Pricing Statement of Compliance for CRD 994 – FTTH Review of Tariff Structures

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4.0	Final reviewed	FINAL

Introduction

eir has prepared a revised tariff proposal (the "**FTTH Tariff Proposal**"), CRD 994, which promotes the deployment of a high-capacity fibre-based broadband network on a national basis (excluding the Intervention Area), reduces access costs for wholesale customers and incentivises operators to upgrade from FTTC products to higher-capacity FTTH products and/or to migrate customers from older products to new technology, whilst ensuring that there is robust and vigorous competition on an ongoing basis between wholesale network operators.

This is a pricing statement of compliance for CRD 994. It is provided pursuant to Annex 1 of Decision D05/24 (the "**Decision Instrument**").[1] Section 14.9 stipulates that eir may not implement discounts or promotions for FTTP-based VUA without ComReg's explicit prior approval. Such approval may be granted based on an application by eir in accordance with Section 14.11, provided the conditions in Section 14.10 are fulfilled.

Section 14.11 outlines the procedure for regulatory approval of discounts and promotions by eir. Notifications must be submitted to ComReg at least three months before the proposed publication date. These notifications should detail the offer and eir's submission for ComReg's assessment under the specified sections.

For ComReg to approve a discount or promotion under Section 14.10, the following criteria must be met:[2]

- 14.10.1: The pricing, inclusive of any promotions or discounts, must remain above the Price Floor, which means the monthly rental charges for FTTH-based Virtual Unbundled Access ("**VUA**") must be set at or above the applicable price for FTTC-based VUA.
- 14.10.2: ComReg must be satisfied that the promotion or discount does not disproportionately benefit Eircom's retail arm and is accessible to a variety of Access Seekers.
- 14.10.3: The promotion or discount should not be geographically targeted, ensuring no geographic price differentiation.
- 14.10.4: ComReg must be convinced that the promotion or discount will not negatively impact investments by other Undertakings or harm market competition.

This statement demonstrates that the FTTH Tariff Proposal is compliant with eir's regulatory obligations as provided above.

Rationale for the FTTH Tariff Proposal

The FTTH Tariff Proposal promotes the deployment of a high-capacity fibre-based broadband network on a national basis and reduces access costs for wholesale customers. The FTTH Tariff Proposal will incentivise operators to upgrade from FTTC products to higher-capacity FTTH products

[1] Market Reviews, Wholesale Local Access (WLA) provided at a fixed location, Wholesale Central Access (WCA) provided at a fixed location for mass-market products, Response to Consultation and Final Decision, Reference: ComReg 24/07, Decision D05/24, 18 January 2024

[2] ComReg refer to FTTP in the Decision. FTTP and FTTH are in this compliance statement understood to be the same.

whilst ensuring that there is robust and vigorous competition between wholesale network operators.

The FTTH Tariff Proposal proposes a tailored pricing structure comprising a new pricing structure for FTTH VUA which meets the requirements of the price controls specified in Decision D05/24. This offer, which is available to all wholesale customers on a non-discriminatory basis, is outlined in more detail in the section below.

Details of the Tariff Proposal

The offer comprises the following features:

- A €3 reduction on the monthly cost of any copper-based technology upgrade including FTTC to FTTH upgrade, available to all eligible operators on a non-discriminatory basis;
- No volumes targets are required to be met for operators to be eligible for the reduction;
- The reduction is available for new upgrades only, starting from the effective date of the offer;
- The reduction applies for the duration of the offer (which will be a maximum of 3 years in absence of an earlier notification which will be subject to 12 month notification); and
- The reduction applies to all FTTH profiles available from eir, including VUA and Bitstream products.

The offer is intended to incentivise operators to upgrade their connections from copper-based technology services to FTTH, which will lead to improvements in the quality and speed of the broadband service that such operators ultimately offer to their customers. This offer only applies to upgrades of an operator's own customers. It does not apply if an operator acquires a customer from another operator and in the process upgrades them from copper-based broadband to FTTH. The operator is offered a €3 reduction on their monthly cost of all FTTP profiles (including Bitstream and VUA) for <u>any</u> upgrades from copper-based services (such as FTTC) to FTTH (e.g., the discount would apply for an upgrade from Vodafone FTTC to Vodafone FTTH).

There are no volume-based targets that an operator must meet in order to be eligible for the discount outlined in the Offer. The operators must simply decide to upgrade from copper-based services (such as FTTC) to FTTH. To avoid any concern of foreclosure, the scope of the new pricing structure is limited and applies only to new upgrades that occur after the effective date on which the offer begins (i.e., 1 August 2024). Any upgrades that took place before the effective date of the offer will not be entitled to the benefit of the new pricing structure. The promotional pricing is set for a maximum duration of three years. Unless a prior notice is issued, the offer is scheduled to conclude on 31 July 2027. To ensure clarity and predictability for wholesale customers, eir commits to a 12-month notification period before the termination of the pricing structure. For the avoidance of doubt all FTTH services that have qualified for the €3 per month discount will revert to the normal price level that applies for that FTTH service at the end of the promotion.

Regulatory Compliance

The current regulatory framework applying to eir's WLA products is described in the Decision Instrument, which sets out the framework for regulating the prices that eir can charge for its products in this market.

Section 14.10.1 Criterion: The pricing, inclusive of any promotions or discounts, must remain above the Price Floor, which is set with reference to the applicable price for FTTC-based VUA.

The maximum discount possible is €3 per month. The current standalone FTTC based VUA cost is €19.12. The lowest FTTH VUA rental is €23.50. A €3 reduction would bring this to €20.50. The maximum discounted FTTH VUA price remains above the FTTC VUA price and therefore the price floor. The criterion is met.

Section 14.10.2 Criterion: The promotion or discount does not disproportionately benefit eir's retail arm and is accessible to a variety of Access Seekers.

The offer applies to all FTTH profiles, including Bitstream and VUA that are triggered by offering services at the retail level. This means the discounts are not selective or preferential to one specific service over the other.

Considering eir retail's position as the operator with the largest number of FTTC customers on eir's network, a cap will be established for their eligible customer base. This cap is specifically set at 1.32 times the size of the second-largest FTTC customer base within eir's wholesale network as of December 2023. As a result, although eir retail currently serves [redacted] FTTC customers, the number of customers eligible for this promotion is limited to [redacted].

The selection of a 1.32 multiplier is a deliberate, proportional approach to structuring incentives for network upgrades. This figure is informed by eir's current broadband market share, which stands at approximately 32%. By basing the cap on the customer base size of the second-largest FTTC provider and then applying this multiplier, we mitigate any potential undue competitive advantage that eir retail might have from its substantial FTTC customer base. Hence this approach promotes fair competition and establishes a level playing field, ensuring that the benefits of network upgrades are accessible in a balanced and equitable manner across the industry. There is no cap for the other copper-based services such as CGA.

In conclusion, the criterion is met.

Section 14.10.3 Criterion: The promotion or discount should not be geographically targeted, ensuring no geographic price differentiation.

The offer makes no distinction between specific geographic areas and there is no geographic price differentiation. The criterion is met.

Section 14.10.4 Criterion: The promotion or discount will not negatively impact investments by other Undertakings or harm market competition.

For the purpose of the following, we assume that eir is, what in competition law terms is called, a dominant undertaking. The treatment of discounts and rebates by dominant undertakings is evolving in European and national competition law. The focus is on ensuring these firms compete fairly, without using their dominance to exclude rivals through discounts or promotions. Certain discounts by dominant firms are likely to be deemed abusive. However, an effects-based approach in Europe requires authorities to prove these discounts actually exclude, or are likely to exclude, competitors.

Competition authorities and court judgements provide guidance on discount schemes likely to cause exclusionary effects. In the 2022/23 WLA/WCA market review, Oxera advised ComReg on discounts that could undermine competition. They highlighted potentially problematic practices, including volume-related discounts, discriminatory and non-transparent conditions, exclusivity discounts, the duration of discounts, and retroactive rebates. These practices can enhance customer loyalty to the detriment of competition. This advice is also reflected in the ComReg D05/24 (see e.g. paragraph 9.557). In the following we review the offer against identified concerning features, summarised in the table below.

Table 1: Assessment of features of the proposed offer

Feature Category	Offer
Volume-related Discounts	No target required for eligibility.
Discrimination and Non-transparency	Available to all wholesale customers on equal terms. No undue preferences for eir's downstream business. No different effective prices for different-sized customers.
Exclusivity Discounts	No exclusivity component.
Discount Duration	Subject to 12-month notice period to end or modify.
Retroactive Rebates	Only applies to incremental sales. No retroactive rebate element.

Table 1 suggests that the proposed offer lack characteristics typically associated with competitive concerns as identified by competition authorities and ComReg's advisors. This provides an initial indication that the offer is unlikely to have exclude any competitors or that it has a material effect on competition, even if eir is considered to be dominant in the relevant market.[3]

Assessing Exclusionary Potential of the Proposed Offer

The next step involves assessing whether the proposed offer might exclude competitors in practice. This involves checking if an equally efficient competitor could match the offer, focusing on whether the offer prices fall below a relevant cost threshold. This approach aligns with the "as efficient competitor" principle common in European competition law for assessing exclusionary pricing by dominant firms.

[3] It is worth noting that traditional competition concerns with retroactive rebate schemes stem from their impact on the installed base of orders. Such schemes can incentivize customers to predominantly order from the dominant player, as discounts are applied or removed based on the existing order volume.

We have compared the proposed offer prices against the modelled cost of FTTH using FTTC VUA as an appropriate proxy for such costs. The lowest FTTH VUA rental is €23.50 and with a reduction of €3 the discounted price would be €20.50. The current standalone FTTC based VUA cost is €19.12. In addition, this is also significantly above the estimate of the potential cost of FTTH VUA (including connection and migration) of €[redacted].[4] Neither offer is priced below these benchmarks, indicating no evidence of potential exclusionary effects.

Impact on Investment

Determining the proposed offer's potential impact on FTTH investment is challenging without detailed competitor information. However, two factors suggest that the proposed offer is unlikely to materially undermine competitors' investment in FTTH networks:

- Cost considerations: The prices in the proposed offer do not fall below a reasonable estimate of a cost-based price floor, indicating that there can be no material impact on competitors' investment plans. Additionally, competitors like Virgin Media and SIRO may have similar or lower long-run costs than [redacted].

- Market structure: eir faces substantial competition in both wholesale and retail broadband markets. Competitors are well-established with growing FTTH networks and existing customer bases. Vertical integration among competitors creates effective competition and manages investment risks, reducing the likelihood of the proposed offer impacting their investment decisions.

Further, international examples show that certain discount types, like volume discounts, are accepted as beneficial for sector objectives. In Europe, reciprocal access deals have led to high penetration and competitive prices without significant cost duplication. In the UK, Ofcom's approval of BT's Equinox offers reflects regulatory flexibility in commercial offers, despite less direct competition at the wholesale level compared to Ireland.

Evaluating Economic and Consumer Benefits

In competition law, authorities can consider economic and other benefits when evaluating the impact of discounts or promotional tariffs. These benefits might include increased efficiency, technology upgrades, or lower consumer prices, potentially offsetting any negative effects on competition. The proposed offer warrants assessment for potential benefits, focusing on two areas: i) efficiencies from the copper to fibre transition and ii) consumer benefits from lower prices.

The offer incentivises operators to shift customers from copper to FTTH, likely speeding up the transition to fibre. This will lead to cost savings and performance improvements for eir and the wider economy. The current regulatory framework provides limited incentives for this transition. The

[4] [redacted].

proposed offer could mitigate this by reducing FTTH prices and encouraging operators to upgrade their customers.

Regarding lower prices to customers, ComReg's analysis shows that the retail broadband market is competitive. Therefore, reductions in wholesale prices are likely to lead to lower retail prices. The proposed offer, which represents close to a 10% reduction in wholesale prices, would therefore be expected to modestly reduce customer prices, a significant factor in an inflationary environment.

Conclusion

Given the assessment above, as the proposed offer will not materially impact investments in the sector or harm market competition, the criterion is met.