



Commission for  
**Communications Regulation**

## Consultation Paper

### **Consultation on a Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets - Part 1.**

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All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 06/41” as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before 5:30pm on Friday  
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## 1 Foreword

On behalf of the Commission for Communications Regulation (“ComReg”), I am pleased to announce the first of two consultations on a retail price cap as a potential remedy on fixed narrowband access markets.

This Consultation follows Consultation 06/39 “Market Analysis – Retail Narrowband Access Markets” issued on 17 August 2006, and therefore should be read in conjunction with that consultation. In that document ComReg assesses the level of competition in the retail markets for lower and higher level narrowband access and provisionally concludes that competition in these relevant markets is not effective.

This paper explains why ComReg takes the provisional 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. ComReg believes it is appropriate to consult on the possible scenarios for applying retail price controls (RPC) to identified retail access markets in order to determine the most appropriate and proportionate regulatory response as a result of any Significant Market Power (“SMP”) designation that might be made following the retail access market consultation.

The main concern arising from a finding of SMP in retail markets is the ability of *eircom*, identified as a dominant provider, to set and/or maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will be able to sustain prices above cost to the detriment of consumers. Therefore a key objective of a price cap on lower and/or higher level access services, if necessary, is to provide consumers with protection against any potential exploitation of market power, such as excessive pricing.

For basic services notably monthly PSTN line rental, consumers and in particular low spending consumers who depend on the phone but make few calls may need continued protection against price rises where competitive pressure alone in respect of the services they purchase is too weak. Provided that ComReg is satisfied consumers are adequately protected, for example, through wholesale regulatory measures or consumer information measures, such as, [www.callcosts.ie](http://www.callcosts.ie) and [www.askcomreg.ie](http://www.askcomreg.ie), regulation may be progressively reduced at the retail level.

I urge all interested parties to respond in the time set aside for comment, so that any decision may be taken against a full range of views from all potentially impacted parties, consumers and industry.

**Isolde Goggin**  
**Chairperson.**

## 2 Executive Summary

- 2.1 ComReg has recently completed its preliminary review of competition and developments in the markets for fixed narrowband retail access carried out in line with EU Directives.<sup>1</sup> Having provisionally identified *eircom* with SMP in retail narrowband access markets at least one regulatory measure must be imposed on *eircom*. In that regard, ComReg is considering whether or not to oblige *eircom*, as the identified SMP operator, to adhere to a retail price cap as one of the relevant remedies to address the identified market failure.
- 2.2 If any continued regulation of the closely related retail fixed narrowband calls markets is determined ultimately to be appropriate, ComReg will separately consult as to whether a price cap remedy is still necessary and appropriate in respect of retail call markets.
- 2.3 ComReg believes it is appropriate to consult on the possible scenarios for applying retail price caps to identified retail access markets in order to determine the most appropriate and proportionate regulatory response as a result of any SMP designation that might be made following the retail access market consultation. In relation to a price cap as a potential remedy, there are a range of options which can be considered:-
- Regulatory Forbearance - no retail price cap regulation on access services in place of the existing Price Cap Order
  - Inclusion/Exclusion of lower and/or higher level access prices for a retail price cap
  - Overall basket cap, a basket of ranges of access services or separate individual cap(s) on each identified SMP market and /or service (e.g., a cap on PSTN line rental only)
  - Cost orientation
- 2.4 On balance, ComReg believes that the option not to have any form of a retail price cap on access services is premature in the face of *eircom*'s continued dominance in both lower and higher level access markets.<sup>2</sup> ComReg is mindful of the risk that, in the absence of some form of a price control to address *eircom*'s SMP, consumers may face rises in access prices. Absent effective competition at the wholesale and retail levels, there is potential for *eircom* to exploit its position of dominance through excessive pricing. Primarily because of this, ComReg believes that there is a continued need for some form of a retail price cap control. ComReg believes that

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<sup>1</sup> ComReg Document no 06/39. This consultation document on a potential price cap remedy should be read in conjunction with that document, in particular, the SMP assessment paragraphs 4.8 to 4.66.

<sup>2</sup> The first of these covers mainly access to copper exchange lines and basic rate ISDN services (single network connection), and the second relates to higher level ISDN access (two or more connections capable of being used simultaneously).

a retail price cap on lower level access is the minimum necessary to protect consumers against large increases in line rental, notably residential users.

- 2.5 If ComReg determines as final, following consultation, that a retail price cap is necessary, the statutory basis for any such price control would not continue to be s 7 of the 1996 Act. A price cap on fixed retail narrowband access markets, if any, will constitute a remedy flowing from Regulation 14 of *the Universal Service Regulations*. ComReg will inform providers of telecommunications services at the appropriate stage of its proposals, if any, to “modify” the Price Cap Order and allow a period of two months statutory consultation within which to make representations to ComReg.
- 2.6 This consultation paper is the first of two consultations. It introduces some of the main issues and asks respondents for their initial views. ComReg intends to issue a second consultation paper in early December which will, subject to the outcome of the access market review, consult on a methodology to be used in setting a level for a price cap(s) and the level and structure of any price cap(s) to be applied, if a price cap on access is deemed appropriate. At that stage ComReg will include a draft instrument containing the price cap mechanism and will commence the statutory 2 month consultation period. A final Decision Notice is planned for March 2007 after a full consideration of the responses to the December Consultation Paper and notification to the EU Commission.
- 2.7 In successive sections of the consultation document the following issues are considered in some detail:
  - Section 3 sets out the rationale for the existing price cap and monitors price developments of services currently controlled by the price cap.
  - In section 4, ComReg analyses the possible scenarios for applying retail price controls (RPC) as a result of any SMP designation that might be made following the retail access consultations.
  - Section 5 in conjunction with the rest of this document represents a Regulatory Impact Assessment (“RIA”).
  - Finally, section 6 provides interested parties with details of how and when comments to this consultation should be submitted.
- 2.8 To summarise, this paper explains why ComReg takes the provisional view that some form of a price cap control continues to be necessary for at least some of the retail services provided by *eircom* in fixed narrowband access markets.

### 3 Introduction

- 3.1 ComReg has recently assessed the level of competition in the retail markets for lower and higher level narrowband access.<sup>3</sup> Competition in these relevant markets does not yet appear effective.<sup>4</sup> As there will be no significant challenge to *eircom*'s dominance in narrowband access markets within the lifetime of this review there may be a case for continued regulatory intervention to ensure that *eircom* does not exploit its market position unfairly in the retail access market and disadvantage consumers. The imposition of a price cap is to protect consumers in circumstances where the competitive process is not operating effectively.
- 3.2 ComReg may impose appropriate and proportionate remedies on such operator(s) related to the identified market failure. In light of the foregoing, ComReg is considering whether or not to oblige *eircom* as the identified SMP operator to adhere to a retail price cap as one of the relevant remedies for these markets. In that regard, it is reviewing the current Price Cap Order to determine whether it is still necessary and/or appropriate in light of changing market circumstances.

#### **Legal and regulatory framework for setting a retail price cap control**

- 3.3 An overall basket price cap (access and domestic calls<sup>5</sup> considered together) has been imposed on *eircom* since February 2003.<sup>6</sup> Amongst other things, the Price Cap Order provides that the price cap on certain services provided by *eircom* must not exceed the annual percentage change in inflation/Consumer Price Index ("CPI") - 0%.
- 3.4 If ComReg determines as final, following consultation, that a retail price cap is necessary, the statutory basis for any such price control would not continue to be s 7 of the 1996 Act. Subject to the completion of the market review of the fixed retail narrowband access markets, any future price cap will constitute a remedy flowing from the market analysis process and, as such, will be imposed, if deemed appropriate, under the new EU framework. ComReg has discretion as to what SMP obligations to impose, wholesale and/or retail. Retail measures may be imposed where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given retail market identified in accordance with Regulation 26 of the Framework

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<sup>3</sup> In ComReg document 06/39, paragraph 3.4 to 3.92, the market analysis proposes to define 2 separate markets, lower level narrowband access and higher level narrowband access.

<sup>4</sup> In ComReg document 06/39, paragraph 4.8 to 4.66, ComReg is provisionally proposing to designate *eircom* as an undertaking having SMP on all of the identified retail access markets.

<sup>5</sup> Calls subject to the current cap include local, national, fixed to mobile, operator assisted calls and calls to payphones.

<sup>6</sup> The Price Cap Order was made by ComReg pursuant to s 7 of the Telecommunications (Miscellaneous Provisions) Act, 1996. The current price cap mechanism is set out in the Telecommunications Tariff Regulation Order 2003, S.I. 31 of 2003. See Annex A for an outline of the legislative developments in relation to the price cap control.

Regulations is not effectively competitive and it concludes that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations<sup>7</sup> would not result in the achievement of the objectives set out in Section 12 of the Communications Regulation Act, 2002.

- 3.5 ComReg may apply remedies provided for by Regulation 14 of *the Universal Service Regulations* which provides that:

“(3) The Regulator may require an undertaking to which paragraph (1) applies to comply with -

- (i) measures to control individual tariffs, or
- (ii) measures to orient tariffs towards costs or prices on comparable markets,

in order to protect end-users’ interests whilst promoting effective competition.”

- 3.6 ComReg will inform providers of telecommunications services at the appropriate stage of its proposals, if any, to “modify” the Price Cap Order and allow a period of two months statutory consultation within which to make representations to ComReg.

**Q. 1. Do respondents have any observations in relation to ComReg’s assessment of the statutory basis for the imposition of any new price cap and the procedures that must be adhered to in that regard? Please provide detailed reasons in support of your response.**

### **The rationale for the existing retail price cap control**

- 3.7 The principal objective for imposition of a price cap is to protect consumers in circumstances where the competitive process is not operating effectively. An overall basket price cap has been imposed on *eircom* since February 2003. At that time, ComReg concluded that the maximum average price rise for the services subject to the cap should be the rate of inflation. This represented a relaxation of the previous existing retail price cap control with the removal of a sub caps on

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<sup>7</sup> Which transposes Article 17 of the Universal Service Directive, (2002/22/EC), into national law.

access in anticipation of the introduction of a wholesale line rental product (WLR)<sup>8</sup> which would be used by competitors.<sup>9</sup>

- 3.8 A consideration relevant in assessing the appropriate form of intervention should a future price cap be deemed appropriate, is the extent of pricing freedom afforded to *eircom* by virtue of its SMP in the relevant markets. ComReg is particularly concerned that *eircom* does not use its SMP to charge excessive prices to the detriment of consumers. Table 1 lists the services currently subject to the price cap and gives a brief overview of developments with respect to the prices of *eircom*'s services that are subject to the current price cap.

**Table 1 - Overview of percentage price change of currently capped services**

Price Capped Services	2003	2004	2005	% change nominal Feb 03 – Feb 06
<i>Rental PSTN</i>	18%	5%	0%	23%
<i>Rental ISDN</i>	0%	0%	0%	0%
<i>Connection PSTN</i>	0%	0%	-7%	-7%
<i>Connection ISDN</i>	0%	0%	0%	0%
<i>local</i>	0%	-2%	0%	-2%
<i>national</i>	0%	0%	-0%	-0%
<i>Fixed to mobiles</i>	-4%	-4%	-5%	-13%
<i>OAC</i>	0%	0%	0%	0%
<i>Payphones</i>	8%	0%	0%	8%
<i>overall change in basket</i>	5%	1%	-1.23%	

- 3.9 The price cap imposed by ComReg in 2003 recognised a number of important dynamics in the voice telephony markets. First, there was by now a well established wholesale regime in place at cost orientated prices which allowed competing operators to offer service through Carrier Select/Carrier Pre Select.<sup>10</sup> Secondly, there was a recognition, in Ireland as in other European countries, that the cross subsidisation implicit in historical rates would have to cease and access charges, (notably, the line rental) would have to rise in order to recover efficient costs, in line with EU legislation. Thirdly, it was important to preserve the relativities of wholesale and retail rates. For all these reasons, it was felt that a cap

<sup>8</sup> Wholesale Line Rental (WLR) allows alternative suppliers of telecoms services to lease access lines on wholesale terms from *eircom*, and resell those lines to consumers, providing a single bill to the consumer that covers both line rental and telephone calls.

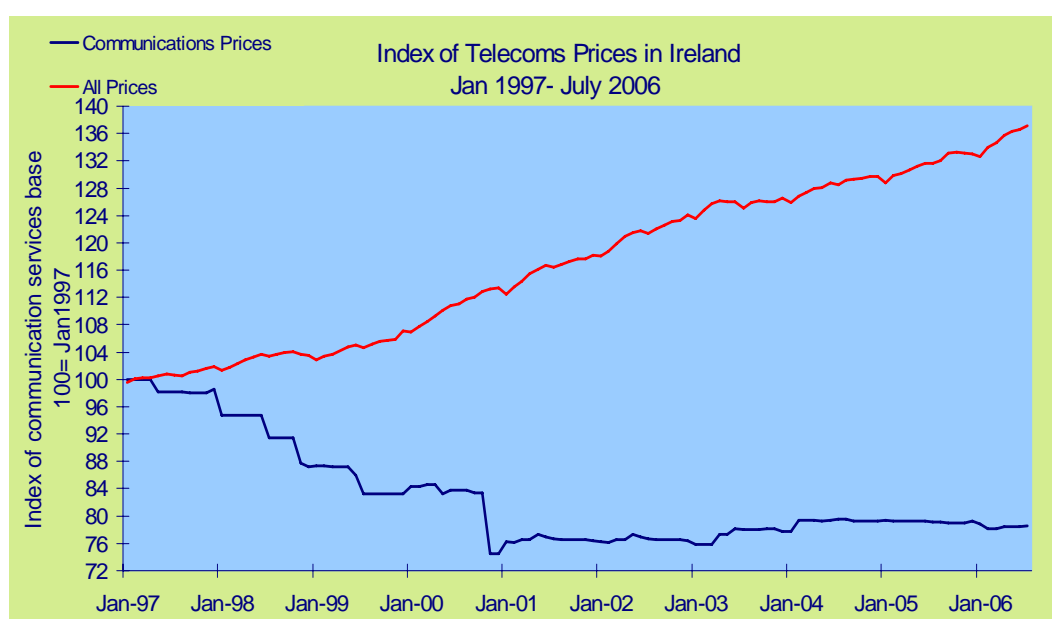
<sup>9</sup> Until February 2003, price capped services were subject to individual sub-caps of CPI+2% within the overall price cap of CPI-8%. There were separate sub caps for line rental (PSTN and ISDN rental) and connections (PSTN and ISDN connection). From February 2003 all sub-caps, including those sub-caps on line rentals and connections were removed placing services within an overall price cap of CPI-0%.

<sup>10</sup> Carrier pre-selection (CPS) – this allows you to rent a line from *eircom* but use a different company to make your calls.



of CPI-0%, with the removal of the sub caps on access, would achieve a number of desired objectives; it would prevent telecommunications consumer prices overall from rising above the rate of inflation, while allowing some necessary rebalancing of rental and call charges and also allowing further competition to develop on access and calls, which in itself would act as a check on prices.

- 3.10 The prices that *eircom* charge end users for line rental and calls have been controlled since 1996. This approach has been successful in reducing communication prices overall in contrast to the general rise in other consumer prices. The following chart compares changes in the communications index relative to the overall Consumer Price Index:-



- 3.11 From Table 1 above, *eircom* has, since February 2003 made reductions in the standard nominal prices for fixed to mobile calls,<sup>11</sup> local calls and PSTN connection charges.<sup>12</sup> Standard nominal ISDN access prices also subject to the price cap have remained unchanged. Nonetheless, where *eircom* did not increase prices to levels permitted by the general basket cap CPI-0% this is effectively a real reduction (a less than inflation increase) for the consumer in respect of those charges.

- 3.12 However, concerns remain. *eircom* has increased PSTN line rental appreciably between 1998 and 2004, albeit within the confines of the existing price cap limit. From above, the CPI-0% cap, in line with European legislation, recognised the principle of rebalancing to ensure that efficient cost is recovered in an appropriate

<sup>11</sup> Pass through of the savings to consumers following reductions in wholesale mobile termination charges introduced by the mobile operators.

<sup>12</sup> *eircom* also introduced temporary promotions on PSTN and ISDN connection fees over the period since the last price cap review.

way. In ComReg's view, PSTN increases have succeeded in aligning those access prices with cost. In any case, ComReg would not wish to see a significant increase in monthly PSTN line rental charges which are currently the highest in the EU.<sup>13</sup>

- 3.13 The significant barriers to entry into access markets and *eircom*'s ability to continue to act to an appreciable extent independently of its competitors and customers in these markets over the period of the review give rise to concerns about *eircom*'s potential exploitation of market power, such as excessive pricing.

### Objectives for a price cap

- 3.14 In reviewing the current price cap, ComReg believes that any decisions coming out of the review need to be aimed at achieving the best social outcome from a number of objectives. ComReg in exercising its functions in relation to the provision of electronic communications networks and services has the objectives of promoting competition whilst protecting the interest of consumers.
- 3.15 The main concern arising from the preliminary finding of SMP in retail access markets is the ability of *eircom*, identified as an SMP provider, to set and/or maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will be able to sustain prices above cost to the detriment of consumers. Therefore, a key objective of intervention would be to constrain the ability of *eircom* to set excessive prices to the detriment of consumers. Of particular concern are low spending consumers who depend on PSTN line access but make few calls. National legislation requires the designated universal service provider to maintain the affordability of basic services.
- 3.16 Mindful of the need to have regard for investment and sustainable competition,<sup>14</sup> ComReg recognises that should a price cap be put in place the integrity of the network needs to be maintained. Setting too stringent a retail price cap could have a potential adverse effect on competition, service innovation and long term investment. This will be considered alongside the potential consumer protection benefits of a retail price cap, if deemed appropriate.
- 3.17 In carrying out this consultation on whether following the SMP assessment to propose a retail access cap remedy, ComReg proposes that the principal objectives for a price cap should be:
- to address SMP in retail markets by preventing a dominant operator from charging excessive prices and ensuring that the prices of SMP services reflect efficient costs;
  - to facilitate the rapid development of effective competition in the supply of telecommunications services; and

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<sup>13</sup> EU 11<sup>th</sup> Implementation Report 2006, Volume 2.

<sup>14</sup> The Memorandum to the Recommendation on Relevant Markets, page 14.

- to achieve the above objectives by the least intrusive means.

3.18 ComReg will aim to meet these objectives in such a way that the measures imposed:

- do not endanger the continuing provision of high quality telecommunications services to customers;
- do not distort or restrict competition, including the development of future competition;
- encourage efficient provision of telecommunications services;
- ensure that there is no discrimination in the treatment of undertakings in the market; and
- subject to the market reviews, ensure that regulation remains appropriate in light of changing market conditions.

**Q. 2. Do respondents agree with the objectives of ComReg with respect to its current review of the price cap? Which objectives should have priority, if any? Does the respondent feel that this list excludes other important objectives that need to be considered? If yes, please list.**

### Other Factors

3.19 Where based on the outcome of the market reviews ComReg determines an operator to have SMP in a relevant market, it will consider how appropriate a price cap might be taking into account factors such as:-

- the prospects for an increase in the level of competition arising from any changes in market circumstances, in any part of those markets and the timeframe within which any such competition is likely to occur;
- the scope and effects of existing regulation;
- the potential impact of a price cap on the development of competition; and
- the level of administrative cost that is likely to be involved relative to potential gains or losses from regulation.

3.20 ComReg will consider, taking on board the views of respondents, a full range of factors before deciding whether a price cap is the most appropriate policy response to any lack of effective competition.

**Q. 3. In the event that there is no effective competition in the access market(s) defined, what other factors should ComReg consider before deciding to impose a retail price cap remedy? Do respondents agree with the factors listed above?**

**Q. 4. Do respondents consider that any of the factors listed above preclude the imposition of a retail price cap on any of the specific markets identified? Please give reasons for views expressed and supporting analysis and/or data if possible.**

## 4 Options Assessment for a Future Price Cap Control

- 4.1 ComReg believes it appropriate to consult on the possible scenarios for applying retail price caps to determine the most appropriate and proportionate regulatory response as a result of any SMP designation that might be made following the retail access consultation. A full analysis of each of the access markets has been carried out to determine if *eircom* can act to an appreciable extent independently of its competitors and customers. On the basis of the competition assessment, ComReg is able to take account of all indicators of competition in assessing which retail price cap controls may be appropriate, if any.
- 4.2 Having provisionally identified *eircom* with SMP in both the retail narrowband access markets at least one regulatory measure must be imposed on *eircom*.<sup>15</sup> Therefore some form of *ex ante* regulation is required. This consultation aims to identify the opportunities to withdraw from or reduce levels of regulation in the relevant markets, and as appropriate, the minimum remedies necessary to protect consumers in the transition to more effective retail competition. A price cap will only be applied where there is no effective competition and where other factors do not suggest that a price cap would be inappropriate.

### The nature of potential competition problems

- 4.3 In ComReg Document 06/39, ComReg presents a detailed assessment of the state of competition on the relevant access markets. From the market assessment, the entrenched position of the incumbent has persisted in many areas. Retail access markets under review are demonstrably not effectively competitive. In particular, in the provision of lower level access services (principally residential customers and SMEs) the incumbent operator has maintained a very strong position. Many of these users (in particular in rural areas) are entirely dependent on the provision of access by the incumbent operator. Choice of access provider is limited as barriers to entry are high (largely because little has been invested in the direct build of alternative access networks to connect lower level access users). Barriers to entry are such that without regulatory intervention via CPS/WLR competition would be virtually non-existent in the lower level access markets and restricted in higher level access.
- 4.4 *eircom*'s market power may not be uniform between access markets and is likely to be stronger in the lower level access than higher level access. Nonetheless, in view of the high barriers to entry into the higher level access market, ComReg also provisionally concludes that *eircom* is dominant in this relevant market. Given the continuing high market shares and persistent barriers to entry there is no indication

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<sup>15</sup> See "The Guidelines", paragraphs 21 and 114.

that growing competition is likely to effectively constrain *eircom*'s pricing and commercial behaviour over the review period.<sup>16</sup>

- 4.5 There is a high risk that the SMP operator would exercise its market power in the provision of access by charging excessive retail prices for the relevant service. In the absence of some form of a price control to address *eircom*'s SMP, consumers may face rises in access prices. From above, *eircom* has increased PSTN line rental appreciably between 1998 and 2004. Any price cap obligation would be imposed, if necessary, in order to address *eircom*'s ability to raise prices above the competitive level in light of its SMP in markets to which the control applies.
- 4.6 Because an SMP operator has control of the wholesale inputs necessary for an entrant to offer an access service, it is in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets. This is particularly important because of the economies of scale identified in the access market, as market entry is most likely to be via the purchase of wholesale inputs in order to offer service over *eircom*'s network. Without open and truly equivalent access to such assets, sustainable infrastructure based competition could be too risky and too easily frustrated. *eircom* may have an incentive to restrict or distort competition it faces from other network operators (and resellers) in serving final customers, for example, through charging higher input prices to competing providers or the use of cross subsidy.
- 4.7 Where *eircom* is engaged in offering services subject to increasing competition as well as services that are not yet demonstrably effectively competitive, it may have incentives to cross subsidise the price of the more competitive service, financing that through potential over pricing of non competitive services. Appropriate use of a price cap may reduce incentives by the SMP operator to leverage its position in narrowband access markets and protect consumers against any potential exploitative abuse of market power.

## Summary of Regulatory Options

- 4.8 In considering price cap controls as a potential remedy for problems identified in the fixed access markets, ComReg has identified two broad options which are:
  1. **Option 1** – Regulatory Forbearance - no retail price cap regulation on access services in place of the existing Price Cap Order.
  2. **Option 2** - Impose a new retail access price cap *under the USO Regulations* in line with market circumstances.

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<sup>16</sup> For a more detailed discussion of the identified market failure in the fixed access markets please see ComReg Document 06/39, paragraphs 6.6 to 6.30. Also, for a discussion of potential problems in narrowband markets see Koboldt C. *Journal of Network Industries, volume 5 no.1, 2004.*

4.9 In the event that ComReg deems that a price cap should be introduced under *the USO Regulations (Option 2)*, it will be necessary to determine what form, if any, a future retail price cap mechanism may take, including the following alternatives:

2...1 Inclusion/Exclusion of lower level access prices for a price cap

2...2 Inclusion/Exclusion of higher level access prices for a price cap

2...3 Introduction of an overall basket cap (lower and higher level access considered together), a basket of ranges of access services (e.g., lower level access and higher level access considered separately, rentals and/or connections etc) or separate individual caps on each identified SMP market (e.g., a cap on PSTN line rental only)

2...4 Cost orientation

4.10 A price cap should include no more services than are necessary to protect those customer interests that are identified as requiring specific protection.

**Option 1: Forbearance - no retail price cap regulation of access markets**

4.11 ComReg is considering alternatives in regulation, such as, the option to forbear from intervention in retail access, and/or wholesale intervention in place of retail regulation. In accordance with the spirit of the EU framework, ComReg's general regulatory approach is that where satisfactory competition exists at the wholesale level, regulation of affected retail markets could be relaxed or lifted. Such an approach may achieve the objectives of protecting the consumer and promoting competition by the least intrusive means, one of the stated objectives for a price cap, thus lightening any regulatory burden. Deregulation would allow *eircom* complete freedom over all its retail access prices. This may be beneficial for competition as it could lead to more innovative pricing such as price bundles and increased competition where competing operators are able to identify commercial opportunities.

4.12 ComReg believes that the main constraint on *eircom's* access prices in future should be provided by competition. Competition is increasing (but not yet effective) and ComReg believes it should be stimulated further by the continued availability of WLR. Despite *eircom's* continued dominance in the retail access markets under review, it may be a proportionate response (given wholesale developments) not to impose any future retail price cap mechanism. In assessing the appropriate form of regulation following the SMP assessment,<sup>17</sup> ComReg considers the extent to which other factors - competitive pressure and other regulation - could potentially mitigate *eircom's* SMP in the retail access markets under review and therefore its pricing freedom in these relevant markets.

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<sup>17</sup> See ComReg Document 06/39 for a more detailed assessment of competition issues.

- 4.13 Evidence demonstrates an initial rapid take-up of WLR in the lower level access market as operators migrated customers from CPS, from close to zero in October 2004 to 200,000 by the end of 2005. The rate of growth of WLR in the lower level access market has slowed in the second half of 2005. Concerning higher level access, from an initial slow start the trend in WLR uptake in this market appears to be increasing. Currently, WLR represents 5% of OAOs share of higher level access, the remaining 26% being direct access. The impact of wholesale developments appears to be reflected in *eircom*'s retail market shares:-

**Table 3 – Changing Market Shares**

Identified Markets	2002	2003	2004	2005
<i>analogue access /ISDN BRA</i>	100%	99%	94%	89%
<i>OAO Indirect</i>	0%	1%	6%	11%
<i>OAO Direct</i>	-	-	-	-
<i>ISDN FRA &amp; PRA</i>	81%	81%	69%	69%
<i>OAO Indirect</i>	0%	0%	1%	5%
<i>OAO Direct</i>	19%	19%	30%	26%

- 4.14 ComReg recognizes the potential positive impact of WLR (together with CPS) on competition in retail access markets. In view of the high and persistent barriers to entry (other operators would need to build out a fixed network of their own), absent wholesale regulatory intervention via CPS/WLR competition would be virtually non-existent in the lower level access markets and restricted in higher level access. The aim of WLR is to promote competition by addressing *eircom*'s dominance in the access market, and to enhance the effectiveness of the CPS remedy in the calls market. In conjunction with the CPS provision, it is envisaged that in the longer term the WLR product will stimulate competition in retail markets, as providers using WLR seek to provide both access and calls to subscribers. In particular, it facilitates consumer demand in respect of single billing thereby reducing somewhat barriers to competition at the retail level.
- 4.15 Although wholesale intervention is a necessary condition for promoting competition in retail fixed access, wholesale only intervention is not sufficient of itself to adequately protect consumers who face rising access prices. The retail minus mechanism does not constrain where *eircom* sets the level of retail and wholesale prices, only the differential between them. Evidence demonstrates that *eircom* as the dominant operator in fixed access has had the ability to significantly increase some line rental charges. For instance, the nominal monthly PSTN charge in Ireland has risen by over 30% since 1998. ComReg notes however, that the price of line rental for both lower and higher level access has remained unchanged since 2004. As discussed at paragraph 3.11 above, no change in the price of a capped service, where the existing cap permits a price increase in line with inflation, is effectively a real price reduction benefiting consumers in respect of that service.
- 4.16 ComReg does not consider that it can perform its duties under Regulation 14 of *the USO Regulations* at the present time solely by setting SMP conditions at the



wholesale level. That is because it will take time for the intended effect of those conditions to come to full effect i.e., to improve competition in the retail market across all areas and end users. As yet, ComReg does not see indications that these service based measures, or infrastructure based competition through cable networks or ULL<sup>18</sup> would change the quasi monopolistic supply structure within the period of this review.

- 4.17 It is necessary in the meantime in order for ComReg to perform its duties under Section 12 of the Communications Act, 2002 – promote competition and the interests of consumers - to impose some form of a price control on *eircom* prices in certain retail access markets. From above, one of the objectives for any retail price cap, if deemed necessary, is to facilitate the rapid development of effective competition in the supply of telecommunications services. Setting too stringent a retail price cap could have a potential adverse effect on competition, service innovation and long term investment.

### Conclusion

- 4.18 On balance, ComReg concludes that this option is premature in the face of *eircom*'s continued SMP in both lower and higher level access markets. ComReg is mindful of the risk that, in the absence of some form of a price control to address *eircom*'s SMP, consumers may face rises in access prices. This means that any control at the wholesale level needs to be supplemented by a retail price cap measure in order to have the desired impact on the access markets and to achieve the correct balance between promoting competition and protecting the consumer.

**Q. 5. Do respondents agree that, in addition to wholesale measures, some form of a retail price cap remedy is an appropriate and proportionate form of regulation in light of changing market circumstances for retail SMP access services? Please give reasons for views expressed and supporting analysis and/or data if possible.**

### Option 2: Imposition of a Retail Price Cap under *the USO Regulations*

- 4.19 ComReg is interested in the views of respondents on possible markets to be considered for inclusion or exclusion from any future retail access price cap, and the underlying analysis outlined to date. ComReg in the following sections considers four variants were it to determine as final, following consultation, that a retail price control is necessary, appropriate, justified and proportionate under *the USO Regulations*.

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<sup>18</sup> Unbundled Local Loop.

Variant 1: Inclusion/Exclusion of Lower Level Access prices from a future price

- 4.20 Applying a price cap to lower level access (PSTN and ISDN BRA rentals and connections), ComReg suggests that a reason for considering this option is that while *eircom*'s share of the lower level access markets (by number of channels) has fallen, *eircom* still has a market share of 89%, and ComReg's market review of lower level access finds that competition is not fully effective. Evidence shows limited competition in the provision of lower level access despite historical intervention at both the wholesale and retail level. No operator other than *eircom* has a market share of more than 5% of this market. Absent regulation, *eircom*'s market share in the lower level market is likely to be 100% as competition by direct build infrastructure is *de minimus*.
- 4.21 Choice of access provider is limited as barriers to entry are high (largely because little has been invested in the direct build of alternative access networks to connect lower level access users). WLR is the only means of competition in the lower level access market. Direct access competition via ULL is unlikely to offer sufficient prospective competition over the period of the review. While competition is developing in lower level access, it is not clear that competition in this market is (or is likely to become in the period of the review) sufficiently developed to protect fully all consumers at this time. In the absence of a retail price cap, and given that *eircom* continues to have SMP, it has the incentive and ability to set and/or maintain lower level access prices at a level higher than if competition was effective. Substitution of fixed access by mobile access is unlikely to act as a sufficient constraint on *eircom*'s pricing behaviour.<sup>19</sup>
- 4.22 ComReg recognises that in the absence of effective competition at the wholesale level and retail level, there is potential for *eircom* to exploit its SMP position through excessive pricing to the detriment of consumers. In the absence of a retail price cap, and in light of past experience, ComReg believes consumers are likely to face further increases in PSTN line rental charges. PSTN line rental has increased appreciably between 1998 and 2004, albeit within the confines of the existing price cap limit. From above, the CPI-0% cap, in line with European legislation, recognised the principle of rebalancing to ensure that efficient cost is recovered in an appropriate way.
- 4.23 *eircom* has in the past implemented a 23% increase in PSTN line rental within one 12-month period. In ComReg's view, these increases have succeeded in aligning PSTN access prices with cost. ComReg therefore expects that it will no longer be necessary for *eircom* to increase lower level access prices in order to rebalance tariffs. ISDN BRA line rental has not been subject to the same price increase as PSTN line rental, remaining unchanged since the last price cap review. Other lower level access prices have remained unchanged or have fallen marginally since

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<sup>19</sup> As part of the review of fixed narrowband markets ComReg fully examined the issue of fixed mobile substitution. In Document 06/39 paragraphs 3.34 to 3.67, ComReg provisionally finds that mobile and fixed access to be in separate markets. Mobile access does not provide a sufficient constraint on the pricing or commercial behaviour of *eircom* in relation to fixed access at this time.

the last price cap review. Price reductions or unmade price increases within the limits of the general cap represent a real reduction to the consumer in respect of those charges. Overall, the preliminary conclusion that *eircom* has SMP means that it has the ability to increase prices above the competitive level. Regulatory obligations currently in place (WLR and cost orientation) do not obviate the need for a continued price cap on lower level access services.

## Conclusion

4.24 Because of *eircom*'s continuing dominance in lower level access and the unlikelihood that OAOs will pose a significant competitive constraint in this market over the review period, ComReg believes that a cap on the price of some or all of the services in the lower level access market, given the predominance of residential users, should continue to apply at least in the near term. A price cap measure on lower level access will ensure that the alignment of costs and price in respect of retail line rental is maintained. A specific cap on lower level access could offer consumers better protection where concerns over exploitation of market power may be most significant.

**Q. 6. In the event of *eircom*'s having SMP in the lower level access market, does the respondent believe that some form of price cap should be applied to this relevant market? Please give reasons for views expressed and supporting analysis and/or data if possible.**

### Variant 2: Inclusion/Exclusion of Higher Level Access prices from a future price

4.25 An option might be to consider higher level access products and services for withdrawal from a price cap (safeguard). ComReg notes the emergence of different levels of competition between lower and higher level access markets. It can see therefore some merit in being able to differentiate the ways in which price controls are applied in the lower level access and higher level access markets. Maintaining a basket cap (on lower and higher level access considered together) risks being unduly burdensome and disproportionate to the extent that it would potentially apply much more widely and beyond those end users requiring protection.

4.26 ComReg recognises that although competition is still ineffective, higher level access users (predominantly business users) have a range of choice of alternative suppliers with OAOs building competing alternative infrastructure. There is evidence that *eircom* is facing some competition in this market, even though *eircom* remains dominant in the supply of higher level access services. There are now several operators offering ISDN services, and the largest after *eircom* has achieved a growing market share over recent years. *eircom*'s market share of higher level access has, while remaining high, gradually declined from 81% at Q2 2002 to 69% currently. OAOs have made inroads into *eircom*'s market share of

higher level access going from 21% share at Q1 2004 to 31% by end 2005. Recent gains in market share by OAOs has come from the uptake of WLR which now represents 5% of OAOs share of higher level access. This is expected to be further enhanced by continued availability of WLR/CPS and LLU.

- 4.27 While higher level access is potentially more competitive than the lower level access this may still not be enough to constrain *eircom's* ability to raise prices above the competitive level. ComReg's review of the higher level access markets (ISDN FRA and PRA) indicates that *eircom's* market share remains high (69%) and relatively stable. Barriers to entry are such that without regulatory intervention via CPS/WLR competition would be restricted in higher level access. In the absence of regulatory intervention in respect of WLR, *eircom's* market share for the higher level market is likely to be approximately 74%. In this case, an OAO wishing to introduce an ISDN WLR product would need to be able to acquire wholesale inputs at appropriate cost.
- 4.28 In addition, ComReg continues to have concerns about SMP in this market despite the decrease in *eircom's* market share. While OAOs continue to build and/or maintain competing infrastructure, in view of the high barriers to entry, their direct access market share has been fluctuating in the region of 24% and is unlikely to increase significantly in the near term. As yet, ComReg does not see indications that these service based measures, or infrastructure based competition through cable networks or ULL would change the quasi-monopolistic supply structure within the period of the this review. And there is no indication that this market power is likely to decline significantly during the timeframe of the review.
- 4.29 Exclusion of higher level access from the scope of a price cap would mean that ComReg believed that measures at the wholesale level and other retail pressures would be sufficient to act as a constraint on *eircom's* pricing and commercial behaviour. All notified price amendments to ComReg on the part of *eircom* associated to higher level access products (ISDN FRA and PRA rental and connection charges), since the current price cap came in to force in February 2003, relate either to temporary connection promotions or supplementary services charges. The standard nominal prices of higher level access products have remained unchanged since the start of the current cap. Nonetheless, where *eircom* did not increase prices to levels permitted by the general basket cap this represents a real reduction. In principle, however, if higher level access prices are subject to a growing constraint from alternative suppliers and end users, for instance through direct build and/or countervailing buyer power (CBP), consumers might expect to see reductions in these charges.

## Conclusion

- 4.30 The higher level access market is demonstrably not effectively competitive.<sup>20</sup> Absent regulation, barriers to entry would be high and *eircom* would likely be in a position to act to an appreciable extent independently of its competitors and

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<sup>20</sup> See ComReg Document no. 06/39, paragraphs 4.8 to 4.66 for full details of the competitive assessment of this and other relevant access markets.

consumers. A price cap could also apply to higher level access services until there is further evidence as to the sustainability of competition based on CPS/WLR and ULL. The appropriateness or not of a retail price cap measure for this market would depend on the speed of the development of greater competition based on ULL. It would give these consumers (in particular SMEs) confidence that some level of price constraint would remain if competition developed less rapidly than expected.

**Q. 7. In the event of *eircom* having SMP in the higher level access market, does the respondent believe that some form of retail price cap should be applied to this relevant market? Please give reasons for views expressed and supporting analysis and/or data if possible.**

Variant 3: Overall basket cap on access services or Individual caps on either specific access market(s) or specific access service(s)

4.31 In considering a price cap as a potential remedy to address the identified market failure in the fixed access markets, ComReg identified a further range of options including but not limited to:-

- a global basket cap (all PSTN and ISDN products considered together);
- a basket cap on a range of access services (e.g., connection and/or rentals);
- individual price cap(s) on either each identified SMP market (PSTN and ISDN BRA) access considered together, all ISDN FRA and PRA products considered together); or
- individual price cap(s) on each identified SMP service (e.g., PSTN line rental only).

4.32 ComReg is interested in the views of respondents on the potential range of alternative forms of a price cap that could be applied where ComReg determines as final, following consultation, that some form of a retail price control is necessary.

4.33 The existing price cap control (CPI-0%) is a global price cap and covers a basket of services (access and various types of calls considered together). This allows *eircom* flexibility on how it balances charges between those services included in the basket. If any price cap regulation is eventually determined to be appropriate for lower and/or higher level access markets, it may be appropriate and proportionate for *eircom* to have some flexibility to alter charges within a general basket cap on

overall retail access charges, for example, in the presence of joint or common costs.<sup>21</sup>

- 4.34 As lower level and higher level access are considered separate markets it may be more appropriate to apply, where necessary, separate individual retail price caps on each relevant market (lower and higher access considered separately). If, in response to emerging competition in higher level access *eircom* reduces prices for some access services, then this means that *eircom* can, even within the limits of the present overall basket cap, increase charges for lower level access products, notably PSTN line rental. As a basket cap the current price cap acts as a limited constraint on price increases as it allows *eircom* the scope to increase prices for specific services (line rental) within the constraints of the Price Cap Order. Since it allows *eircom* a degree of flexibility, it will not necessarily prevent *eircom* from charging excessive prices for access even where it does apply.
- 4.35 Increases in line rental charges disproportionately impact those who depend on the telephone but make few calls. For instance, the fixed line rental charge is likely to make up the bulk of a user's fixed line bill. Such users are likely to have a strong requirement for 'access' to making calls (the service charged as 'rental') to allow them, for example, to make calls to emergency services, while demand for the services offered over the network (the different types of calls) might be less important, or not in as great a demand, for these customers. A specific cap on either lower level access markets or specific SMP services, such as, PSTN line rental could offer consumers better protection where concerns over exploitation of market power may be most significant.
- 4.36 While it may be necessary that *eircom* having been identified with SMP in lower and higher level access markets continue to be subject to a retail price cap, applying a basket price cap similar to the current one may not be appropriate to current circumstances. If *eircom* were to target price cuts at higher level access users such an approach may afford *eircom*, as the SMP operator, the ability to increase market power by way of a cross-subsidy of the higher level access market by lower level access where certain consumer groups or areas may be captive. Continuation of a basket price control may give *eircom* the incentive to reduce prices ahead of competitive pressures and make competitors market position unsustainable where they are trying to maintain a foothold in the WLR product.

## Conclusion

- 4.37 The introduction of separate price caps (lower and higher level access considered separately) may increase the certainty around future cost and tariff paths and may be more appropriate to developing sustainable markets. Furthermore, a specific individual cap to limit flexibility in the pricing of particular services in the basket may be a more appropriate and proportionate regulatory response in order to avoid that *eircom* would charge, within the boundaries of a basket cap, potentially excessive prices thereby exploiting consumers. A specific cap on either the lower

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<sup>21</sup> The cost of providing access may be shared with or common to the provision of other services.



level access market or specific services could therefore offer consumers better protection where concerns over exploitation of market power may be most significant.

**Q. 8. In the event that a price cap remedy is deemed necessary, which form of price cap do you consider would be the most appropriate and proportionate remedy, a global basket cap (lower and higher level access considered together) or separate individual cap(s) on each identified SMP market and/or services? Please explain your reasons with supporting analysis and data if possible.**

**Q. 9. In the event that an individual cap either on an SMP market or service is deemed necessary, in relation to lower level SMP markets/services should this be a narrow cap on PSTN line rental only, or should it be expanded to include other lower level access services (e.g., connections)? If so, which ones? Which combinations?**

**Q. 10. In the event that an individual cap either on an SMP market or service is deemed necessary, in relation to higher level SMP markets/services should this be a narrow cap on ISDN rental only or be expanded to include other higher level access services (e.g., connections)? If so, which ones? Which combinations?**

**Q. 11. Are there any access services, or access products for particular groups of customers, which should be price capped separately on the basis that competition may soon develop to the point where controls can be dropped? If so, please state which services and your reasons why?**

Variant 4: Cost Orientation

4.38 At present the main controls in place to prevent excessive pricing are the retail price cap and the obligation of cost orientation. A retail cost orientation obligation could continue to be applied as a means of protecting consumers against any potential excessive prices for individual line rental and connection services even where they are included in a price cap. While the existing price cap addresses the

upper limit of pricing for a “basket” of services (including access and calls),<sup>22</sup> cost orientation is a more general obligation that can prevent the SMP operator from charging excessive prices for specific services such as line rental and prevent any restriction of market entry by charging unreasonable low prices that may harm competition. For narrowband access markets, however, retail minus is used to regulate wholesale line rental prices which should be sufficient to minimize concerns in relation to charging an unreasonably low price that may harm competition.

- 4.39 Where the risk is one of excessive pricing, a cost orientation obligation may no longer be appropriate in the presence of a retail price cap remedy to control access prices, if deemed necessary.
- 4.40 ComReg considers whether a cost orientation obligation at the retail level obviates the need, if any, for a price cap or whether it could be a more effective alternative to a price cap remedy on lower and/or higher level access. If the price for access (for example, PSTN) has reached a level that broadly reflects efficient cost, a cost orientation obligation could be used to align prices with cost, mindful of the need to take investment incentives into account. Access prices should be based on objective criteria.
- 4.41 However, the process of determining cost orientated prices may potentially prove to be complex or protracted. If there are shared and common costs, a cost orientation obligation as an upper limit constraint may not be appropriate. Where there are uncertainties in allocating costs to specific services a more effective remedy may be to include SMP line access services in a retail price control to guard against excessive prices and reward efficiency gains.

## Conclusion

- 4.42 From above, one of the principle objectives for a price cap is to achieve the regulatory objectives by the least intrusive means. A cost orientation obligation may no longer be appropriate in the presence of a price cap to control access prices, if deemed necessary. In particular, in the presence of a retail-minus approach to WLR pricing, any concerns about predatory behaviour should be addressed by this method. The other potential objective of cost orientation – protecting against potential excessive pricing – is better addressed directly through a retail price cap, as discussed above.

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<sup>22</sup> The current price cap applies to a weighted average of *eircom*'s revenue for services subject to the price cap.



**Q. 12. In the event of *eircom* having SMP in the lower and/or higher level access market, does the respondent believe that a cost orientation obligation can be an effective upper limit control in the alternative to a price cap measure? Please state your reasons why/why not?**

## Conclusion

- 4.43 ComReg considers that some form of a retail price cap continues to be needed to prevent *eircom* from exploiting its market power as competition develops. While competition is developing in the higher level access market, it is not clear that competition is fully protecting all consumers at this time or is likely to over the review period. On balance, ComReg considers the option to forbear in narrowband access is premature in the face of *eircom*'s continued dominance in both lower and higher level access markets.
- 4.44 Given the unlikelihood that OAOs will pose a significant competitive constraint in this market over the review period, ComReg believes that a cap on the price of some or all of the services in the lower level access market given the predominance of residential users should continue to apply at least in the near term. A price cap measure on lower level access will ensure that the alignment of costs and price in respect of retail line rental is maintained. A specific cap on either the lower level access market or specific services could offer consumers better protection where concerns over exploitation of market power may be most significant.
- 4.45 *eircom* would appear to be able to maintain prices for higher level access services at a higher level than would be if competition were effective. The standard nominal prices of higher level access remained unchanged since February 2003. Absent regulation, barriers to entry would be high and *eircom* would likely be in a position to act to an appreciable extent independently of its competitors and consumers. A price cap could also apply to higher level access services until there is further evidence as to the sustainability of competition based on CPS/WLR and ULL. The appropriateness or not of a retail price cap measure for this market would depend on the speed of the development of greater competition based on ULL.
- 4.46 Views are invited on ComReg's possible scenarios for applying an access price cap remedy, if any, as a result of any designation of SMP with respect to identified services and the underlying analysis set out above. ComReg would also welcome respondents views on any other options that could be considered in addition to those outlined above. If ComReg were to impose a price cap on one or more retail access markets or products as a result of any SMP designation that might be made following the market access consultations, it will consult fully on the appropriate level and form of any retail price cap as a remedy for access markets.

**Q. 13. In respect of the options analysed above, is there additional analysis that in your opinion should be carried out? If so please specify.**

**Q. 14. Are there additional factors that in your opinion require analysis by ComReg? If yes, please indicate precisely what they are. In respect of the factors analysed, is there additional analysis that in your opinion should be carried out. If yes please indicate precisely what this is?**

## 5 Regulatory Impact Assessment (RIA)

- 5.1 As part of the process of selecting appropriate remedies, ComReg is conducting, *inter alia*, a Regulatory Impact Assessment in accordance with the Ministerial Direction<sup>23</sup> and in accordance with the EU framework Directives. ComReg is also paying close attention to best practice, and specifically, to recent Guidelines on Regulatory Impact Assessment issued by the Department of the Taoiseach.<sup>24</sup>
- 5.2 It is proposed that a retail price cap obligation on lower and/or higher level access markets would be proportionate and justified on the basis of competition. ComReg again sets out here reasons as to why it considers that some form of a price cap continues to be necessary for at least some of the retail services provided by *eircom* in fixed narrowband access markets. In choosing remedies, ComReg has taken into account the potential impact of each alternative in regulation or price cap scenario (see below) on consumers, competitors and on *eircom*.
- 5.3 The following sections in conjunction with the rest of this document represent a RIA. It sets out a preliminary assessment of the potential impact of proposed price cap measures. Further consideration of the potential impact of a price cap will be given in subsequent consultations if a price cap is, subject to current consultations, still considered necessary and appropriate for retail access markets.

### ***Appropriateness***

- 5.4 ComReg recognises that any remedy decision must be a reasoned decision which is in line with the obligations under the Regulations. The nature of the problem that a price cap aims to address has been identified in the course of the market assessment<sup>25</sup> and outlined in section 4 of this document. The main concern arising from a finding of dominance in retail markets is the ability of *eircom*, identified as an SMP provider, to maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will be able to sustain prices above cost to the detriment of consumers.
- 5.5 There is *de minimus* entry in the lower level access market via direct build because of high economic barriers to entry due to economies of scale and significant sunk costs. Absent regulation, barriers to entry would also be high in the higher level access market and *eircom* would likely be in a position to act to an appreciable extent independently of its competitors and consumers. For both lower and higher level access markets, in the absence of price control and given that *eircom* continues to have SMP, *eircom* has the incentive and ability to set and/or maintain prices higher than what they would be if competition was effective.

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<sup>23</sup> Issued by the Minister for Communications Marine & Natural Resources in accordance with Section 13 of the Communications Regulation Act, 2002 published in February 2003.

<sup>24</sup> See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, [www.betterregulation.ie](http://www.betterregulation.ie)

<sup>25</sup> Document no 06/39 refers.

- 5.6 Maintaining some form of upper limit on retail access services, ComReg is seeking to find the best balance between the interest of consumers and the long term sustainability of the industry. ComReg concludes that introducing a cap on lower level access is the minimum necessary to best achieve this balance. A price cap could also apply to higher level access services until there is further evidence as to the sustainability of competition based on CPS/WLR and, in particular for this market greater competition based on ULL.

### **Proportionality**

- 5.7 ComReg has carried out a very thorough, careful and overall analysis of competition and market developments in these relevant markets. On that basis ComReg takes the provisional view that some form of a price cap control continues to be necessary for at least some of the retail services provided by *eircom* in fixed narrowband access markets. ComReg believes that it is appropriate to consult on the possible range of scenarios in relation to the application of a price cap in order to determine the most appropriate and proportionate regulatory response that could address *eircom*'s position of SMP in these relevant markets.
- 5.8 ComReg is considering alternatives in regulation such as the option to forbear from intervention in retail access and/or wholesale intervention in place of retail regulation. From above, ComReg does not consider that it can perform its duties under Regulation 14 of *the USO Regulations* at the present time solely by setting SMP conditions at the wholesale level. In order for ComReg to perform its duties under Section 12 of the Communications Act, 2002 – to promote competition and the interests of consumers – it is necessary to impose some form of a price cap on *eircom* prices in certain retail access markets.
- 5.9 Any of the possible range of regulatory scenarios outlined above by ComReg would not be unreasonable and/or would not place a disproportionate burden on *eircom* as the SMP operator in the relevant market. Absent a price control on access, and given that *eircom* continues to have SMP, there is a risk that *eircom* with SMP will increase access prices to the detriment of consumers. A retail price cap control represents a proportionate response given market and regulatory developments are not yet sufficient to adequately protect consumers. While it may involve some net cost to *eircom*, ComReg sees net benefits to consumers from some form of a retail price cap. A specific cap on either the full basket of SMP access services or on PSTN access only reflects targeted regulation in that it would apply to products where concerns over exploitation of market power may be most significant.
- 5.10 From above, ComReg proposes that one of the principal objectives for the price cap should be to achieve its outlined objectives by the least intrusive means. ComReg will aim to meet its stated objectives in such a way that they, subject to the market reviews, ensure that regulation remains appropriate in light of changing market conditions. This consultation aims to identify the opportunities to withdraw from or reduce levels of regulation in the relevant markets, and as appropriate, the minimum remedies necessary to protect low spending consumers in the transition to more effective retail competition.

**Effectiveness**

5.11 The imposition of a price cap is to protect consumers in circumstances where the competitive process is not operating effectively. A price cap is an effective remedy as it contains price increases for services which are not yet subject to sufficient competition to within the price cap limit. It would give consumers, notably, residential and SMEs confidence that some level of price constraint would remain if competition developed less rapidly than expected in both lower or higher level access markets. Wholesale only regulation may not be adequate to protect all consumers availing of access products. The price cap has co-existed with the introduction of competition. The regulatory challenge is to ensure that they work together to benefit all consumers.

**Summary Impact Assessment**

5.12 Where there is a designation of *eircom* with SMP in lower level and/or higher level fixed access markets, the potential impact of proposed price cap scenarios on interested parties are summarised as follows:

<b>Scenarios</b>	<b><i>eircom</i></b>	<b>OAOs</b>	<b>Consumers</b>
Forbearance	Increased pricing flexibility and potentially less of a compliance burden or administrative cost	May be beneficial for competition as competing providers may be able to identify opportunities and increase competition	no protection for consumers who may face raising retail access prices where there is a designation of <i>eircom</i> with SMP and wholesale only intervention is insufficient
Wholesale only intervention (if sufficient)	as above	May promote retail competition but contingent on appropriate and /or sufficient wholesale measures	Where insufficient may not adequately protect consumers. Given <i>eircom</i> 's SMP they may face raising retail access prices
Individual cap on retail lower level access only	<i>eircom</i> 's pricing freedom controlled; though potentially less of a compliance burden relative to a wider price cap.  Appropriate and proportionate response where <i>eircom</i> may raise access prices to	To the extent that <i>eircom</i> 's prices are constrained OAOs competitive opportunity may also be constrained. However, OAOs can and do compete in the presence of price control via WLR.	Upper control on price increases for lower level access will protect these end users maintaining affordability for basic services.  May not offer adequate protection for customers availing of ISDN who given <i>eircom</i> 's SMP may face rises in ISDN access prices.

	the detriment of these consumers.		
Individual cap(s) on both lower and higher level retail access	as above	as above	All end users protected against any risk of access price increases, notably residential and SMEs.
Apply price cap basket	as above	as above	Potential non uniform competition across retail access markets, some consumers or areas may be captive with limited alternative suppliers. Risk of ineffective regulation where price cuts for higher level access were sustained by price increase lower level access

## Conclusion

- 5.13 The proposed retail price cap on access is justifiable, in that it is required to ensure that *eircom* does not exploit its market power by raising prices in markets concerned to the detriment of consumers. It does not unduly discriminate against *eircom* in that, while it only applies to *eircom*, the condition is imposed in order to address *eircom*'s clear ability to raise prices above the competitive level in light of its SMP in markets to which the control applies. It is proportionate in that it is the least burdensome means of achieving this aim. ComReg considers that it has met the condition of transparency by setting out the potential requirements on *eircom*, the justification for the proposed retail measure, and issuing a public consultation on the same.
- 5.14 **ComReg invites comments from interested parties on the above regulatory impact assessment and its underlying analysis.**

## 6 Submitting Comments

All comments are welcome. However it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

The consultation period will run from 21 August 2006 to 29 September 2006 during which time the Commission welcomes written comments on any of the issues raised in this paper. When ComReg has considered responses to this consultation (in conjunction with the responses to Consultation 06/39 “Market Analysis – Retail Narrowband Access Markets”), it will decide whether a retail price cap is necessary, appropriate, justified and proportionate under *the USO Regulations*.

In the event of a final determination that *eircom* has SMP in the lower and/or higher level access market, ComReg intends to issue a further consultation on a potential retail price cap remedy for narrowband access markets in early December. This will, amongst other things, summarise the substantive issues raised by respondents to the first consultation. It will also consult, if a price cap on access is deemed appropriate, on a methodology to be used in setting a level for a price cap(s) and on the level and structure of any price cap(s) to be applied.

In order to promote further openness and transparency ComReg will publish all submissions by respondents to this consultation, subject to the provisions of ComReg’s guidelines on the treatment of confidential information – ComReg 05/24. We would request that electronic submissions be submitted in an-unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. As it is ComReg’s policy to make all responses available on its website and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response. Such Information will be treated subject to the provisions of ComReg’s guidelines on the treatment of confidential information – ComReg 05/24.

## Appendix A - Legal and Regulatory framework for setting price caps

- 6.1 The Commission for Communications Regulation (ComReg) was formed on December 1 2002 in accordance with section 6 of the Communications Regulation Act, 2002. Section 9 of the same Act transferred to the Commission all the functions of the Director of Telecommunications Regulation.
- 6.2 The Office of the Director of Telecommunications Regulations (ODTR) was established in 1997 under the terms of the Telecommunications (Miscellaneous Provisions) Act 1996 “the Act” (SI No 34 of 1996). The Act transferred to the Director a range of powers previously held by the Minister, including the making of orders specifying a price cap in respect of one or more than one basket of telecommunications services after the expiration of a period of 5 years after such an order is made by the Minister, or earlier on receipt of a request from the Minister.
- 6.3 Under Section 7 of the Act, the Director could introduce a price cap in respect of a basket (or more than one basket) of telecommunications services where the Director believes that there is no competition or that the provider of those services holds a dominant position. Before doing so, there is a statutory requirement that the provider to whom the Order is to apply must be given two months to make representations on the terms of the proposed order. The Minister introduced a tariff regulation order which came into force on 1 January 1997<sup>26</sup> and following a request from the Minister, the Director reviewed that Order, introducing a modified Order which came into force on 1 January 2000.<sup>27</sup> On 4 February 2003 ComReg issued a new Tariff Regulation Order to replace the Telecommunications Tariff Regulation (Modification) Order, 1999 (S.I. No 438 of 1999) and the Telecommunications Tariff Regulation Order, 1996 (S.I. No. 393 of 1996). This is the Price Cap Order that is currently in force.
- 6.4 Subject to the completion of the market review of the fixed retail narrowband access markets, any future price cap will constitute a remedy flowing from the market analysis process and, as such, will be imposed, if deemed appropriate, under the new EU framework. ComReg may apply remedies provided for by Regulation 14 of *the Universal Service Regulations*.

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<sup>26</sup> The Telecommunications Tariff Regulation Order, 1996 (S.I. No. 393 of 1996).

<sup>27</sup> The Telecommunications Tariff Regulation (Modification) order, 1999 (S.I. No. 438 of 1999).



## Appendix B– Consultation Questions

- Q. 1. Do respondents have any observations in relation to ComReg’s assessment of the statutory basis for the imposition of any new price cap and the procedures that must be adhered to in that regard? Please provide detailed reasons in support of your response. .... 6
- Q. 2. Do respondents agree with the objectives of ComReg with respect to its current review of the price cap? Which objectives should have priority, if any? Does the respondent feel that this list excludes other important objectives that need to be considered? If yes, please list. .... 10
- Q. 3. In the event that there is no effective competition in the access market(s) defined, what other factors should ComReg consider before deciding to impose a retail price cap remedy? Do respondents agree with the factors listed above? ..... 11
- Q. 4. Do respondents consider that any of the factors listed above preclude the imposition of a retail price cap on any of the specific markets identified? Please give reasons for views expressed and supporting analysis and/or data if possible. .... 11
- Q. 5. Do respondents agree that, in addition to wholesale measures, some form of a retail price cap remedy is an appropriate and proportionate form of regulation in light of changing market circumstances for retail SMP access services? Please give reasons for views expressed and supporting analysis and/or data if possible. .... 16
- Q. 6. In the event of *eircom*'s having SMP in the lower level access market, does the respondent believe that some form of price cap should be applied to this relevant market? Please give reasons for views expressed and supporting analysis and/or data if possible. .... 18
- Q. 7. In the event of *eircom* having SMP in the higher level access market, does the respondent believe that some form of retail price cap should be applied to this relevant market? Please give reasons for views expressed and supporting analysis and/or data if possible. .... 20
- Q. 8. In the event that a price cap remedy is deemed necessary, which form of price cap do you consider would be the most appropriate and proportionate remedy, a global basket cap (lower and higher level access considered together) or separate individual cap(s) on each identified SMP market and/or services? Please explain your reasons with supporting analysis and data if possible. .... 22
- Q. 9. In the event that an individual cap either on an SMP market or service is deemed necessary, in relation to lower level SMP markets/services should this be a narrow cap on PSTN line rental only, or should it be expanded to include other lower level access services (e.g., connections)? If so, which ones? Which combinations? ..... 22
- Q. 10. In the event that an individual cap either on an SMP market or service is deemed necessary, in relation to higher level SMP markets/services should this be a narrow cap on ISDN rental only or be expanded to include other higher

level access services (e.g., connections)? If so, which ones? Which combinations? ..... 22

Q. 11. Are there any access services, or access products for particular groups of customers, which should be price capped separately on the basis that competition may soon develop to the point where controls can be dropped? If so, please state which services and your reasons why? ..... 22

Q. 12. In the event of *eircom* having SMP in the lower and/or higher level access market, does the respondent believe that a cost orientation obligation can be an effective upper limit control in the alternative to a price cap measure? Please state your reasons why/why not? ..... 24

Q. 13. In respect of the options analysed above, is there additional analysis that in your opinion should be carried out? If so please specify. .... 25

Q. 14. Are there additional factors that in your opinion require analysis by ComReg? If yes, please indicate precisely what they are. In respect of the factors analysed, is there additional analysis that in your opinion should be carried out. If yes please indicate precisely what this is? ..... 25