



Commission for
Communications Regulation

Letter correspondence between Eircom and ComReg

Wholesale pricing review in WLA and WCA Markets

Reference:ComReg 17/26C

Date: 7/4/2017

An Coimisiún um Rialáil Cumarsáide

Commission for Communications Regulation

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14 December 2016

Mr Jeremy Godfrey
Chairman
ComReg
Abbey Court
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Dear Jeremy,

Re: ComReg Information Notice 16/110 re Draft cost ranges for NGA services

I refer to ComReg's Information Notice 16/110 which was published on 12 December 2016.

eir has grave concerns regarding this development, as well as the proposals which ComReg has made in its consultations on the Wholesale Local Access market (WLA market) and the Wholesale Central Access market (WCA market). In particular, we note that the Information Notice was published:

- during the course of ComReg's consultations on the WLA and WCA market reviews and prior to its forthcoming consultation on the appropriate form of price control for NGA services. It is so early in the consultation process that we struggle to see how Comreg can legitimately publish an indicative wholesale price range at this point in time,
- without any prior notice to the market,
- without any engagement with eir in relation to how the cost and network inputs were being applied, and
- with a very broad range of so-called draft costs and caveats so broad as to question their reliability and usefulness.

I also note the following points in relation to the contents of ComReg's publication.

The WLA and WCA market reviews are still only at consultation phase and responses are not due until the end of January 2017. ComReg itself acknowledges in paragraph 2 of the Information Notice that it will only be issuing a separate consultation on the detail of NGA FTTC price obligations in early 2017. Yet ComReg is effectively 'jumping the gun' by taking the pre-emptive and unprecedented step of publishing indicative cost ranges for a proposed cost orientation remedy during a consultation on the application of such a remedy and prior to commencement of the pricing consultation process which is meant to determine the appropriate costing methodology. Instead, ComReg has effectively started with the answer by publishing draft cost ranges from a model on which we have had no engagement. eir is also concerned that ComReg is effectively creating an erroneous expectation among industry participants that NGA FTTC pricing will be within the draft cost ranges published by ComReg.

As a broader point, eir notes that ComReg is proposing using a whole range of different costing methodologies across open eir's access network. It largely used a HCA approach for setting WLR prices; it appears to have already assumed a BU_LRIC approach for FTTC prices and a retail minus approach for FTTH prices. In fact, ComReg appears to be proposing the co-existence of two forms of pricing obligations on our NGA FTTC products, both a cost orientation and a retail margin squeeze

obligation. eir has fundamental concerns with this approach and will set these arguments out fully in due course in response to the market review consultations and the forthcoming pricing consultation.

We also note that ComReg is considering a cost orientation remedy for FTTC despite not having foreshadowed this in any earlier market review, consistent with good regulatory practice, ComReg's duties in relation to encouraging investment and the Commission Recommendation. eir believes that ComReg should consider all responses fully and follow due process prior to concluding the appropriate market analysis, any change to the price control remedy and any population of appropriate cost models; rather than pre-emptively publishing draft NGA cost ranges based on ComReg's pre-determined view of the outcome of the consultation processes. This mix and match of costing methodologies is resulting in the lowest wholesale access and broadband prices across different parts of the WLA and WCA markets and is not allowing a reasonable prospect of eir recovering its significant investment costs, even if such costs were settled. Nor is it sending the right signals to network infrastructure providers about investment in fibre broadband. As ComReg is well aware, eir's FTTC rollout is still continuing. eir considers that many of these points might form the basis of an appeal were ComReg to maintain its proposed decisions on the pricing remedy for FTTC and the type of costs which it has published.

I note that ComReg's motivation for taking this unprecedented step appears to be based on levels of interest from industry and the likely relevance to the NBP process. In respect of the latter, surely all bidders are in the same position in terms of what is known to the market in respect of open eir's published prices? These are the prices that are in effect until such time as there is a robust basis for putting any other potential forward looking prices into the public domain. It is not clear why ComReg has chosen to depart from proper processes and good regulatory practice because of the NBP.

In conclusion, eir reiterates its deep concern with the unprecedented step that ComReg has taken. We believe that this will have a chilling effect on investment and competition in the fibre broadband market and will have the opposite effect of meeting the requirements of the EC Recommendation to enhance the broadband investment environment.

eir strictly reserves all of its rights in relation to this and any future publications by ComReg in relation to this vitally important issue.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'RM', with a long, sweeping horizontal stroke extending to the right.

Richard Moat



Mr. Richard Moat
Eircom Limited
1 Heuston South Quarter
St John's Road
Dublin 8

BY POST AND E-MAIL

11 January 2017

Re: ComReg Information Notice 16/110 re Draft cost ranges for NGA services

Dear Richard

I refer to your letter dated 14 December.

Firstly, I would like to point out some factual errors in your letter. You claim that *“ComReg is considering a cost orientation remedy for FTTC despite not having foreshadowed this in any earlier market review, consistent with good regulatory practice”*. In fact we have already set out proposals for a cost orientation obligation in our consultation document ComReg Document No. 16/96 *“Market Reviews: Wholesale Local Access and Wholesale Central Access”*.

Your also state that we have never consulted on a proposed pricing methodology and provided an indication of likely prices consequent on the proposal at the same time. This is incorrect. As an example we did precisely that in the consultation preceding ComReg Decision D03/16.¹

The NGA cost modelling work necessarily involves a degree of interaction between ComReg and Eircom in advance of ComReg publishing a formal public consultation on its preliminary view of detailed cost obligations. However, we considered that it could give Eircom a competitive advantage over other NBP bidders if this interaction meant that Eircom had sight of early model outputs in advance of other bidders. We also considered that the early model outputs would be of interest to other market participants. For these reasons, we decided to publish the preliminary outputs rather than share them privately with Eircom.

¹ Eircom's Wholesale Access Services: Further specification and amendment of price control obligations in Market 4 and Market 5 and further specification of price control obligation in Market 2 ComReg Document No. 15/67.



ComReg disagrees with argument implicit in your letter that Eircom is somehow entitled to see the preliminary outputs of our modelling work in advance of other interested parties. We also disagree with your assertions that sharing preliminary outputs in this instance amounted to “*jumping the gun*” or that it has created any erroneous expectations among industry. The information note about the preliminary outputs was very clear that there is no guarantee either that we will eventually opt for a cost orientation obligation for FTTC services or that final prices will fall between the two scenarios presented were we to do so.

We will consider the points you have raised regarding costing methodologies as part of the consultation. However, I note that our decision regarding WLR pricing which you specifically mention has already been taken in 2016². There were good reasons for using HCA in that case and these are set out in ComReg Document No.15/67 and ComReg Decision D03/16.

In conclusion, I do not accept the assertions in your letter. As your letter does not appear to contain any confidential information we plan to publish it and this response in due course as its contents are germane to the current consultation. If you wish to make representations in this regard I request that you do so by close of business 27 January 2017.

Yours sincerely

Jeremy Godfrey
Chairperson

² ComReg Decision No. D03/16.

cc: GF/KOB/DL



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Mr Jeremy Godfrey
Commissioner
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19th January 2017

Dear Jeremy

ComReg information notice 16/110 – draft cost ranges for NGA services

Thank you for your response to my letter of 14 December. Unfortunately I think you have failed to fully appreciate a number of the points in my letter.

You say that ComReg has foreshadowed the application of a cost orientation obligation in a prior market review and then say that it was foreshadowed in the very market review which proposes applying it. My point was that it is good regulatory practice and provides regulatory certainty to allow an operator to take into account likely future changes in its investment decisions. Other regulators give notice in the prior, rather than the current, market reviews of likely changes. This was done in the UK in relation to the local loop unbundling charges payable by Sky and Talk Talk where 3 years' notice was given and in relation to the possible application of cost orientation of VDSL which was raised in the 2013 market review. Last year, a consultation on a possible cost model was published in advance of the market review consultation which has yet to be published. This ComReg has failed to do.

You also do not appear to acknowledge that publication of likely prices creates an expectation in the market. As you say the publication would be of interest to other market participants. The creation of market expectation is inevitable and particularly in the case of the NBP where such prices are relevant for the cost models of the bidders and of the Department of Communications, Climate Action and Environment.

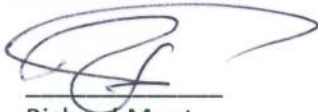
I note your statement that there is no guarantee of a cost orientation obligation being imposed which is very important, as eir's NGA rollout, including its VDSL rollout, is continuing and its costs remain uncertain. However, it does not seem consistent with the fact that ComReg has already built a BU LRIC model to use as the apparent basis for consulting on proposed prices.

I also did not say that we were entitled to see the preliminary outputs of ComReg's model in advance of other parties, but this is how price reviews have been conducted in the past, and we are currently engaged in this exercise with ComReg in advance of the pricing consultation you refer to. This is understandable given our knowledge of our network and separated accounts. The difference in this case however, was that indicative price ranges were published in advance of the engagement process.

Your response does not seek to address our concerns around due process. Effectively ComReg have pre-judged the outcome of the market review process and a pricing consultation which has not yet been published, by pre-emptively publishing draft cost ranges and developing cost models.

Whilst I do not consider it appropriate for ComReg to publish this type of bilateral correspondence I would seek your assurance that all correspondence received by ComReg on its pricing proposals and the market review is being published.

Yours sincerely

A handwritten signature in black ink, appearing to be 'R. Moat', written over a horizontal line.

Richard Moat
CEO



Commission for
Communications Regulation
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Mr. Richard Moat
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BY POST AND E-MAIL

24 March 2017

Re: ComReg Information Notice 16/110 re Draft cost ranges for NGA services

Dear Richard,

I refer to your letter dated 19 January. While not intending to engage in an endless exchange of correspondence on the same matter we feel that it is important to clarify ComReg's position on some of the issues highlighted in your recent letters¹.

It was not apparent from the letter of 14 December that Eircom considers that ComReg should "foreshadow" pricing decisions several years before they are made. At the same time, in a manner which we consider to be inconsistent, your letter criticises ComReg's decision to share information about a draft cost model several weeks before adopting a preliminary view and publishing a consultation about pricing obligations in the WLA/WCA² markets. I will deal with both these issues in this letter.

Foreshadowing

In accordance with Regulation 12 of the Framework Regulations ComReg is obliged to consult publicly on proposed measures. Where applicable before reaching a final decision we also consult with the Competition and Consumer Protection Commission (CCPC), as well as with the European Commission, BEREC and national regulatory authorities (NRAs) in other Member States as required under Regulation 13 of the Framework Regulations. In pursuit of ComReg's regulatory objectives we are also required to promote regulatory predictability by ensuring a consistent regulatory approach. This does not mean that ComReg must "foreshadow" decisions in any particular timeframe as suggested in your most recent letter.

In the specific context of the proposed cost-orientation obligation for FTTC based VUA products and services, we note the following:

- In the 2013 NGA Decision³, we explained that having taken account of the 2013 Recommendation we had considered whether to impose a cost orientation obligation in respect of NGA products and service and set out the features of the market which led us to

¹ Letters from Eircom (R. Moat) to ComReg (J. Godfrey) dated 14 December 2016 and 19 January 2017.

² Wholesale Local Access ('WLA') (also referred to as 'Market 3a' in the 2014 European Commission Markets Recommendation and Wholesale Central Access for mass market products ('WCA') market (also referred to as 'Market 3b' in the 2014 Commission Recommendation. Commission Recommendation of 9 October 2014 on relevant product and service markets (2014/710/EU) ('2014 Markets Recommendation').

³ ComReg Decision D03/13.

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the conclusion that cost orientation was not appropriate at that time. This earlier decision-making process was referred to in our recent consultation, ComReg Document No. 16/96⁴.

- The European Commission Recommendation on non-discrimination and costing methodologies⁵ (issued in 2013) recommended cost orientation for next generation access (NGA) products and service. While not legally binding, ComReg must take the utmost account of such recommendations.
- ComReg's strategy statement for 2014-16, published on 17 July 2014, stated that ComReg would begin a market review of what are now the WCA and WLA markets during 2014/15. We have provided updates on the timing of this exercise as our public Action Plan has been revised and updated.

In light of the above Eircom cannot reasonably claim to be surprised that cost orientation is being considered in the current market review. Nor could Eircom reasonably claim to be unaware that ComReg might reach a different conclusion on cost orientation if the salient characteristics of the market had changed since the 2013 NGA Decision.

Cost modelling

I do not accept Eircom's assertion that ComReg has in any way pre-judged the outcome of the WLA/WCA market review and its consideration of possible pricing remedies by commissioning cost modelling work and publicly sharing early outputs.

As required under the provisions of the Framework and Access Regulations⁶ ComReg is in the process of reviewing relevant markets and has set out its preliminary view in ComReg Document No. 16/96 that Eircom continues to have SMP in the relevant markets. ComReg has also set out a preliminary view on the competition problems that arise and on appropriate remedies, including a preliminary view that a cost orientation obligation is now proportionate and justified for FTTC based VUA products and services.

No final view has yet been taken on any of these matters. Before making a final decision ComReg will comply with relevant consultation and notification obligations (as set out above) under Regulations 12 and 13 of the Framework Regulations.

We have also stated that we will form a preliminary view and consult on detailed price obligations, and that we will invite respondents to submit further observations on the contents of ComReg Document No. 16/96 if they wish to do so in the light of the information provided in the detailed price consultation.

We propose to make final decisions on the market review and on detailed price control obligations at the same time.

In order to inform this decision-making approach, ComReg has engaged with its advisors and has prepared a model to calculate the possible costs and prices in the event that we were to adopt a

⁴ See for example paragraphs 8.624-8.628.

⁵ Commission Recommendation dated 11 September 2013 on 'Consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment'.

⁶ Including Regulations 26 and 27 of the Framework Regulations (S.I. 333 of 2011) and Regulation 8 and 13 of the Access Regulations (S.I. 334 of 2011).



decision to impose a cost orientation obligation. We are currently engaged with Eircom in its review of the draft cost models.

It is wholly consistent and correct that ComReg would develop a model based on the proposed costing methodology and Eircom's costs at this point in the process. This is essential if we are to form a preliminary view of the prices that would result from the application of our preliminary proposals on the pricing methodology. In doing so, we will also provide respondents to the public consultation with information that may be useful to them in considering their responses to the detailed price consultation as well as any additional views they may wish to provide in relation to the contents of ComReg Document No. 16/96 .

Furthermore, the publication of the draft costs in the Information Notice⁷ does not (as Eircom has asserted) pre-judge the final decision on the pricing methodology or prices. As Eircom will be aware a number of important caveats were clearly set out in the Information Notice with regards to the published preliminary outputs of the NGA cost model⁸. These caveats mean that no party can reasonably claim to have a legitimate expectation that our final decision will be to impose a cost orientation obligation, nor what the prices would be in that event.

I should perhaps repeat the reasons why we took the step of publishing an indicative draft price range in this instance. As you acknowledge, the modelling process necessarily involves sharing early outputs with Eircom before ComReg adopts a preliminary view on detailed price control obligations. You also acknowledge that such early outputs, while not final, may be of use to NBP bidders in assessing future regulatory scenarios for their cost models. As Eircom is an NBP bidder, it might undermine the competitive process were Eircom to have exclusive knowledge of the early outputs.

I confirm that we propose to publish all correspondence which expresses views on matters which are the subject of ongoing public consultations. In this regard, we plan to publish your most recent letter and this response in due course. The letter does not appear to contain confidential information; if you wish to make representations in this regard I request that you do so by close of business 29 March 2017.

Yours sincerely

Jeremy Godfrey
Commissioner

⁷ ComReg Document No. 16/110.

⁸ See Information Notice which stated that "Firstly, we have not made a decision as to whether or what type of price control might ultimately apply. We have not made a decision as to the particular assumption(s) within the NGA cost model and we strictly reserve our right to alter any and all aspects of the model prior to finalising it. We also noted that the publication of indicative costs is being done as an exceptional measure and does not create any precedent. We have not yet shared the NGA cost model with any industry player, including Eircom. We intend to engage in an appropriate degree of consultation with both Eircom and interested parties which may result in changes to the NGA cost model and its output. We take no responsibility for the effect of any commercial decision made on foot of the information presented in this document. Inappropriate reliance ought not therefore to be placed on the contents of this document."