



Commission for
Communications Regulation

Decision Notice and Decision Instrument

SMP Obligation: Retail Price Cap Remedy

Fixed Narrowband Access Markets

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In the Decision Instrument in Annex 1, apart from the correction of minor punctuation errors the only other amendments are as follows: In the definition of “connection and take over charge” the word “the” is deleted twice before the word “Eircom”. In footnote 36, the word “or” is added after the word “ownership”, and the word “hereunder” is substituted by the word “herein”.

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1 Foreword

On behalf of ComReg, I am pleased to announce the conclusion of our review of a retail price cap (RPC) as a potential remedy for fixed narrowband access markets.

In setting the level of the price cap on Eircom ComReg has sought to find the best balance between the interests of consumers and the long term sustainability of the industry. ComReg believes that individual caps on each of lower and higher level access services and a sub-cap on basic telephone line rental in the form of a price freeze for a period of 12 months from today, followed by caps which allow prices to move in line with inflation thereafter will best achieve this balance.

In addition to achievable efficiency gains by Eircom, ComReg has considered the impact on consumers, competition and investment in setting an appropriate level of X in the CPI-X price cap. The price cap is set such that it acts as a safeguard cap protecting consumers against the risk of excessive prices increase by Eircom in the provisioning of access services while simultaneously facilitating the development of competition, innovation and long term investment.

Mike Byrne
Chairperson.

2 Introduction

- 2.1 This Decision Notice and Decision Instrument follows on from the final consultation paper “Retail Price Cap (RPC) as a potential remedy on fixed narrowband access markets – Part II”, issued on 26 July 2007.
- 2.2 This final decision relates to the appropriate structure, level and operation of the price cap and has been taken following a lengthy consultation process over the last 12-15 months. It is based on the substantial body of empirical estimation and analysis in previously published documents where due consideration was given to the full range of issues covered.¹
- 2.3 In Decision Notice 07/61 (the SMP Decision), ComReg concluded that the markets for fixed narrowband retail access are not effectively competitive and that Eircom is dominant in the provision of access services to end users.² In addition, obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve on their own the objectives³ of promoting competition while protecting the interests of consumers in the period of the review. Eircom has maintained its position of dominance in the provision of access services to consumers even in the presence of wholesale regulatory measures and regulation in adjacent markets, such as LLU.⁴
- 2.4 In August 2006 ComReg consulted on the appropriateness or not of a RPC and set out the provisional view that some form of price control was necessary on some or all of the retail fixed narrowband access services in order to ensure that prices for retail consumers are at a competitive level. ComReg solicited views on issues such as the appropriate price control structure, objectives for a retail price cap (RPC) and which services should be included.⁵
- 2.5 ComReg Document 07/48 consulted on the substantive issues raised by respondents to 06/41, on the services which should be subject to a price cap, ComReg’s methodology and proposals for setting a RPC and, on the appropriate “X” factor. ComReg retained Frontier Economics to undertake an analysis of Eircom’s efficiency in relation to narrowband access services for

¹ It follows on from ComReg Document(s) 06/39 “Market Analysis – Retail Narrowband Access Markets”; 06/41 “Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets – Part I”; 07/26 “Market Analysis – Retail Narrowband Access Markets (response to consultation and consultation on draft decision); 07/48 “Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets – Part II”; and 07/61 “Market Analysis – Retail Narrowband Access Markets (Decision Notice and Decision Instrument)”. These documents should be read in conjunction with this Decision Instrument.

² ComReg formed the view that there are two retail narrowband access markets - a market for lower level narrowband access and a market for higher level narrowband access. ComReg used a wide range of criteria including market share, absence of potential competition, high barriers to entry and expansion, absence of or low countervailing buyer power and also conducted a prospective analysis of the relevant markets. Within the period of this review, there is nothing to suggest to ComReg that the SMP which Eircom has will be diluted in any meaningful way, in the absence of appropriate and proportionate SMP obligations.

³ Set out in s 12 of the Act of 2002.

⁴ Local loop unbundling.

⁵ ComReg Document 06/41.

the purposes of proposing an appropriate level of a price cap.⁶ The text of the draft decision instrument was also included for consultation purposes.

- 2.6 ComReg has reviewed carefully and in detail all comments received by respondents to 07/48 and would like to thank all of those who responded to the consultation. No further evidence has come to light at this time which would suggest that a RPC should not be imposed on the SMP operator. The SMP Decision indicated that the current Price Cap Order⁷ would be maintained pending the final outcome of ComReg's consultations on a RPC as a potential remedy on the retail fixed narrowband access markets and which was noted by the EU Commission.
- 2.7 Based on the final competition assessment⁸ and the outcome of the financial modelling conducted by Frontier Economics, ComReg has concluded that a RPC continues to be necessary to prevent Eircom from introducing excessive increases in access prices. It should be noted that the revenues from the lower level basket of services represent the largest percentage of overall total revenues to be regulated by the price cap(s). The objective for the imposition of a RPC is to ensure that prices for retail customers reflect efficient cost and that Eircom has incentives to deliver services as efficiently as possible. In order to meet this objective, ComReg has concluded that:
- Eircom's retail access markets will be subject to a CPI-X price cap obligation on each of the lower⁹ and higher level access services;¹⁰
 - The cap on each market and/or services will be set at CPI-CPI (constant prices) for the first price cap year and CPI-0 (inflationary increases) thereafter;
 - Within the overall price cap for lower level services there will also be a sub-cap of CPI-CPI on basic telephone line rental for the first year moving to a CPI-0 cap for subsequent price cap years; and
 - This regime should last until September 2010, and/or where this RPC remedy would be reviewed in line with any future assessment of SMP in these markets.
- 2.8 The final Decision Instrument setting out the RPC obligation to be imposed on Eircom as a result of the SMP designation is set out in Annex 1. The RPC obligations therein are effective from the 1 October, 2007.

⁶ ComReg Document 07/48a – Consultation on a Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets - Part II: Appendix C.

⁷ Telecommunications Tariff Regulation Order 2003, S.I. 31 of 2003.

⁸ ComReg has taken in to account all indicators of competition in assessing the appropriateness of a RPC.

⁹ The provision of telephone exchange lines, ISDN BRA lines, and telephone exchange line and ISDN BRA connection and takeover.

¹⁰ The provision of ISDN FRA and PRA lines, ISDN FRA and PRA connections and takeover.

3 Response to 07/48 and ComReg's Position

- 3.1 Documents 06/41 and 07/48 set out ComReg's preliminary view that a RPC continues to be necessary in both the lower and higher level narrowband access markets. ComReg solicited respondents' views on a wide range of issues such as the range of services to be included, proposals for setting a price cap level, if any, and the need for cost pass through or carryover. ComReg also invited views from interested parties on the regulatory impact assessment (RIA) and its underlying analysis.
- 3.2 ComReg received 5 responses in relation to the consultation and on the draft decision instrument contained in Document 07/48. The four industry respondents were ALTO, BT, Eircom, Vodafone and one consumer response. ComReg would like to thank all respondents for their submissions. ComReg has taken all comments into account in arriving at its final conclusions.
- 3.3 The following sections set out ComReg's responses to comments received on foot of Document 07/48 and ComReg's final position. ComReg notes that the respondents did not comment directly on the RIA and its underlying analysis.

Price control on lower and higher level access services

- 3.4 Document 06/41 set out ComReg's preliminary view that some form of a retail price cap continues to be necessary for at least some of the retail services provided by Eircom in fixed narrowband access markets. The last consultation 07/48 indicated that there are strong arguments for maintaining a price control on both higher and lower level narrowband access services.¹¹
- 3.5 Continuation of a RPC on Eircom is appropriate and necessary because:
 - To forbear in narrowband access is premature in the face of Eircom's continued dominance in both lower and higher level access markets;
 - Eircom's market share is over 83% in the lower level access market and approximately 66% in the higher level access market at the end of December, 2006;
 - ComReg's SMP analysis noted that Eircom's high market share in the lower and higher level access markets had not been appreciably mitigated by other factors including the presence of wholesale regulation (e.g. SB-WLR, CPS); and
 - Competition is not yet effective in the retail narrowband access markets, nor is it expected to be within the lifetime of the review.
- 3.6 ComReg's proposal is to separately apply a CPI-X price cap on each of lower level services and higher level services.¹² This would lead to the withdrawal of

¹¹ ComReg's view on forbearing from intervention at the retail level is set out in section 4 of consultation documents 06/41 and 07/48.

¹² Line Rentals and Connections in each market.

the cost orientation obligation, which would be superfluous to any price cap, once fully implemented. ComReg set out its views that the objective of protecting against potential excessive pricing would be better addressed through a RPC which also has better incentive properties.

Respondents Views

- 3.7 The majority of respondents agreed with the range of services to include in a narrowband access cap. However, one respondent submits that regulatory controls on retail services – even when considered in the context of the Universal Services Directive – can only be imposed where relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition. This respondent does not believe that a price cap is justified or proportionate, citing well-established, effective competition in access markets and the adequacy of regulation at the wholesale level.
- 3.8 In general, respondents agreed with a specific cap on each of the lower and higher level access markets. One respondent believes that significant cross-subsidisation between higher and lower level access services should be precluded by competitive pressures in the context of a global cap, yet separate caps would not be an unduly burdensome remedy, in light of relatively small common costs between the services. Another respondent although agreeing with the need for a RPC commented that RPCs are a “crude method” to replicate the effects of competition and that the barriers to entry to competitors continue to remain too high in access markets.
- 3.9 In relation to the issue of whether to use specific cap, or sub-cap on identified SMP services, one respondent believes the use of a sub-cap on basic line rental to be overly prescriptive and unnecessary, where the overall cap on lower level access services is sufficient to prevent excessive increases in PSTN line rental. This respondent also suggests that protecting vulnerable consumers is best addressed through specific measures and not through a sub-cap. Another respondent concedes that in the event a price cap is deemed to be necessary it should focus on the affordability of the basket of services purchased by low-usage customers and/or ‘vulnerable users’.
- 3.10 Concerning cost orientation, one respondent agrees with the proposal to withdraw the cost orientation obligation once a RPC is fully implemented, as it has superior incentive properties, can be more effectively monitored and would be superfluous to any RPC remedy. Another respondent commented that cost orientation obligations, properly interpreted, can ensure that prices allow an adequate return to the SMP operator and encourage efficient entry, whilst discouraging inefficient entry.

ComReg's Position and Conclusions

- 3.11 In general, retail regulation should be imposed only to the extent that wholesale remedies are alone insufficient to ensure competition and protect

consumers.¹³ ComReg has carried out a thorough and careful analysis of competition and market developments in the relevant markets. The SMP Decision¹⁴ concluded that the markets are not effectively competitive and designated Eircom with SMP. Having regard to the above analysis, ComReg identified the SMP obligations that it considers would be appropriate to impose on Eircom, including a price control obligation.¹⁵ ComReg concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not alone achieve the objectives of promoting competition, whilst protecting the interests of consumers. The measures were notified to the EU Commission and were accepted on 7 June, 2007.

- 3.12 ComReg's considers that clear reasons for the appropriateness of a RPC as remedy for retail access markets and for the inclusion of lower and higher level access markets in a RPC have been provided in consultation documents 06/41 and 07/48. To forbear in narrowband access is premature in view of Eircom's continued dominance in both lower and higher level access markets. ComReg's SMP analysis indicated that despite the presence of wholesale regulation (e.g. SB-WLR, CPS, supporting measures and wholesale measures in related access markets such as LLU) competition is not yet effective in the retail narrowband access markets, nor is it expected to be within the lifetime of the review. It is of note that while in particular indirect wholesale measures have facilitated the development of limited competition in these markets, they have not served to remove Eircom's SMP. Furthermore, it should be recognised that absent these measures, Eircom's dominant position would be further enhanced.
- 3.13 The financial analysis conducted indicates that access prices should be included in the price control. ComReg would also note the concerns of some of the respondent's that the barriers to entry to competitors continue to remain too high in access markets. Having considered all available evidence, including the competition analysis, financial modelling and the views of respondents to each of the RPC consultations, ComReg sees no persuasive reason to alter its provisional view as set out in the consultations that a RPC is necessary each on lower and higher level access markets to protect consumers against potential excessive increases in line rental, to prevent Eircom from introducing excessive increases in access prices, to ensure prices reflect efficient costs and that services are delivered as efficiently as possible. The appropriateness, or not of a sub-cap is discussed below in relation to setting the X factor for lower level access services. The markets and services to which the decision relates are set out in the Decision Instrument at Annex 1 below.
- 3.14 In relation to the issue of removing the existing cost orientation obligation, having considered the issue taking account of respondents views, ComReg concluded that the position should remain unchanged to that expressed in the

¹³ Directive 2002/22/EC, Universal Service Directive, recital 26.

¹⁴ ComReg document 07/61.

¹⁵ These were the obligations of, access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.

consultation documents i.e., that it is superfluous to any price cap, once fully and effectively implemented. Where there are uncertainties in allocating costs to specific services, a more effective remedy is to include SMP access services in a retail price control, so as to guard against excessive prices and reward efficiency gains. Compliance with a RPC can be more effectively monitored than a cost orientation obligation, thereby reducing any potential compliance burden.

- 3.15 ComReg plans to consult on the issue of affordability for low usage customers and/or ‘vulnerable users’ under the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003, in quarter four, 2007. Taking on board the views of respondents, ComReg considers that the Universal Services Regulations is the appropriate mechanism to address the issue of affordability of services. ComReg intends to consider during that consultation the potential needs of vulnerable and low usage customers and any tariff proposals presented on its merits and in light of all applicable legislation.

Need for cost pass through

- 3.16 ComReg proposed to subject Eircom’s access prices to a CPI-X price control where CPI is the annual percentage change in the Irish Consumer Price Index and “X” is the adjustment specified by ComReg.
- 3.17 In the event that loop costs experience increases different from inflation, ComReg considered whether or not there is any need to adjust the CPI-X formula to allow for automatic pass through of changes, if any, to the real cost of the local loop. ComReg did not propose to make such an adjustment to the CPI-X formula for automatic pass through of changes in loop costs at this time. However, ComReg indicated that a review of the RPC may be considered should it be determined following a review of the local loop price that loop costs have changed significantly more than inflation.

Respondents Views

- 3.18 All respondents agree with ComReg that the CPI-X formula should not be adjusted to allow for automatic cost pass through of changes to the real cost of the local loop. One respondent opposed any pass through of higher costs believing that LLU prices are too high and one of the contributing factors to barriers to entry remaining high in access markets. Another respondent believed that a cost pass through adjustment would introduce complexity, thereby undermining the benefits of transparency and simplicity that are associated with the CPI-X formula. This respondent contended that in the event of any forecast error in respect of the local loop cost, this could be corrected for in any subsequent review of the price cap regime, irrespective of the outcome of the review of the ULMP charge.

ComReg's Position and Conclusions

3.19 In view of the forgoing and the key objective of a RPC – to provide consumers with protection against potential excessive increases in access charges – having had regard to the views of respondents, ComReg concludes that the CPI-X price cap should not include an automatic cost pass through mechanism at this stage. Nonetheless, in the event that there was evidence that market conditions had changed such that loop costs were sufficiently different from inflation, ComReg may consider a review of the RPC, once any determination on a new ULMP price is finalised. ComReg notes the view of one respondent that it is unlikely that increases greater than inflation will occur each year in the LLU price over the period of any future price cap.

Level and Structure of a RPC

3.20 As indicated in the last consultation 07/48, ComReg used the forward looking financial model as constructed by Frontier Economics, in conjunction with the wider assessment of market power in narrowband access markets, to estimate an appropriate level of a cap for each of the lower and higher level access markets and to assess the potential impact on these markets of different price cap proposals. As the X factors are not set simply on the basis of expected future efficiency gains, ComReg has considered the potential impact a decision on the level and structure of a price cap may have on consumers, competition and investment.¹⁶

3.21 On the basis that individual caps will be set (lower level and higher level access markets and/or services considered separately), ComReg proposed that the level of a cap on each access market will also be set separately. ComReg's proposals in relation to the structure and level of RPC are set out in 07/48, sections 5.12 to 5.25 as follows:

- Subject Eircom's access prices to a CPI-X price control, with CPI to be used as a measure of inflation;
- Adjust the level of the price cap in the first year of a price control, such that Eircom's access prices would remain in place (CPI-CPI or constant prices) for a period of 12 months beginning on the start date of the RPC;
- Permit Eircom's access prices to move in line with inflation in subsequent price cap years (CPI-0);
- Subject basic line rental (PSTN) to a separate sub-cap within the overall basket cap on lower level access services again of CPI-CPI in the first twelve months and move to a CPI-0 thereafter.

3.22 ComReg provisionally concluded that the above proposals in relation to the setting of an appropriate structure and level of a RPC will best achieve its

¹⁶ The Memorandum to the EU Commissions Recommendation on Relevant Markets, page 14.

objectives of protecting consumers and the long term sustainability of the industry.

Respondents Views

- 3.23 In general, the majority of the respondents agreed with the imposition of a CPI-X price cap on Eircom's access prices. However, a wide range of views were expressed in relation the CPI-X proposed cap values for the lower and higher level access services and for the sub cap on PSTN line rental.
- 3.24 A number of the respondents expressed concerns that the proposed X values for both the baskets and the sub cap on PSTN line rental are too lenient. One of these respondents does not believe full inflation linked, or index linked costs should be allowed and line rental should not be allowed to increase in the immediate future (5 years) given Eircom's dominance. A second respondent believes that given the "exorbitant" level of line rental, there is no reason to relax the cap after year one, which would force Eircom to tackle inefficiencies in its cost base. The final respondent commented on the need to reduce LLU prices to as soon as possible to overcome some of the barriers to entry for access seekers.
- 3.25 One respondent while agreeing with the proposed level of X for the separate baskets provided that there is a high level of confidence around the key assumptions underpinning the calculation of the X value, believes the sub-cap on PSTN line rental to be overly prescriptive regulation and unnecessary to achieve the objectives set out by ComReg. This respondent contends that protecting vulnerable consumers is best addressed through specific measures and not through a sub-cap. One final respondent while agreeing with a specific cap on PSTN rental to prevent vulnerable or low users with low telecommunications spend being exposed to large increases in their bill, also believes that specific measures for these specific users is preferable to a sub-cap on PSTN line rental.
- 3.26 The final respondent does not agree with a CPI-CPI cap for the first year, as this is equivalent to a "price freeze" for 14 months, and suggests changing the duration of the CPI-CPI to a period of 10 months, which results in an effective price freeze on services for 12 months. This respondent expressed a similar view in relation to the CPI-CPI period for the baskets of the lower and higher level access service and the PSTN sub cap.

ComReg's Position and Conclusions

- 3.27 Having taken in to account the responses to this consultation, ComReg sees no persuasive reason to alter its views on setting the proposed price cap values as they relate to the separate basket caps on lower and higher level access services, having had regard to conditions in each of those markets. ComReg's considers that clear reasons as to an appropriate structure and level of RPC are set out in 07/48, sections 5.12 to 5.25.

- 3.28 Based on the final competition assessment¹⁷ and the outcome of the financial modelling conducted by Frontier Economics (Document 07/48a),¹⁸ ComReg concludes that the above proposals in relation to the setting of an appropriate structure and level of a RPC will best achieve its objectives of protecting consumers and the long term sustainability of the industry. ComReg has considered the potential impact a decision on the level and structure of a price cap may have on consumers, competition and investment. ComReg notes the view of one respondent that ComReg's proposed price cap approach is superior to setting a RPC based solely on the most optimistic scenario for achievable future efficiency gains, which may benefit consumers in the short run through lower prices, but at the risk of undermining sustainable competition and investment.
- 3.29 For lower level access services, Frontier Economic's cost analysis provides the range of estimates for X is 0 to 2%. ComReg concludes that the more conservative level of cap, CPI-CPI cap followed by CPI-0 cap thereafter, is appropriate as this would prevent prices of basic access services from rising more quickly than the rate of inflation safeguarding consumers until such time as competition is operating effectively. It will also ensure that the alignment of costs and price in respect of lower level access is maintained.
- 3.30 For higher level access markets and/or services, ComReg also concludes the more conservative level of cap, CPI-CPI cap followed by a CPI-0 cap thereafter is appropriate. In forming this view, ComReg was mindful that setting of too stringent a cap could have potential adverse effect on competition, service innovation and long term investment. A safe-guard cap on higher level services would allow further competition to develop in respect those services, which in itself would act as a check on prices.
- 3.31 In relation to the adjustment to the level of the price cap in the first year of the new price cap (CPI-CPI or constant prices), ComReg continues to believe that the first price cap period should be a 12 month, rather than a 10 month period. Application of a CPI-CPI cap (constant prices) would protect consumers from a second line rental increase within a single year¹⁹ therefore leading to certainty of prices in the market place and would bring prices back into line with efficient costs in the lower level market and would not negatively affect competition in the higher level market. It should be noted that ComReg is not applying the stricter option on Eircom of CPI-2 cap for lower level access, or the potentially greater level of X for higher level access.

¹⁷ ComReg has taken in to account all indicators of competition in assessing the appropriateness of a RPC.

¹⁸ Given the narrowness of the scope of the RPC, a number of cost elements for the purposes of the modelling exercise were based on Eircom's own reported costs. The main driver of the efficiency results (i.e. the range of estimates for the level of X) were provisioning and subscriber unit/line card costs rather than actual repair costs. Nonetheless, a comparison of Eircom's fault rate with a sample of comparable operators, revealed that the fault rate reported by Eircom was towards the higher end of the reported range. This in part reflected the difference between a state of the art network (the forward looking basis on which the access network has been valued) and Eircom's actual network and hence the appropriate level of repair costs should be Eircom's reported repair costs adjusted by an efficiency factor (the mean fault rate for the comparator countries). Hence, the estimated efficient level of repair costs was taken to be 78% of the level reported by Eircom.

¹⁹ Eircom increased PSTN and ISDN line rental prices in line with inflation on 30th July, 2007.

- 3.32 ComReg continues to believe a sub-cap on PSTN to be a proportionate and appropriate response to achieve its objectives. Taking account of the responses to the last consultation, the cost of basic telephone line rental is of most importance to retail consumers and ComReg will aim to ensure that the efficient cost of this service is recovered in an appropriate way. Imposing a sub-cap on PSTN line rental limits Eircom's flexibility in the pricing of this service and therefore, gives certainty to consumers as to the level of line rental prices in the coming years.²⁰

Start Date and Duration

- 3.33 ComReg proposed to introduce the new price caps at the end of September, 2007 if deemed appropriate, with any cap operating on an annual basis. This also corresponds better with Eircom's financial year (following their change in financial year end in 2007) therefore aiding compliance calculations.
- 3.34 ComReg also proposed that this regime should last until September 2010, (approximately three years' duration) to align a review of the RPC remedy with the ongoing market review process and any future assessment of SMP in these markets. As basic line rental prices are broadly in line with costs, in view of prospective developments in telecoms markets and given the narrow scope of the proposed RPC, ComReg considered that approximately three years' duration for the proposed price cap would be appropriate. To create certainty for consumers and the market generally, any RPC would remain in place until such time as it is amended, or withdrawn by a market review.

Respondents Views

- 3.35 In general, respondents are in agreement with ComReg's approach to the start date and operation of any future price cap. One respondent acknowledged the benefit of changing the start date of the RPC to September, as the period for the relevant revenue weights to be used in any compliance calculations will have passed. This would provide greater certainty than the situation with the current Price Cap Order where the price cap year begins, while still in the period for the relevant revenue weights.²¹
- 3.36 All respondents agree with ComReg that a RPC remedy should be reviewed in line with any future assessments of SMP in these markets. However, one respondent added that the control should be limited in duration (2-3 years) and should expire if ComReg does not replace it with a revised control. As set out above, this respondent also believes the duration of the first year for the price

²⁰ ComReg's detailed views for introducing a specific sub cap on PSTN line rental are set out in section 4.19, 5.22 and 5.23 of consultation document 07/48 and are based on the final competition assessment and the outcome of the financial modelling conducted by Frontier Economics (Appendix C refers).

²¹ The period for relevant revenue weights is April to March while the price cap year for the existing price cap begins in February. If Eircom wishes to make a change at the beginning of a price cap year, a forecast must be made for the remaining time period which also needs to take account of the effect of the price change.

cap should be a period of 10 months which results in a ‘price freeze’ for 12 months.

ComReg’s Position and Conclusions

- 3.37 Having completed the review of competition and developments in the fixed narrowband access markets, and taking into account the views of respondents to the RPC consultations, ComReg at this stage considers that it would be appropriate to commence the new RPC on 1 October, 2007 and that it is appropriate for this to run on an annual year basis from 1 October to 30 September.
- 3.38 With respect to the duration of the first price cap year, ComReg believes that the first price cap period should be 12 months rather than a 10 month period as discussed in paragraph 3.31 above. In addition, a shorter duration for the first price year would undermine the potential benefits to Eircom of the change to a September start date. ComReg notes the agreement of one respondent that the move to a September start date (after the financial year end) provides more certainty in terms of relevant revenue weights for Eircom. By setting the duration of the first price cap year for a period of 10 months rather than a 12 month period, subsequent price cap years would begin at the end of July. Although subsequent price cap years would begin after the end of the period for the relevant revenue weights,²² Eircom would again have to forecast the revenue weights required to calculate compliance for the remaining period and some of the relevant revenues should they wish to make a price change effective from July. Following the SMP Decision, Eircom is required to notify price changes 2 months in advance of their coming into effect (SMP obligation of transparency).
- 3.39 ComReg continues to believe that the price cap control should last until September, 2010 where this RPC remedy would be reviewed in line with a future assessment of SMP in these markets. Any change in ComReg’s assessment of competitive conditions for the SMP designation of operators at this later stage may have implications for the remedies that are currently imposed, including the retail price cap regime. Thus, the continuation (or not) of the RPC will be contingent on the state of competition in the markets at the time of the review. As such, ComReg does not believe that an automatic sunset of the price cap is appropriate or indeed legally permissible. In accordance with the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the retail price cap will remain in place until such time as it is amended or withdrawn by a further market review.
- 3.40 A three year time frame is appropriate and strikes the right balance between regulatory certainty and flexibility to allow future market developments, including incentive for the SMP operator to operate efficiently.

²² The period for relevant revenue weights is now July to June.

Need for Carryover

- 3.41 In document 07/48 ComReg indicated that it preferred a process whereby carryover should be allowed from one price cap period to the next on a discretionary rather than automatic basis. This would prevent any potential abuse of market power by Eircom. Nevertheless, allowing carryover of unused increases, or excess reductions offers Eircom the flexibility to introduce price restructuring in a single year rather than phasing in changes and encourages the operator to bring forward additional price reductions or postpone price increases. Not allowing carryover in any circumstances may force Eircom to bring forward price increases and limits the flexibility of the cap.

Respondents Views

- 3.42 All respondents agree that carryover should be permitted. However, views ranged from those that suggested carryover should be automatic, to those that suggested it should be discretionary. Of the respondents who agree with carryover on a discretionary basis, one of these submits that carryover should only be permitted if the regulator believes consumers will benefit from it. Two respondents believe automatic carryover should apply to price caps, as it gives greater flexibility and regulatory certainty to the SMP operator.
- 3.43 One respondent is unclear as to how the proposed carryover would work for decreases and increases and is concerned at how discretion would be applied.

ComReg's Position and Conclusions

- 3.44 ComReg is of the view that carryover should continue to be allowed from one price cap period to the next, as the inclusion of a carryover provision may encourage Eircom to bring forward additional price reductions or postpone price increases. As previously stated, carryover will apply to price reductions, as well as unmade increases for any overall basket cap and also for sub-caps.
- 3.45 However, ComReg concludes that carryover should only be allowed on a discretionary basis, rather than automatically, so as to prevent potentially excessive increases in access prices to the detriment of consumers. A discretionary approach to carry over means that any decision to grant, or not grant carryover would be considered on a case by case basis and would be made based on developments in the market and other relevant factors. For certainty and transparency for consumers, a discretionary approach whereby Eircom would seek agreement from ComReg before making use of a carryover facility should minimise any scope that Eircom would use this facility to potentially abuse its SMP. Allowing carryover at ComReg's discretion is a superior approach to a strict annual application of the price cap.
- 3.46 In relation to the issue of whether or not carryover from one price cap to the next should be allowed, after further consideration, ComReg's view remains that which was expressed in document 07/48 i.e., it should not be permitted. The majority of respondents agreed with restricting carryover only within a given regime.

Compliance at all times

- 3.47 Similar to the existing price cap order, ComReg proposed to include a provision that Eircom is required to comply with the price cap at all times throughout each relevant year. This measure would further protect consumers through limiting Eircom's flexibility to introduce any price increases early in the relevant year and delaying the corresponding price reductions that are necessary for compliance with the price cap until late in the year.

Respondents Views

- 3.48 Three respondents commented in relation to the provision compliance at all times, two of which agreed that a provision for compliance at all times should be included while the other believed that clarity was needed on the proposed RPC provision "compliance will be required at all times".

ComReg's Position and Conclusions

- 3.49 In relation to the provision regarding compliance at all times ComReg's view after further consideration of this issue remains that which was expressed in the last consultation document. Compliance at all times means that on any given day in the price cap year the price increase cannot exceed the cap level. For example, we consider higher level services, which in the first year are subject to a CPI-CPI cap. Compliance all year means that Eircom cannot increase the prices of these services (by say 2%) on day one of the price cap, and reduce them (by 2%) at the end of the year – that is at no time during the first year can the weighted average price of services in the basket increase by more than CPI-CPI. It is not intended to imply that prices can only increase gradually throughout the year to the upper limit allowed.
- 3.50 ComReg believes that compliance at all times will protect consumers through limiting Eircom's flexibility to introduce and price increases early in the relevant year and delaying price reductions that may be necessary for compliance until the end of the year.
- 3.51 As with previous price caps, ComReg will monitor compliance on an ongoing basis and will require Eircom to supply compliance statements with any price change that affects either the higher or lower level access basket. At the end of each price cap year ComReg will issue a statement confirming compliance.

Decision Instrument

- 3.52 In Document 07/48, ComReg consulted upon the draft text of the proposed decision instrument and asked if respondents believed that the draft decision instrument adequately reflects ComReg's proposals for a price cap and whether respondents believed the text to be sufficiently detailed, clear and precise.

Respondents Views

3.53 Of the respondents that commented directly, two agreed that the draft decision instrument did accurately reflect ComReg’s proposals for a price cap as set out in the last consultation document. Another respondent, however, believed that any RPC must be capable of being implemented from a legal, technical and practical perspective. In that regard, this respondent suggested a number of textual changes and sought clarification on other aspects of the draft decision instrument as follows:

- Clarification on clauses (1.1.4, 1.1.5) concerning the statutory powers under which ComReg is issuing the direction. The respondent suggested inclusion of references to previous consultations would seem to imply that legal obligations under the draft measure are comprised not only of the text of the decision instrument, but also of the full text of the supporting consultation documents.
- Clarification of the definitions of ISDN BRA, ISDN PRA, ISDN FRA, Δ CPI, CPI, ‘n’, first relevant year and relevant year;
- Inclusion of a definition for “connection and takeover charge” and insertion of a note indicating that the recurring charge relates to the standard price and excludes the price of a bundle which may include one or more of the higher/lower level services as a bundle element and promotional offers.
- Use June on June CPI figures (as published by the CSO Ireland mid July) as the appropriate CPI figures rather than the July to July CPI figures as proposed by ComReg in the last consultation.

3.54 The same respondent also requested an amendment to the text of clause 2.10 (carryover provision) and the insertion of a note relating to the existing Vulnerable User Scheme (VUS).

ComReg’s Position and Conclusions

3.55 ComReg is anxious to ensure that its intentions in respect of the provisions of the Decision Instrument set out below are clear and unambiguous, and in light of the comments made above by one respondent, amendments to the definitions in the Decision Instrument have been made where appropriate. A definition of “connection and takeover charge” has also been added.

3.56 For the reasons set out in the last consultation and in paragraphs 3.31 and 3.38 above, ComReg believes that the duration of the first price cap period should be 12 months rather than a 10 month period. The definition of first relevant year has not been changed and means the period of 12 consecutive calendar months, beginning from 1 October, 2007.

- 3.57 With respect to an appropriate CPI figure for the purposes of assessing compliance with the RPC, Document 07/48 proposed to use the July CPI figures as published by the CSO. This represents a recently published figure at the start of the price cap year. ComReg will continue to regulate Eircom through a CPI-X price cap as the CPI measure of inflation is both widely publicised and commands general acceptance. Following the SMP Decision, Eircom is required to notify price changes 2 months in advance of their coming in to effect (obligation of Transparency). Therefore, to use the July CPI figures which are published in August may potentially result in tight timelines for Eircom to comply with that obligation. As the inflation rate is unlikely to vary significantly from one month to the next, the definition of Δ CPI has not been changed and means the annual percentage change in the CPI from June to June in the year preceding the (first) relevant year as published in the month of July. This should give Eircom sufficient certainty and flexibility in relation to price amendments, if any, and the required notice period, yet still implement any price changes on 1 October.
- 3.58 As in previous price caps, the current standard prices and associated revenue weightings will be used to determine compliance with the price cap. The financial model used to determine the range of estimates for the appropriate level of X, for each basket of higher and lower level services, applied revenues associated with standard prices (i.e., not discounted or bundled revenues in coming to the results). By using standard charges, this ensures that customers will be able to avail of this price. Special offers and discounted charges will not contribute to price cap compliance.
- 3.59 The issue of the vulnerable user scheme (VUS) has been discussed in section 3.15 above. ComReg expects that Eircom would continue to offer the existing vulnerable user scheme to consumers, until such time as the consultation process on the issue of affordability of services for low usage customers and/or ‘vulnerable users’ is completed.
- 3.60 ComReg notes the concerns of the respondent that inclusion in ComReg’s decision instruments references to previous consultations and reasoning therein (which led to the final decision) would potentially create uncertainty for the SMP operator or the market generally. The approach is intended to aid interpretation/construction of the formal provisions in the decision instrument and to ensure that the proper purpose and intention of the decision instrument is respected. In the unlikely event that there is for example, an ambiguity in the language used in the decision instrument, or that ambiguity might permit regulation to be circumvented, it might be necessary to invoke this provision. ComReg wishes to stress that it is not its intention to introduce any additional or unforeseen regulation. ComReg has no wish to create uncertainty, or to intentionally, or unintentionally impose regulation in such a manner.
- 3.61 ComReg would like to note that the amendments made to the decision instrument do not involve substantial changes to the nature of the obligation that it originally proposed to impose in 07/48. The final Decision instrument formalising the RPC obligation to be imposed on Eircom is set out in Annex 1 to this document.

4 Next Steps

- 4.1 This Decision Instrument is effective from the 1 October 2007 until further notice by ComReg.
- 4.2 ComReg document 07/26 indicated that the current price cap imposed under the Telecommunications Tariff Regulation Order, 2003, SI No. 31 of 2003 (“the 2003 Order”)²³ would be maintained pending the final outcome of ComReg’s consultations on a RPC as a potential remedy on the retail fixed narrowband access markets. As ComReg has concluded that a retail price cap is appropriate and justified in relation to retail narrowband access markets, the 2003 Order is revoked as and from 1 October, 2007 by the revocation order - SI No. 665 of 2007.²⁴ This revocation order also provides that should an aggrieved party appeal the decision imposing the new price cap to the High Court, then the revocation order will not have effect at all and that the 2003 order is maintained. This precautionary measure is designed to guard against a regulatory lacuna (i.e. the possibility that for an unspecified period, the market would not legally be subject to any regulation).²⁵ The practical effect of the proviso in the revocation order is that if the new price cap to be imposed under this decision is appealed, the 2003 Order will not be revoked, but will in fact continue in full force and effect.
- 4.3 Pursuant to Regulation 9 of the Access Regulations, the obligations on Eircom relating to transparency and cost orientation under Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations, 1999 will also be withdrawn upon the revocation of the Telecommunications Tariff Regulation Order, 2003.²⁶

²³ The 2003 Order was made pursuant to s 7 (2) of the Telecommunications (Miscellaneous Provisions) Act, 1996.

²⁴ Telecommunications Tariff Regulation (Revocation) Order, 2007. The SMP Decision (07/61) indicated that the existing Price Cap Order remains in full force and effect, until expressly revoked by ComReg pursuant to s 7 of the Telecommunications (Miscellaneous Provisions) Act, 1996.

²⁵ This could occur if ComReg revoked the Telecommunications Tariff Regulation Order, 2003 without any proviso and at the same time an aggrieved party appealed the decision imposing the new price cap. If that happened, that party would in all likelihood seek an order from the High Court suspending the coming in to effect of the new price cap, until the outcome of the appeal.

²⁶ It should be noted that the SMP obligation on transparency has been imposed as a remedy under the SMP Decision - Document 07/61.

Annex 1 Decision Instrument

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument is made by the Commission for Communications Regulation:

1. Having had regard to sections 10 and 12 of the Act of 2002;²⁷
2. Having (where appropriate) complied with the Policy Directions made by the Minister;²⁸
3. Having taken the utmost account of the SMP Guidelines;²⁹
4. Having taken account of the submissions received in relation to Document No. 06/41³⁰ and Document No. 07/48;³¹
5. Having had regard to the analysis and reasoning set out in Document No. 07/76³² which shall be construed together with this Decision Instrument; and
6. Pursuant to and having regard to the significant market power (“SMP”) designation on Eircom³³ and pursuant to Regulation 14 of the Universal Service Regulations.³⁴

Definitions

1.2 In this Decision Instrument:

“ComReg” means the Commission for Communications Regulation, established under section 6 of the Communications Regulation Act, 2002;

²⁷ The Communications Regulations Act, 2002.

²⁸ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

²⁹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

³⁰ Consultation “Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets – Part I”, dated August, 2006.

³¹ Consultation “Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets – Part II”, dated 26 July, 2007.

³² SMP Obligation: Retail Price Cap Remedy Fixed Narrowband Access Markets (Decision Notice and Decision Instrument).

³³ Document No. 07/61 “Market Analysis – Retail Narrowband Access Markets (Decision Notice and Decision Instrument)”.

³⁴ The European Communities (Electronic Communications) (Universal Service and Users' Rights) Regulations 2003.

“connection and takeover charge” means a charge made by Eircom for the connection of a customer to Eircom’s networks or to services on Eircom’s network;³⁵

“Δ CPI” means the annual percentage change in the CPI from June to June in the year preceding the (first) relevant year as published by the Central Statistics Office, Ireland;

“CPI” means the consumer price index number, as compiled and published by the Central Statistics Office, Ireland;

“Eircom” means Eircom Ltd (including Eircom Retail);

“Eircom Retail” means the retail division within Eircom known by that name;

“first relevant year” means the period of 12 consecutive calendar months, beginning on 1 October 2007;

“Formula” means $\sum_{i=1}^n \Delta P_i * (R_i / R_t)$

Where,

n is the total number of services in either the higher level services, or the lower level services;

ΔP_i is the percentage change in the tariff (before discounts) for telecommunications service “i” based on the base of the tariff pertaining on the day preceding the beginning of the first relevant year, or thereafter, on the day preceding the beginning of a relevant year;

R_i is the total revenue before discounts for the telecommunications service “i” in Eircom’s financial year ending on or about 30 June preceding the first relevant year, or a relevant year;

R_t is the overall total revenue before discounts in Eircom’s financial year ending on or about 30 June preceding the first relevant year, or a relevant year, for the total number of services in either the higher level services, or the lower level services;

“higher level services” means the provision of ISDN FRA and ISDN PRA lines, (those being services for which a recurring charge is made by Eircom for the availability of such lines) and ISDN FRA and ISDN PRA connection and takeover;

“ISDN” means integrated services digital network, that is a network whereby telephone calls are made over switched end-to-end digital transmission paths;

“ISDN BRA” means ISDN basic rate access which consists of two bearer channels and one delta channel;

³⁵ Connection and takeover includes for example, initial connections to Eircom’s network and/ or services, in situ connections and re-connections. Connection and takeover is subject to a separate charge.

“ISDN FRA” means ISDN fractional primary rate access which consists of 30 bearer channels and one delta channel where a minimum of 16 bearer channels and a maximum of 28 bearer channels are available for use;

“ISDN PRA” means ISDN primary rate access which consists of 30 bearer channels and 1 delta channel with all bearer channels available for use;

“lower level services” means the provision of telephone exchange lines and ISDN BRA lines, (those being services for which a recurring charge is made by Eircom for the availability of such lines) and telephone exchange line and ISDN BRA connection and takeover;

“relevant year” means any period of 12 consecutive calendar months, beginning on 1 October, 2008 and 1 October thereafter;

“the provision of Integrated Services Digital Network lines” means a service for which a recurring charge is made by Eircom for the availability of Integrated Services Digital Network lines (but does not include connection and takeover charges);

“the provision of telephone exchange lines” means a service for which a recurring charge is made by Eircom for the availability of such lines (but does not include connection and takeover charges);

2 RETAIL PRICE CONTROL

- 2.1 The retail price controls in this section 2 relate to the markets for higher level and lower level retail narrowband access from a fixed location. The retail price controls in this section apply to higher level services and lower level services (as defined in section 1.2) provided by Eircom and shall be complied with by Eircom and its successors and assigns (or, the successors and assigns of Eircom Retail).³⁶
- 2.2 Eircom shall not increase tariffs by more than $\Delta \text{CPI} - \Delta \text{CPI}$ in respect of lower level services in the first relevant year.
- 2.3 Eircom shall not increase tariffs by more than $\Delta \text{CPI} - 0\%$ in respect of lower level services in a relevant year.
- 2.4 Without prejudice to section 2.2, the following adjustment to the Formula shall apply: in respect of the provision of telephone exchange lines, Eircom shall not increase tariffs by more than $\Delta \text{CPI} - \Delta \text{CPI}$ in the first relevant year.
- 2.5 Without prejudice to section 2.3, the following adjustment to the Formula shall apply: in respect of the provision of telephone exchange lines, Eircom shall not increase tariffs by more than $\Delta \text{CPI} - 0$ in a relevant year.

³⁶ If for example, Eircom Retail comes under different, or separate ownership or control, the obligations herein shall be complied with by Eircom Retail.

- 2.6 Eircom shall not increase tariffs by more than $\Delta\text{CPI} - \Delta\text{CPI}$ in respect of higher level services in the first relevant year.
- 2.7 Eircom shall not increase tariffs in respect of higher level services by more than $\Delta\text{CPI} - 0\%$ in a relevant year.
- 2.8 For the purpose of determining and ensuring compliance with the price controls in sections 2.2, 2.3, 2.6 and 2.7, the Formula shall be applied.
- 2.9 Eircom shall comply with sections 2.2, 2.3, 2.4, 2.5, 2.6 and 2.7 at all times throughout the first relevant year and a relevant year.
- 2.10 ComReg may make the following adjustment to the Formula: to the extent that Eircom has made, during the first relevant year, or a relevant year, in respect of higher level services, or lower level services, a reduction in tariffs, or an increase in tariffs that is less than the increase that is permitted by sections 2.2, 2.3, 2.4, 2.5, 2.6 and 2.7, the difference may be taken into account by ComReg in applying sections 2.3, 2.5 and 2.7 in a relevant year, subsequent to a relevant year in which the reduction was made, or the allowable increase was not availed of.

3 WITHDRAWAL OF CERTAIN OBLIGATIONS

- 3.1 Pursuant to Regulation 9 of the Access Regulations, the obligations on Eircom relating to transparency and cost orientation under Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations, 1999 are withdrawn immediately upon the revocation of the Telecommunications Tariff Regulation Order, 2003.

4 MAINTENANCE OF OBLIGATION

- 4.1 For the avoidance of doubt, nothing in this Decision Instrument shall in any way (either expressly, or by implication) affect the continuing validity of the Telecommunications Tariff Regulation Order, 2003, which, remains in full force and effect, until expressly revoked by ComReg pursuant to s 7 of the Telecommunications (Miscellaneous Provisions) Act, 1996.

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to, or after the effective date of this Decision Instrument) from time to time as the occasion requires.

6 EFFECTIVE DATE

6.1 This Decision Instrument is effective, from the date hereof, until further notice by ComReg.

Mike Byrne
Chairperson
The Commission for Communications Regulation
The 1st day of October 2007