComReg's most recent quarterly review, Vodafone and 02 combined hold an 89.3% share of the market.[5] 3 Ireland only commercially launched its services recently and so no market share data is available. Meteor has doubled its share of the mobile market in the last twenty months but at 10.7% it continues to be a distant third player.

18. Mobile markets are less heavily regulated than fixed line markets although ComReg has found SMP and imposed obligations in two important markets: the market for wholesale mobile access and call origination ("MACO") and the market for mobile call termination.

[5] *Quarterly Key Data Report*, Figure 3.2.1

19. ComReg found Vodafone and 02 jointly dominant in the MACO market in December 2004.[6] It found structural links between the two operators which created interdependence that increased the natural tendency towards coordinated effects inherent in an oligopolistic market. It also found a lack of competition between Vodafone and 02 at both the wholesale and retail level. It found that Meteor did not constitute a competitive threat to Vodafone and 02 due to Meteor's difficulty in attracting subscribers and revenues, Meteor's 'late mover' disadvantage, a perception of a lack of national network coverage, and little evidence that Meteor had made any significant impact on the tariffs of Vodafone and 02.

20. ComReg imposed obligations of access, non-discrimination, cost-orientation, accounting separation, and cost accounting on both Vodafone and 02 although it delayed implementing the latter three obligations until an attempt at negotiating access on a commercial basis had been made.

21. Under this designation, Vodafone and 02 have obligations to meet reasonable requests for access to their networks by Mobile Virtual Network Operators ("MVNOs"). However, Vodafone, 02 and Meteor have appealed this decision and any implementation is delayed pending the outcome of the appeals.

22. In addition, ComReg has found that each mobile network constituted a separate market for mobile call termination, and that each operator has SMP on the market for its network.[7] 3 Ireland successfully appealed this designation, but it continues to apply to Meteor, Vodafone and 02. ComReg imposed all six obligations available on Vodafone and 02 but imposed only access, transparency, non-discrimination, and cost orientation on Meteor and 3 Ireland. As a consequence, Meteor is obliged to charge cost-oriented prices for its termination rates but is not under any kind of accounting obligation to ComReg. ComReg plans to use the cost information provided in Vodafone and 02's accounts to benchmark a cost-oriented price for call termination for Meteor.[8]

Fixed and Mobile as Separate Markets

23. ComReg and the European Commission ("the Commission") have repeatedly determined that fixed and mobile telecommunications services are in separate markets.[9] Opinions of The Competition Authority have agreed with ComReg's market definitions.[10] Although it is generally accepted that there is a certain degree of substitution between the two technologies for voice calls and that the degree of substitution is increasing, The Competition Authority believes that the level of

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[6] ComReg, *Market Analysis: Wholesale Mobile Access and Call Origination*, Doc. No. 04/118 and 04/118a, 9th December 2004.

[7] ComReg, *Market Analysis*: *Wholesale Voice Call Termination on Individual Mobile Networks,* Doc. No. 03/127a, 22 October 2003.

[8] ComReg, *Consultation on Remedies: Wholesale Voice Call Termination on Individual Mobile Networks*, Doc. No. 04/62b, 8th June 2004.

[9] Some of the Commission's most recent merger determinations in which it found that the mobile market was a market of its own include: Case COMP/M.3530 – *Telia Sonera AB/Orange AS* (2004), Case No. COMP/M.3561 *Deutsche Telecok/Eurotel* (2004); Case No. COMP/M.3776 – *Vodafone/Oscar Mobile* (2005). However, the most detailed discussion of fixed and mobile as separate markets occurred in Case No. COMP/M.1439 *Telia/Telenor* (1999), para 73-120 and COMP/M.2803 – *Telia Sonera* (2002), para 10-11. ComReg's most recent discussion of fixed and mobile as separate markets occurred in its *Market Analysis: Retail Fixed Calls Markets*, Doc. No. 05/26, 22nd March 2005.

[10] E.g. *Market Analysis: Retail Fixed Calls Markets*, Appendix A.

substitution has not reached the point where the different products can be considered to be in the same market. There is no evidence that the level of substitution has changed significantly since the most recent determinations by ComReg and the Commission that fixed line and mobile telecommunications services are in separate markets. ComReg specifically addressed this in its analysis of the retail fixed call markets in March 2005 where it stated that while the trend was towards increasing substitutability, other factors such as the persistent price differential between fixed and mobile calls and the limited functional substitutability of the products led to the conclusion that calls from fixed line locations and calls from mobile phones are in separate markets.[11]

Fixed/Mobile Convergent Products

24. Notwithstanding the above, there is a significant likelihood that a new market will emerge in coming years for fixed/mobile convergent products ("FMC"). FMC technology, for the purposes of this determination, refers to technology that allows one product to be used as both a mobile and a fixed line phone. One such product that has been widely publicized is the BT Fusion system which has recently been released in the UK. This product uses a specially designed phone that operates as a mobile phone on a mobile network but uses Bluetooth technology to connect to the fixed line network while at home and charges landline rates in the 'home' zone. It does this by using a broadband connection and Bluetooth access point in the home to transfer the mobile phone signal via the Internet to the PSTN (public switched telephone network). BT partners with Vodafone in the UK to provide the mobile element of this service.

25. Mobile operators are also developing products that allow them to simulate fixed/mobile convergence. Vodafone and 02 are both trialling technology in Germany that allows them to offer a product with the same effect (a mobile phone that offers landline rates while at home) but without actually using the fixed line PSTN. Vodafone *Zuhaus Zone* allows customers to have special rates (comparable to fixed line rates) when the user is inside the 'cell' of the mobile network that surrounds the user's home. The latest package advertised offered 1000 minutes of calls for €20 from within the home zone to landlines, with extra charges for mobile and national calls. 02 Germany has a product called Genion that operates in a similar way except that it also includes a broadband product called "Surf at Home" that uses 3G technology to provide broadband at home. This particular technology is presently confined to 02's German network as there are special features of its network that allow for 3G to be used in this way.

26. Although these products are in development in other countries, there is no indication that an FMC product is close to being introduced in Ireland. eircom has estimated that it is at least eighteen months away from introducing any such technology, and The Competition Authority has seen no evidence that other operators in Ireland are trialling FMC products.

Geographic Market

27. The geographic market is the State.

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[11] *Market Analysis: Retail Fixed Calls Markets*, paras. 3.13 to 3.21.

Competitive Effects

28. Post-acquisition, eircom intends to continue to operate Meteor as a standalone subsidiary. However, it also intends to establish a business within eircom which is likely to focus on corporate, small and medium sized enterprises (“SMEs”), and post-paid customers. For the purposes of this determination, this business division will be referred to as “the mobile phone entity.” eircom has stated that it will continue to operate Meteor but that the mobile phone entity will likely be used to develop a presence in the post-paid mobile sector. Therefore, it appears that eircom intends to offer mobile services from two companies, one which would be a subsidiary of eircom and one which would be a business division within eircom Limited.

29. There is no overlap in the markets in which eircom and Meteor operate so the proposed acquisition is not a horizontal acquisition. Therefore, the proposed acquisition will not result in any unilateral or coordinated effects.

30. There is a possibility for non-horizontal effects to arise, as the transaction is likely to affect both fixed and mobile telecommunications markets as well as the emerging market for fixed/mobile convergent products. Most of the third party submissions raised concerns about how the proposed acquisition would affect fixed line and mobile markets. However, it should be noted that none of the submissions contended that the concerns were severe enough for The Competition Authority to block the transaction. Rather, the submissions argued for The Competition Authority to consider imposing conditions on the transaction to prevent these concerns from arising.

31. The concerns raised by the third parties are addressed in turn below.

Pricing Concerns

32. Many third parties were concerned about the potential ability of the post-acquisition entity to use pricing strategies such as cross subsidization, margin squeeze, and discriminatory wholesale pricing to gain an advantage over its competitors.

33. Initially, it should be noted that for The Competition Authority to find that the post-acquisition entity is likely to engage in anti-competitive conduct (such as pricing abuses) that would cause a substantial lessening of competition, it must examine comprehensively the likelihood of such conduct occurring. Particularly, it must examine whether the fact that conduct is unlawful would serve as a deterrent that may outweigh the incentives of engaging in such behaviour.[12]

<u>Cross Subsidization through Cost Allocation</u>

34. ComReg noted that there may be potential for the post-acquisition entity to mis-allocate common costs that should be attributed to mobile businesses to fixed line businesses. An increase in the costs allocated to eircom’s fixed-line business (“eircom fixed line”) could increase the prices

[12] *Commission of the European Communities v. Tetra Laval BV*. Cases C-12/03 P and C-13/03 P [2005]

that eircom charges competitors for those fixed line wholesale products that are priced on a cost basis, such as interconnection charges[13] and LLU.[14]

35. An increase in interconnection charges would adversely affect both fixed line and mobile markets as all network operators must interconnect with eircom. An increase in the price of wholesale products such as LLU will further affect fixed line operators that use such products to provide services to consumers. Any increase in the wholesale prices charged could result in either a margin squeeze on competitors or higher prices for consumers. A margin squeeze would have particular effect in fixed line markets where eircom is dominant and OAOs are dependent on eircom's wholesale products to provide services to customers.

36. Regardless of whether such behaviour by eircom is likely, ComReg should be able to prevent it if it can adequately monitor eircom's common cost allocation. Currently, ComReg monitors eircom's allocation of common costs within its fixed line businesses by analyzing the accounts that eircom provides in accordance with its regulatory obligations. However, the post-acquisition entity will not be required to provide accounting information for either of its mobile arms under current regulatory mechanisms. Under the decision on mobile call termination, ComReg declined to impose accounting separation or cost accounting obligations on Meteor, and the post-acquisition entity will be under no obligation to present accounting information for the mobile phone entity as it will not be designated as an SMP business. Without accounting information from Meteor and the mobile phone entity, ComReg may not be able to adequately monitor the post-acquisition entity's allocation of common costs and therefore may not be able to prevent a misallocation of costs which would have the effect of raising wholesale prices charged to competitors.

<u>Discriminatory Treatment in Interconnection Charges</u>

37. Several submissions also raised the possibility that eircom could charge lower wholesale interconnect rates to a mobile arm, or that a mobile arm could charge lower interconnect rates to the fixed line business, than it charges to competitors. For instance, Meteor could charge eircom fixed line a lower rate to terminate on its network than it charges other operators.

38. Such discrimination could provide eircom with a cost advantage over its competitors in both fixed and mobile markets. Such treatment is unlikely to substantially lessen competition in mobile markets, as Meteor is such a distant third player that any disadvantage to competitors is unlikely to foreclose the market. However, there is a concern that any cost advantage that eircom gains in fixed line markets may strengthen its dominant position in those markets. For example, if Meteor did charge higher termination rates to competitors than it did to eircom fixed line, eircom fixed line would be able to offer lower retail prices for those calls and would be at an advantage over its fixed line competitors that are not able to offer any discounted mobile calls.

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[13] ComReg, *Market Analysis: Interconnection Markets*, Doc. 05/37a, 19th May 2005.
[14] ComReg, *Market Analysis: Wholesale Unbundled Access (including shared access) to metallic loops and subloops*, Doc. No. 04/70, Dec. No. D8.04, 15th June 2004.

39. Again, regardless of the likelihood of such discrimination occurring, existing non-discrimination obligations should protect against this. ComReg can and does monitor compliance with non-discrimination obligations. Meteor currently has an obligation of non-discrimination regarding its termination rates so that Meteor post-acquisition will be required to charge other operators the same termination rates that it charges itself or eircom fixed line businesses. eircom's fixed line wholesale products also are subject to non-discrimination obligations. Although the mobile phone entity would not automatically be subject to non-discrimination obligations, ComReg could conduct a new market analysis to achieve this. In addition, any such discrimination could be dealt with under the Act.

40. However, the lack of availability of accounting information regarding eircom's mobile arms discussed above may hinder ComReg in its ability to monitor compliance with any non-discrimination obligations. Without this information, ComReg may not be able to detect the termination rate charged to different eircom groups.

Proposal

41. To deal with the above concerns regarding misallocation of common costs and potential discriminatory wholesale charges, eircom has proposed to The Competition Authority specific accounting treatment of its mobile businesses with a view to the proposals becoming binding under Section 20(3) of the Act. The specific proposals are detailed at the end of this determination. eircom has proposed the following:

- To continue to operate Meteor as a legal subsidiary and therefore to produce statutory accounts for Meteor. eircom has committed to provide the equivalent of statutory accounts regardless of Meteor's legal status for 3 years following the date of the proposed acquisition.

- To provide profit and loss accounts and balance sheet statements for both Meteor and a potential other mobile business currently referred to as the mobile phone entity. These profit and loss and balance sheet statements contain information on cost allocation and information on transactions between the fixed line and mobile businesses. These accounts will be independently audited by eircom's auditors for compliance with the commitments to The Competition Authority.

- To provide ComReg with further detail on the cost allocation and internal interconnection charges provided within these accounts on request.

42. Based on ComReg's advice that this level of information would be sufficient to allow it to monitor for cross subsidization between fixed and mobile businesses and for compliance with non-discrimination obligations, The Competition Authority believes that the proposals made by eircom resolve potential concerns about eircom's ability to substantially lessen competition in either the fixed line or mobile market through possible pricing abuses.

Cross Subsidization of Mobile Services from Fixed Line Profits

43. The final concern regarding pricing abuses is that the post-acqusitition entity could use profits from fixed line businesses to cross-subsidize retail mobile pricing. In particular, third parties were concerned about the potential to charge special retail rates for calls from eircom fixed lines to Meteor, or from eircom fixed lines to the mobile phone entity. Submissions in particular raised the possibility that eircom could create corporate deals that charge lower "eircom to Meteor" (or to the mobile phone entity) rates that eircom charges other parties to terminate calls on Meteor's (or the mobile phone entity's) network.

44. Generally, it is not clear that this particular issue raises competition concerns. Lower retail prices for mobile calls are one of the expected benefits of the proposed acquisition. Preventing the post-acquisition entity from realizing efficiencies to provide lower retail prices for mobile calls would eliminate one of the most beneficial outcomes of the transaction and would in no way benefit consumers. Lower retail prices for mobile calls are likely to place pressure on other mobile operators in a market that has not been marked by vigorous price competition, particularly in the post-paid market segment.[15]

45. In addition, given that most of eircom's fixed line businesses are heavily regulated, there should not be any monopoly profits for eircom to use to subsidize lower prices in mobile markets if regulation is working properly. To state that eircom will be able to cross-subsidize its mobile businesses from fixed line profits would seem to assume that ComReg has failed or will fail to properly regulate eircom's SMP businesses.

46. However, even assuming that this does arise and eircom is able to cross subsidize its mobile business from its fixed line businesses, The Competition Authority would only be concerned to the extent that any pricing discounts result in retail rates that are less than termination costs (below-cost pricing). Even below-cost pricing is unlikely to be a concern in mobile markets as it is likely to have a pro-competitive effect. Below-cost pricing of mobile calls by the post-acquisition entity could substantially lessen competition in the mobile market only if it foreclosed competitors. The Competition Authority believes that with Meteor's current position in the market such foreclosure is highly unlikely. If Meteor or the mobile phone entity eventually established a dominant position, The Competition Authority would examine *ex post* whether any such pricing is abusive under the Act.

47. Below-cost pricing of mobile calls could possibly disadvantage other fixed line operators (other than Smart Telecom[16]) that will not be able to offer similar discounted fixed to mobile calls. eircom may be able to foreclose competitors and strengthen its dominant position in fixed line markets by offering below cost fixed to mobile rates.

[15] *See, Market Analysis: Wholesale Mobile Access and Call Origination*, Annex B for data that shows mobile pricing trends in the post paid market segment over time.
[16] As discussed in paragraph 57 below, as Smart Telecom has recently been offered a 3G licence it will be in a position, once it has rolled out infrastructure, to complement its existing fixed line business with a mobile offering.

48. However, ComReg has some ability to constrain such pricing. Fixed to mobile calls currently are included in the basket of retail calls which is subject to a price cap.[17] In addition eircom will continue to be subject to an obligation of cost-orientation with respect to all fixed line retail calls, including fixed to mobile calls. ComReg noted in its most recent market review of fixed voice calls that it was retaining the obligation of cost orientation specifically to prevent "unreasonably low" pricing that might not otherwise be caught by the price cap.[18] Consequently, eircom is already required by its regulatory obligations not to price fixed to mobile calls below cost, and any attempt to do so would be a violation of its obligations. Although ComReg does not specifically have approval power over eircom's rates, it does require advance publication of fixed line call prices and may institute proceedings if it believes that fixed to mobile calls are priced below termination costs. It will be aided in such an assessment by the commitments eircom has made to producing accounts that will allow ComReg to see the termination rates charged between eircom businesses.

49. Finally, to the extent that ComReg might be unable to prevent below cost retail pricing from fixed line to mobile phones, The Competition Authority believes such pricing is best addressed using its *ex post* enforcement powers under the Act, so as to keep from constraining eircom's pricing unnecessarily.

Bundling

50. One of the most prevalent concerns raised in the third party submissions was the possible competitive advantage that eircom will have post-acquisition as a result of its ability to produce bundles of fixed line voice and broadband services with mobile services. It is widely expected that eircom will seek to provide bundles of its fixed line and mobile services post-acquisition. Such bundles could be as simple as a single bill provided for mobile voice services, fixed voice services, and broadband. Eventually, however, such bundles are likely to include some sort of discount for purchasing the bundle relative to purchasing the elements separately.

51. Various submissions argued that eircom will be the only operator with the capability of providing such bundles, and that the ability to provide bundles will provide them with a competitive advantage relative to other operators, both in the mobile and the fixed line markets.

52. Two things should be noted initially. First of all, the most immediate effect of any bundled offer will be pro-competitive, in that consumers will gain greater choice in how they can consume telecommunications services. In addition, any advantage eircom may have in bundling products is likely to increase competition, rather than lessen it, in mobile markets. As discussed above, ComReg recently found that Vodafone and 02 were jointly dominant in the MACO market. Meteor has made gains in the market recently but has had difficulty in gaining new customers, particularly in the lucrative post-paid segment where Vodafone and 02 earn three times more revenue per subscriber than the pre-paid

[17] *Market Analysis: Retail Fixed Calls Markets* at para. 6.89.
[18] *Market Analysis: Retail Fixed Calls Markets* at paras. 6.95-6.98.

segment.[19] Any competitive advantage gained by the post-acquisition entity in the mobile market as a result of its ability to bundle fixed line voice services and broadband products is likely to increase the level of competition (relative to the status quo) in what has effectively been a duopoly for several years.

53. A more difficult question is whether eircom's ability to bundle mobile services with its current product offering will substantially lessen competition in fixed line markets. Fixed line operators are already dependent upon eircom's wholesale products to compete, and these operators worry that they will be at a disadvantage relative to eircom due to their inability to gain access to a mobile network.

54. Economic theory suggests that bundling can have both pro-competitive and anti-competitive effects. The conditions under which bundling can have anti-competitive effects are fairly limited. Where the products being bundled are complements, there usually is no incentive for a firm with market power in one of those products to bundle them, as the firm will not be able to gain any additional monopoly profits by doing so. This conclusion applies even when the goods are only imperfect complements. The Competition Authority believes that although fixed and mobile telecommunications services are not perfect complements, their demand is positively correlated. eircom has SMP in most fixed line markets but Meteor does not have market power in mobile markets (and neither will the mobile phone entity). Therefore this general theory that a monopolist of one good cannot increase its profits by bundling a complementary product to deter entry should apply to fixed line and mobile telecommunications markets in Ireland.

55. However, there are some theories under which complementary and positively correlated goods can be bundled to deter entry and to protect existing monopoly profits in one market (rather than gaining additional profits). For instance, it is possible that a firm with market power in one good can bundle it with a complementary good to deter entry in the market for the complementary good. A firm may do this because the producer of the complementary good may, by its presence in that market, gain a capacity to enter the market for the original good in the future and threaten the dominant firm's monopoly profits in that market. Alternatively, a dominant firm may face potential challenges in both the market for the original good and the market for the complementary good. In either case, bundling can increase barriers to entry in this model by forcing a new entrant to enter both markets at once.

56. However, in any of these economic models, bundling cannot deter entry on any markets involved if other operators can produce similar bundles. It is The Competition Authority's opinion that there are a variety of ways that other operators may be able to provide bundles of fixed line, mobile, and internet services in a manner sufficient to ensure an equivalent level of competition in fixed line markets to that which exists today.

57. First, Smart Telecom was offered the last 3G licence in Ireland on 16th November 2005 by ComReg, contingent upon it fulfilling the conditions associated with the licence. Assuming that Smart Telecom fulfils these

[19] *Market Analysis: Wholesale Mobile Access and Call Origination*, para. 4.100.

commitments and builds a 3G network, it will be in a position to bundle mobile services with its current fixed line voice and broadband offers and thus to compete with eircom.

58. In addition, it should be possible for current fixed line operators to gain access to mobile networks. Vodafone and 02 are obliged to provide access as a result of their SMP designations in the MACO market and 3 Ireland must provide access to one MVNO as a condition of its 3G licence. However, Vodafone, 02 or Meteor may be successful in their appeals of the SMP designation. At the very least, implementation of the obligation will be delayed until the appeal is complete. Nevertheless, 3 Ireland continues to be under an obligation to provide MVNO access so that there is at least one operator with whom OAOs can negotiate MVNO deals. In addition, Smart Telecom may well have an incentive to provide MVNO access in order to gain revenues to help fund network build-out. However, it remains the case that no MVNO agreements have been concluded in Ireland, despite the fact that negotiations have been attempted on a number of occasions.[20] Therefore it may continue to be difficult in the short term for a fixed line operator to gain access to a mobile network through MVNO agreements, although it should be clear that The Competition Authority does not believe this difficulty is in any way caused by the proposed acquisition.

59. There are other strategies that fixed line firms could adopt if MVNO negotiations are unsuccessful to give them access to mobile services. They could form joint ventures with mobile operators or potentially acquire an operator. An example of such a joint venture can be found in the United States, where three cable operators have entered into a joint venture with Sprint (a wireless provider) to allow them to offer mobile services in conjunction with their cable television, broadband, and fixed line telephony offerings.[21] Although mobile operators have been reluctant to date to enter into partnerships, the proposed acquisition is likely in fact to strengthen incentives to do so as both mobile and fixed line operators will want to compete with eircom's offerings.

60. In addition, there is nothing to prevent a current mobile network operator from entering the fixed line market by using currently available wholesale fixed line voice and data products. Although particular fixed line operators may be disadvantaged if they are unable to offer mobile services, if mobile operators enter the fixed line market, competition as a whole in fixed line markets is not likely to be substantially lessened.

61. eircom provides various wholesale products that allow other operators to use its network to offer services and mobile operators would be able to use these products to offer fixed line voice and data services if desired. ComReg has categorized the available wholesale products as either "direct access" or "indirect access" products.[22] Indirect access products are products such as Wholesale Line Rental and bitstream where (broadly speaking) the operator simply resells eircom's services. These products

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[20] *Market Analysis: Wholesale Mobile Access and Call Origination*, paras. 4.1.58-4.1.59.

[21] "Sprint, Cable Operators Form Landmark Joint Venture", Mobile Pipeline, 2nd November 2005, at http://www.mobilepipeline.com/news/173401826

[22] ComReg Response of 18 October 2005 to request of The Competition Authority of 6 October 2005.

are provided on pre-determined terms and quality of service parameters that are the same for every customer. Every OAO pays the same price to eircom and they are unable to vary the product or innovate in any way except for price. Even the extent for price competition is limited in retail products because indirect access products are provided on a retail minus basis, with a relatively small margin provided for OAOs.

62. To provide direct access, eircom is required to provide local loop unbundling ("LLU"), although eircom is currently in dispute with ComReg about the extent of this obligation. LLU is the physical process of switching a line over to another operator. It allows alternative operators to place equipment in eircom's exchanges to allow it to provide service to specific lines. The line is physically switched over to the other operator's equipment and the operator can invest in that line to provide services directly to the consumer. eircom is also required to provide a line share product which is essentially the unbundling of the half of the local loop used for high speed data services such as broadband. The line share product currently can only be provided in conjunction with an eircom line rental.

63. As stated above, ComReg currently is in dispute with eircom over its obligations regarding LLU. ComReg believes that while eircom technically provides LLU to operators, it has not provided operators with functionality that they need to offer their products commercially. Operators have requested that eircom offer functionality such as number portability for unbundled lines and streamlined processing of bulk orders when the loop is unbundled, and they argue that the delay by eircom in providing these functions limits their ability to use LLU effectively. Currently, eircom has responded to requests by access seekers and has stated that it will take at least 18 months after industry agreement to provide number portability with LLU and has refused to provide another of the access seeker's main requirements without further market analysis by ComReg. ComReg and the access seekers argue that the eircom's response to access seekers and the existing LLU product are insufficient to allow operators to use LLU commercially.

64. The dispute regarding LLU access has been highlighted by several third party submissions which have suggested that the only mechanism that will allow competitors to create fixed/mobile bundles is this "fit for purpose" LLU mechanism which eircom currently does not provide.[23] Three submissions argued that LLU should in some way be made a condition of the proposed acquisition. ComReg stated in its submission to The Competition Authority that it believes it has the power to require a fit for purpose LLU product but that it is concerned about the length of time it is taking to develop such a product.[24]

65. It is The Competition Authority's opinion that while a fit-for-purpose LLU product would likely be helpful in achieving effective competition in fixed line voice and broadband markets, it is not strictly necessary to allow other operators to construct bundles of fixed voice, broadband, and mobile

[23] The term "fit for purpose" was used by ComReg in its submission of 23rd September 2005 to describe the access seekers' requirements.
[24] ComReg submission to The Competition Authority of 23 September 2005.

services that could serve as alternatives to eircom's bundles for the following reasons.

66. First, The Competition Authority believes that LLU will do little to aid fixed line operators in providing fixed/mobile bundles. While LLU is likely to allow operators to provide better and more innovative fixed line telephone and broadband products, LLU will not help fixed line operators gain access to mobile services. The Competition Authority is of the view that for fixed line operators, the primary obstacle to providing fixed/mobile bundles is the fact that mobile network operators have to date been reluctant to provide access to their networks.

67. Second, it appears that mobile operators would be able to use currently available wholesale products (such as SB-WLR and CPS) to combine their current product offerings with fixed line voice and broadband products. It has been suggested to The Competition Authority that operators could compete more effectively if a fit for purpose LLU product were in place, and The Competition Authority accepts that this is likely to be the case. However, ComReg specifically acknowledged that mobile operators would be able to assemble bundled products using existing indirect access products such as bitstream, wholesale line rental and CPS.[25] The Competition Authority recognizes that these products allow for limited differentiation from eircom's products and that they provide only a limited margin. However, fixed line operators are currently able to compete to a degree with eircom in fixed line voice and broadband markets and mobile operators will be able to compete to the same degree that fixed line operators currently do using SB-WLR and CPS. Whether the degree to which fixed line operators currently compete is sufficient to allow for effective competition is not a question for the merger review process. The only question for the merger process is whether competition is substantially lessened by the proposed acquisition, and The Competition Authority does not believe competition in fixed line markets will be substantially lessened if mobile operators can enter the fixed line market on the same basis as current fixed line providers.

68. Finally, The Competition Authority notes that true infrastructure competition is beginning to develop in fixed line telephony and broadband markets which is also likely to limit any competitive advantage of eircom post-acquisition. Alternative platforms such as cable, wireless, and fibre networks are finally beginning to emerge as plausible competitors to fixed line services for both voice services and broadband. Ntl has begun to significantly upgrade its network to provide broadband and has over 160,000 broadband enabled homes. Under the recently approved acquisition of Ntl by Chorus, the parent company of Chorus has plans to invest significantly in both the Ntl and Chorus cable networks to provide the capability to deliver broadband, telephony, VoIP (Voice over Internet Protocol) and triple play bundles to Irish consumers. New operator Magnet offers bundles of cable television, very high speed broadband, and fixed line telephony. Magnet recently signed a deal with ESB Telecoms whereby ESB Telecoms will provide fibre optic services to the company over a ten year period. The agreement will enable Magnet Networks to roll out its digital entertainment services to the cities of Galway, Cork,

[25] ComReg Response of 18 October 2005 to request of The Competition Authority of 6 October 2005.

Limerick, Waterford and Portlaoise. ESB Telecoms, a wholly owned subisidary of ESB, with a telecoms network that includes a 1300 km nationwide fibre optic network, is connected to many of the e-net managed metropolitan area networks as well as various key data centres in the Dublin area. Over time bundles of broadband and television or broadband, television, and fixed line telephony may be more attractive to consumers than fixed line telephony, broadband, and mobile bundles – particularly for consumers rather than SMEs and corporate customers. In addition, as these alternative technologies continue to develop, there is nothing that would prevent a cable or fixed wireless operator from partnering with a mobile operator to include mobile services in its product offering, as has occurred in the U.S.

69. In conclusion, The Competition Authority believes that no substantial lessening of competition will occur either in fixed line markets or in mobile markets as a result of eircom's ability to bundle fixed line telephony, broadband, and mobile services. The Competition Authority believes that the ability to bundle will have pro-competitive effects in mobile markets. In fixed line markets, The Competition Authority believes that there are opportunities for other operators to create bundled products that would compete with eircom. Assuming that Smart Telecom fulfils its commitments made in its 3G application, there will soon be another operator active in both markets that can provide competing bundles. Fixed line operators should have opportunities to establish MVNOs which would allow them to provide mobile services, although no such deals have been established. In addition, mobile operators can use existing wholesale products to provide fixed line or broadband services. Although resale products do not provide for vigorous competition, mobile operators would be able to compete on the same basis as other fixed line operators currently compete. Finally, cable and wireless broadband providers are emerging that can provide other innovative bundles (possibly including television service) that will be able to compete with eircom. On this basis, The Competition Authority does not believe that the proposed acquisition would substantially lessen competition in either fixed line or mobile telephony markets.

Fixed/Mobile Convergent Products

70. There was some concern that the proposed acquisition would allow eircom to foreclose the emerging market for fixed/mobile convergent products as discussed above.

71. However, the initial effect of the proposed acquisition is likely to be pro-competitive in the emerging market for FMC because it is likely to spur the development of such technologies in Ireland. This will benefit consumers by introducing a new product and increasing consumer choices. The only potential problem is whether the merged entity would be able to foreclose other competitors from offering competing products.

72. The Competition Authority believes that for the same reasons outlined in the section on bundling above, eircom is not likely to be able to foreclose the market for FMC products. ComReg has stated that, as with bundled products, other operators can use existing wholesale products to create FMC deals (although again it argues that fit for purpose LLU will allow for better competition and innovation). In addition, it should be noted that BT Ireland may possibly even have an advantage over eircom in developing

such products (at least technically) given its relationship with BT in the UK which has already introduced such a product.

73. Finally, it appears from the experience of Vodafone and 02 in Germany that access to fixed line networks may not be necessary at all to offer an alternative to a converged product. There is no reason to expect that Vodafone and 02 could not institute similar products here, and thus it is not likely that the proposed acquisition would substantially lessen competition in the emerging market for FMC services.

Miscellaneous Issues

74. One third party submission argued that changes in the allocation of fixed line numbers would aid mobile operators to enter the fixed line market. It suggested that restrictions on the allocation of fixed numbers be eased so that they are not tied to specific locations, and that geographic number portability be assured for any numbers granted to mobile operators for corporate and SME products. The Competition Authority believes this problem is unrelated to the proposed acquisition. It represents an existing barrier, which if removed may improve the ability of mobile operators to offer bundled products. However it is not the case that without these numbering changes, the proposed acquisition will significantly lessen competition.

75. Several submissions also argued that restrictions should be placed on eircom's ability to use its fixed line customer database to market its mobile or bundled products. The Competition Authority does not consider this to be a factor that would lead to substantial lessening of competition. It should also be noted that current regulatory restrictions would continue to apply on the transfer of information between eircom's wholesale division and the retail division of either the fixed or mobile arms. Furthermore, it is possible that competition law could be applied to address any problems arising in this area.

76. Another third party submission raised the concern that the access mobile operators are currently granted to eircom masts may be removed or the access charge raised. It is not clear, however, that access to these masts is essential to mobile operators. Even if it were clear that access to the masts was essential, The Competition Authority would require strong justification to assume that eircom is likely to refuse or raise the price of access. As no evidence has been provided, The Competition Authority does not believe this presents an issue.

Conclusions

77. The Competition Authority believes that the proposed acquisition will have largely pro-competitive effects in Ireland's telecommunications markets. eircom brings many assets to the transaction that will help it to increase Meteor's market share and increase competition in mobile markets where Vodafone and 02 have SMP, particularly in the post-paid market segment. The proposed acquisition will also benefit consumers in fixed line markets by hastening the introduction of bundles of fixed line and mobile products, as well as the development and introduction of FMC products.

78. The Competition Authority believes that the proposal made by eircom with regard to accounting obligations for Meteor and the mobile phone entity (see below) will allow ComReg to monitor for any mis-allocation of common costs or discriminatory wholesale pricing and therefore resolves

any concerns regarding eircom's ability to cross-subsidize between fixed and mobile arms or to apply discriminatory treatment to operators other than eircom.

79. The Competition Authority does not believe that eircom's ability to bundle mobile and fixed line telecommunications services will substantially lessen competition in either mobile or fixed line markets because other operators will be able to offer competing bundles.

80. In addition, The Competition Authority believes that eircom is unlikely to be able to foreclose the emerging market for fixed/mobile convergent services because other operators will be able to produce FMC products.

81. Consequently, The Competition Authority issues the following determination.

Determination

The Competition Authority, in accordance with Section 21(2) of the Competition Act, 2002 ("the Act"), and having taken into account the proposals made by eircom Group plc in accordance with Section 20 (3) of the Act, has determined that, in its opinion, the result of the proposed transaction will not be to substantially lessen competition in markets for goods and services in the State and, accordingly, that the proposed transaction may be put into effect subject to the following:

Introductory Information[26]

Following the proposed acquisition of Meteor Mobile Communications Limited **("Meteor")** by eircom Group plc **("eircom"),** eircom intends to operate Meteor as a stand-alone subsidiary of eircom Limited (which is wholly owned by eircom). Therefore, Meteor will continue to prepare and publish its own statutory accounts.

In relation to eircom's plans to develop a presence in the post-paid mobile sector, eircom is considering setting up a possible future business entity **('the mobile phone entity')** to provide such services.

It is understood that the application of these commitments by eircom will take place in the context of the ordinary course of regulatory supervision of a combined eircom/Meteor entity by the Commission for Communications Regulation **("ComReg").** The Competition Authority will therefore liaise with ComReg in respect of eircom's on-going compliance with these commitments.

In light of eircom's intention to ensure its on-going compliance with these commitments and, for example, to ensure practical implementation of these commitments by eircom, The Competition Authority may discuss with eircom (including with the involvement of ComReg where it is considered necessary by eircom or The Competition Authority) any issue of interpretation or implementation eircom has with its ongoing compliance with these commitments.

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[26] *Please note that some commercially sensitive information has been omitted from the introductory information and the commitments.*

The Competition Authority will review these commitments with eircom every three years (or may review at any other such time as eircom or The Competition Authority requests) to determine whether (based on objective criteria such as the competitive situation of the telecommunications sector in Ireland at the time, changes in the regulatory position of eircom or any change in any circumstances as may be considered relevant by eircom or The Competition Authority) such commitments are necessary or proportionate.

Accounting separation commitments - Meteor

Commitment no. 1

(a) Taking into account the requirements of the regulatory framework, eircom commits to extending the existing published Historical Cost Separated Accounts to include a separate profit and loss statement and balance sheet for Meteor. The format of these accounts will be similar to that of eircom's existing major lines of business.

(b) As part of this commitment, eircom will include a separate statement entitled "Other Business - Meteor" rather than including Meteor within "Other Business - Other Subsidiaries". Under the existing structure, Meteor's operations would form part of the "Other Subsidiaries" sub-section of the Separated Accounts which in turn forms part of the "Other Business" section.

(c) These statements will provide sufficient information to show the transfer of costs between eircom's fixed-line business and Meteor. These accounts will show whether there has been an allocation of costs as between eircom's fixed-line business and Meteor. Therefore related party transactions as between eircom's fixed-line business and Meteor will be contained within the allocation of costs as published in the accounts. ComReg can obtain from eircom further related party transaction details it requires.

(d) eircom provides ComReg with further details if ComReg needs to enquire into the relevant profit and loss account and balance sheet headings that are disclosed in eircom's Separated Accounts. eircom commits to provide, on reasonable request of ComReg and consistent with the appropriate rules under the regulatory framework, a description of costs which are common to its fixed-line business and Meteor, the amounts involved, the basis of the allocation of the costs between the fixed line business and Meteor, and any other elements of the transactions reasonably necessary for an understanding of the treatment of these costs in the financial statements.

(e) The structure of eircom's current Separated Accounts as mandated by ComReg has been set out in a number of ComReg Decision Notices. The list of product areas published in eircom's current Separated Accounts is set out in the Accounting Documents section.

(f) The commitments would be mandated by eircom’s rather than Meteor’s accounting obligations.

Commitment no. 2

(a) ComReg has launched a public consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations **(Consultation).** eircom has responded to this Consultation. In the medium term, it is expected that the structure of the Separated Accounts may evolve from the existing "product view" to a "market view" and which would be aligned to the market analysis currently underway by ComReg under the Regulatory Framework. It is not expected that this would materially impact on eircom's Separated Accounts for its future mobile activities.

(b) eircom commits to notify The Competition Authority when the Consultation process is finalised and any relevant appeals are exhausted and to submit to The Competition Authority any proposed revised treatment of Meteor and 'the mobile phone entity''s accounts, taking into account any changes in the accounting obligations as a result of the Consultation.

Accounting separation commitment in relation to 'the mobile phone entity'

Commitment no. 3

(a) eircom commits to producing accounts for 'the mobile phone entity' in a format which has been agreed with The Competition Authority. These accounts would be produced to ComReg only and eircom's auditors will produce an independent and appropriate form of audit opinion concerning 'the mobile phone entity'. This format of accounts would provide sufficient information to show the transfer of costs between eircom's fixed-line business and 'the mobile phone entity'. These accounts would demonstrate whether there has been an allocation of costs as between eircom's fixed-line business and 'the mobile phone entity'. These accounts will therefore contain related party transactions within the allocation of costs as between eircom's fixed-line business and 'the mobile phone entity'. ComReg can obtain from eircom further related party transaction details it requires.

(b) As part of this commitment, eircom will inform ComReg of the creation of 'the mobile phone entity' and will work with ComReg to finalise these accounting arrangements for 'the mobile phone entity'. Irrespective of whether 'the mobile phone entity' is a line of business within eircom or a separate subsidiary, eircom will provide these accounts to ComReg as set out in this commitment. If 'the mobile phone entity' is created as a separate incorporated subsidiary of eircom, statutory accounts will be produced for 'the mobile phone entity'.

(c) eircom provides ComReg with further details if ComReg needs to enquire into the relevant profit and loss account and balance sheet headings that are disclosed in eircom's Separated Accounts. eircom commits to provide, on reasonable request of ComReg and consistent with the appropriate rules under the regulatory framework, a description of costs which are common to its fixed line business and 'the mobile phone entity', the amounts involved, the basis of the allocation of the costs between its fixed line business and 'the mobile phone entity', and any other elements of the transactions reasonably necessary for an understanding of the treatment of these costs in the financial statements.

(d) eircom would propose discussing any appropriate accounting arrangements with ComReg when further details are determined regarding the structure and launch of 'the mobile phone entity'. eircom will inform The Competition Authority of the final agreed treatment of 'the mobile phone entity''s accounts.

Transparency of transaction costs commitment

Commitment no. 4

(a) eircom is subject to the regulatory framework which imposes accounting obligations. These accounting obligations, set by ComReg, provide for the transparency of transaction costs by eircom.

(b) eircom commits to provide transaction costs information to ComReg relating to transfers between eircom's fixed-line businesses and, respectively, Meteor and 'the mobile phone entity' (as well as between Meteor and 'the mobile phone entity') as part of the agreed Meteor and mobile phone entity accounts. A transfer charge statement for Meteor will be published by eircom in its Separated Accounts. In relation to 'the mobile phone entity', a transfer charge statement will be provided to ComReg. ComReg would therefore be provided with information concerning cost allocations in relation to eircom's relevant services, including Meteor and 'the mobile phone entity'. eircom will provide ComReg with information which would show related party transactions between eircom's fixed-line businesses and, respectively, Meteor and 'the mobile phone entity' (including as between Meteor and 'the mobile phone entity').

Other general commitments

Commitment no. 5

eircom commits to provide ComReg with the same level of information as set out in the statutory accounts for Meteor irrespective of Meteor's future legal composition for a period of up to 3 years following completion of the proposed acquisition of Meteor. This commitment is subject to any accounting changes imposed by ComReg on eircom under the regulatory framework. The remaining commitments shall continue in force and would be subject to on-going review as set out in the Introductory Information above.

Commitment no. 6

To the extent that ComReg imposes any new accounting obligations on eircom's accounts under the regulatory framework, eircom commits to ensuring that the commitments above reflect any such new accounting obligations as appropriate.

Commitment no. 7

To facilitate The Competition Authority in monitoring these obligations, eircom commits to provide The Competition Authority with copies of the relevant accounts when they are submitted to ComReg (in the case of 'the mobile phone entity''s accounts) or when they are published (in the case of the Meteor accounts).

Commitment no. 8

eircom commits to verify to The Competition Authority, on an annual basis, its belief that it has complied with the commitments set out above to the best of its knowledge and in good faith. An appropriate statement to this effect would be published within the Statement of Responsibility as part of eircom's Separated Accounts. In addition, eircom's auditors will provide an independent and appropriate form of audit opinion (to the best of its knowledge and based on the information provided by eircom to such auditors) that eircom is in compliance with these commitments.

For The Competition Authority

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Paul K. Gorecki
Member of the Competition Authority

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Declan Purcell
Member of The Competition Authority

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Noreen Mackey
Member of The Competition Authority