



Commission for
Communications Regulation

Direction

Bitstream Port Transfer

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Contents

1 Foreword..... 2

2 What is Bitstream Port Transfer? 3

3 Comments from interested parties 5

 3.1 RESPONDENTS 5

 3.2 VIEWS OF RESPONDENTS AND COMREG’S ANALYSIS 5

 3.2.1 *Views supporting the Draft Decisions* 5

 3.2.2 *Views opposing the Draft Decisions*..... 5

4 Bitstream Port Transfer 10

 4.1 FURTHER DISCUSSIONS WITH EIRCOM AND EIRCOM’S REVISED PROPOSAL 10

 4.2 COMREG’S POSITION 10

5 Next Steps 12

Appendix A – Legislation 13

1 Foreword

Broadband is a critical service for consumers and vital to the ongoing development of the economy. Whilst broadband products are now available for residential consumers and businesses there is still a long way to go before the level of take up of these services is comparable to other countries in the EU. ComReg's aim has been to promote competition in a manner that will benefit end users.

In order for Ireland to become an efficient and effective information based economy, it is important that Internet subscribers have a variety of products to choose from and that these products are offered by various companies in a competitive market. In order to ensure competitiveness and to improve consumer choice, it is important to remove the barriers which subscribers face when they decide to switch from one product to another or from one provider to another. In other words, it is key that an end user can seamlessly switch between operators as new products are developed. This can be achieved in the broadband DSL area using a feature known as port transfer - an efficient means by which a customer with an existing DSL service can switch to an alternative operator without the need for a significant break in service

In this regard, ComReg sees the provision of effective and efficient port transfer facilities by Eircom to operators providing DSL products as critical since they enable the prompt and uninterrupted switching by DSL subscribers from one provider to another.

Eircom had previously proposed such a service and had published a price for the feature but had recently indicated that it no longer intends to make this available. Due to the lack of any progress despite over 12 months having elapsed, ComReg issued a draft Direction (see document 03/148 Bitstream Port Transfer) requiring Eircom to implement a bitstream port transfer product. The draft direction set out the reasons for its introduction and the features ComReg considered key to a product that will enable efficient and effective port transfer in relation to DSL products without the need for physical disconnection and reconnection (and consequent service interruption) each time a subscriber decides to change their DSL product provider.

ComReg issued the Direction in draft form in light of the fact that the port transfer process is of interest to both consumers and industry alike. This allowed interested parties to comment on the process to ensure that the port transfer process meets market needs and is implemented in a speedy manner. Three responses to consultation were received and ComReg therefore is issuing this document having taken into account the relevant responses and in order to ensure the implementation of the bitstream port transfer product feature by the end of January 2004.

2 What is Bitstream Port Transfer?

Eircom provide a wholesale product to other operators which is known as bitstream. This product is made available to operators who then repackage the product and sell it on to retail consumers. The Eircom retail equivalent of this product is known as i-stream. Where a retail customer of an operator taking the bitstream service wishes to move to an alternative operator also availing of the bitstream service, this port transfer product allows an efficient and low cost migration without a significant break in service.

Following discussions between ComReg (then the ODTR) and Eircom in August 2002, Eircom proposed to ComReg revised bitstream pricing which included a feature defined as “Port Transfer” or “Transfer (per port)” whereby a charge of €60 would be raised by Eircom on an operator to whom a customer transferred their DSL service.

The feature was based upon a customer being able to migrate between service providers without the need for Eircom wholesale to incur the costs of building new network elements for this customer to receive service. This approach to the migration of customers between operators was viewed as an efficient and cost effective solution to management of customer churn between operators and was considered by Eircom to be a suitable approach to avoid the over recovery of costs on infrastructure which was put in place for wholesale customers.

Section 1.6 of the ADSL Bitstream Price List 1.1 as published on Eircom wholesale’s website (<http://www.Eircom.ie/bvEircom/pdf/adslpricelistv1.1.pdf>) sets out a charge of €60 for transfer of a bitstream port. However v1.5 of the corresponding ADSL wholesale bitstream reference offer does not detail the product or the process relating to ‘port transfer’

On 29th October 2003 it was brought to ComReg’s attention by an Other Authorised Operator (OAO) that Eircom, whilst having a published price for this Port Transfer feature, was refusing to make the feature available for transfer of a customer from the Eircom retail arm to an OAO.

Eircom has recently confirmed to ComReg that the processes for the Port Transfer product feature do not exist despite over 12 months having elapsed since making its commitment to ComReg. Throughout this period however Eircom have continued to publish the price for this feature on their wholesale website. Despite numerous requests both verbal and in writing before the issuing of the draft direction, Eircom has refused either to make this product available to operators or to give ComReg an undertaking that they would do so within any reasonable timeframe. This lack of commitment was deemed by ComReg to be a refusal by Eircom to provide the product.

When developing and agreeing Eircom’s proposals for appropriate bitstream charges ComReg considered the availability of a bitstream port transfer product as a fundamental element of the overall product. Without this feature, ComReg considers OAOs to be at a competitive disadvantage. ComReg therefore considers the

unavailability of this product to be a failure by Eircom to perform to its obligations in its signed wholesale access bitstream agreements. Furthermore, ComReg believes that given the pricing basis of the wholesale product, failure to implement the feature would result in an over recovery by Eircom of costs associated with customers moving between operators. ComReg also believes that the availability of this feature is an important process facilitation for consumer choice.

ComReg therefore considered it to be appropriate and necessary to direct Eircom to implement, publish and offer the agreed bitstream port transfer product feature and processes, and in its Draft Direction 03/148 issued two specific Draft Decisions.

Draft Decision 1 proposed “to direct Eircom to implement, publish and offer the agreed bitstream port transfer product and process supporting a customer migration from one operator to another with minimised service outage for the customer. The price chargeable for this product shall be not more than that set out at v1.1 of the ADSL Bitstream Price List and previously approved by ComReg. This product shall be submitted to ComReg for approval no later than 28 calendar days from the date of the Direction and shall be published within 1 week of ComReg approval of the process. ComReg may consult with other operators in the review of the product feature to ensure processes meet the requirements of industry.”

ComReg stated that a port transfer product should include *inter alia* the following features:

- Minimal disruption to service
- Co-ordinated service handover between operators
- The recipient operator would enter a contract with the customer which would give power of attorney to the operator to cease the contract between the current operator and the customer
- Eircom would supply the recipient operator with a date for cessation of retail billing (where the customer was an i-stream customer) and commencement of wholesale billing.

Furthermore ComReg stated that in the interim, and in the interest of promoting competition and for the benefit of end users, Eircom should put in place workaround processes to facilitate the transfer of ports no later than 10 calendar days from the date of the Direction. Draft Decision 2 proposed to direct Eircom to put in place workaround processes to facilitate the transfer of ports no later than 10 calendar days from the date of the Direction. At this time Eircom shall be able to accept OAO orders for the feature and shall be able to implement the transfer within 7 calendar days of the order. No charge for the development or operation of this manual process should be levied on the OAO as an OAO will have associated costs of working to an interim process which should by now reasonably have been developed by Eircom. This interim process shall allow the transfer of a customer from Eircom to an OAO, not from an OAO to Eircom and all reasonable efforts shall be undertaken by Eircom to coordinate the transfer with the OAO in question. This interim process shall not allow any retail win back processes by Eircom. This process should remain in place until the final product is in place and agreed by ComReg and OAOs.

3 Comments from interested parties

3.1 Respondents

Comments were received from the following parties:

- Eircom Limited
- Esat BT
- Leap Broadband

ComReg wishes to thank all of the respondents to the draft direction for their help in reaching its decisions. The responses are available for inspection at ComReg's offices, excluding confidential information that respondents specifically asked to be withheld.

3.2 Views of respondents and ComReg's analysis

3.2.1 Views supporting the Draft Decisions

Two respondents supported both draft directions relating to bitstream port transfer. One respondent (Esat BT) agreed that Eircom had and continued to refuse to supply such a service and agreed with ComReg's evaluation of the damage that such refusal is causing to the development of competition.

This respondent welcomed Draft Direction 1 adding that it is extremely important that Eircom are obliged to introduce an acceptable implementation of the service in a defined short timescale. This respondent also stated it was available to take part in the review of the product feature to ensure that processes meet the requirements of industry. ComReg welcomes this offer.

This respondent also welcomed and agreed with Draft Direction 2 stating that this was important as, in their view, Eircom will seek to further delay the provision of the service. This respondent noted that Eircom should not be allowed any winback process for the interim service.

Another respondent (Leap Broadband) also supported the draft directions and made further suggestions as to the bitstream access service principles could be extended in respect of other products. ComReg considers this to have merit but to be outside the scope of this direction, and is more proper for its forthcoming market reviews of the wholesale broadband access, leased lines and interconnection markets.

3.2.2 Views opposing the Draft Decisions

One respondent (Eircom) made two main arguments against the draft directions

3.2.2.1 Eircom stated that there is a lack of commercial merit for the draft directions.

Eircom disagrees with ComReg on the need for regulatory intervention in the market stating that such controls are disproportionate whilst services are new and innovative. Eircom state that ComReg's draft directions assume that insufficient competition exists in the retail market, and state that this assumption is erroneous as bitstream access is available to OAOs and alternative broadband access means such as unbundled local loops, fixed wireless access and satellite also provide for competition.

Furthermore, Eircom makes the point that broadband presents retail and wholesale players with commercial opportunity but also multiple business risks, requiring service providers to acquire and maintain a solid customer base thus requiring considerable investment. Only time will determine whether such providers earn an adequate return on investment. Eircom state that use of a minimum contract period (typically 12 months) may provide some certainty as to return. According to Eircom any direction on port transfer would have the adverse effect of increasing business risk for retail providers in a developing broadband market and when it is most difficult to demonstrate a return on investment. Eircom fear that the directions would allow some retail providers to minimise marketing spend and instead concentrate on churning customers whose take up decision has been 'funded' by other providers. Therefore Eircom contend that the directions would reduce retail market investment and increase business risk, only creating churn opportunities rather than value in the market.

3.2.2.2 ComReg's position

ComReg disputes Eircom's contention that regulatory controls are inappropriate for broadband services and is of the view that such controls are necessary to ensure protection of end users and effective competition. Whilst it is indeed true that a Bitstream Port Transfer product may increase churn, it is only with such a product that consumers can exercise freedom of choice and move between operators for reasons of value and quality. Contractual issues are a matter for operators and their consumers directly but it is incumbent upon ComReg to ensure that the transfer process is in place.

ComReg believes its intervention is necessary in order to rectify a situation where Eircom have refused to provide a Bitstream Port Transfer product despite having committed to industry and ComReg to do so and maintaining a published price for same.

ComReg would also point out that the European Commission considers differing forms of broadband access as complementary means rather than substitutes¹ and so does not accept Eircom's position.

¹ See C (2003) 497 Recommendation on relevant Product and Service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC

3.2.2.3 Eircom state that there is a lack of legal basis for regulatory intervention

Eircom agree with ComReg that the supply of bitstream by Eircom was mandated by Decision Notice D6/00 entitled ‘Report on the ODTR consultation on Local Loop Unbundling’. Pursuant to the “Voice Telephony Regulations”² and Direction 5.2 of D6/00, ComReg considers that “in order to ensure effective competition, Eircom should offer unbundled bitstream access on non-discriminatory, fair and reasonable terms.” However Eircom contends the port transfer process that ComReg proposes is not a feature of “Voice Telephony Regulations” and Direction 5.2 of Decision Notice D6/00 and is thus without legal basis.

Eircom state that the draft directions constitute new obligations on Eircom and cannot be imposed until ComReg completes its market review for wholesale broadband access, determines significant market power, and imposes remedies as appropriate. Then, when imposing a remedy, ComReg must demonstrate that it is appropriate to address the underlying competition problem, proportionate and justified in the light of basic regulatory objectives for promoting competition and the interests of end users as well as the objectives of the Article 8 of the Framework Directive³. Eircom maintains that a regulatory obligation to provide bitstream port transfer would fail against the objectives of the initial investment and investment risk and of the need to safeguard competition in the long term. As set out earlier, Eircom state that they have made significant investment in developing the Irish broadband market whilst other retail DSL service providers have not demonstrated comparable investment or risk taking. Investment in developing the retail market should not be subjected to increased business risk through opportunistic pursuit of churn, particularly at this initial stage of development of the market. Eircom add that market development and growth will be best served and maximised when retail competitors focus on winning new sales based on unique, value added service offerings and a port transfer product will simply increase churn rather than penetration.

Eircom contend that the current legal basis for bitstream access is one of non discrimination which requires Eircom, when they make use of the fixed public

² SI No 71 of 1999 European Communities (Voice Telephony and Universal Service) Regulations, 1999

³ the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;

- the feasibility of providing the access proposed, in relation to the capacity available;
- the initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- the need to safeguard competition in the long term;
- where appropriate, any relevant intellectual property rights;
- the provision of pan-European services.

telephone and, in particular, use any form of special network access themselves, to provide special network access facilities and information to other operators under the same conditions and of the same quality as they provide for their own services or those of their subsidiary partners, to allow these operators to provide bitstream services. Whilst Eircom agree that given the provision of bitstream access to Eircom Retail, its retail business unit, Eircom recognises its regulatory obligation to supply bitstream access products to OAOs on a non-discriminatory basis. Eircom does not, however, provide bitstream port transfer for its own services as it does not, for example, have two retail service provider divisions between which bitstream ports are transferred.

In particular comment on Draft Direction 2, Eircom states that it strongly opposes these measures as there is no legal basis; it is unlawful, as it is disproportionate, unreasonable and discriminatory. Eircom also state that any restrictions as proposed are invalid and outside ComReg's jurisdiction.

Eircom disagrees with ComReg that an interim workaround process is necessary "in the interests of promoting competition and for the benefit of end-users" and is being imposed because industry understood that the product existed already. *Eircom* does not accept that these reasons are sufficient to justify the undue regulatory obligation that Draft Decision No. 2 imposes. Eircom considers that the interests of end-users and industry would be better served by Eircom committing full resources to developing a robust transfer process, and that timely implementation of the above mentioned Eircom commercial offer will obviate the need for a regulated, workaround process.

3.2.2.4 ComReg's position

ComReg is issuing this Direction acting pursuant to its statutory objectives contained in section 12 of the Communications Regulations Act, 2002.

The supply of bitstream by Eircom was mandated by Decision Notice D6/00 entitled 'Report on the ODTR consultation on Local Loop Unbundling'. Pursuant to Regulation 20(8) of the European Communities (Voice Telephony and Universal Service) Regulations, 1999 (SI No 71) (the "Voice Telephony Regulations"), the ODTR, in Direction 5.2 of D6/00, considered that in order to ensure effective competition, Eircom should offer unbundled bitstream access on non-discriminatory, fair and reasonable terms. ComReg maintains that the Bitstream Port Transfer product feature is an essential feature of the Bitstream Access Product mandated as a result of D6/00 and as such this Direction does not impose a new obligation but rather further specifies requirements to be complied with relating to an existing obligation.

Many of the points which Eircom raise in their legal analysis relate to the powers which will become vested in ComReg on designation by ComReg of an operator or operators as having SMP as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations and thus are outside the scope of this direction since ComReg is not issuing this Direction pursuant to Regulation 9 of the European Communities (Electronic Communications and Services)(Access)

Regulations, 2003 (SI No 305 of 2003) (the “Access Regulations”) and since no relevant designations have occurred to date. ComReg will take into account these points in their forthcoming market review of the wholesale broadband access market.

Regulation 8 (1) of the Access Regulations provides that operators shall continue to comply with obligations including obligations under the Voice Telephony Regulations until a market review is completed and specific obligations pursuant to Regulation 9 of the Access Regulations are imposed. As mentioned above, this market review has not been completed to date and therefore, no obligations have been imposed pursuant to Regulation 9.

Regulation 17 of the Access Regulations permits ComReg, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under the Access Regulations to issue directions. ComReg is issuing this Direction in accordance with Regulation 17 specifying requirements in relation to *inter alia* the obligation of Eircom set out in Direction 5.2 of D6/00 which has been carried over by Regulation 8 of the Access Regulations. This Direction *inter alia* aims to further specify requirements to Eircom concerning its obligation to offer unbundled bitstream access on fair and reasonable terms.

4 Bitstream Port Transfer

4.1 Further discussions with Eircom and Eircom's revised proposal

On 6th January 2004, Eircom made a subsequent proposal to ComReg committing to implementing a bitstream port transfer process by 27th January 2004.

Eircom requested that ComReg communicate Eircom's commitment to launch this service on 27th January 2004 to industry. Eircom also stated that due to the specificity of their offer and its imminent introduction neither of the proposed Draft Decisions were required.

4.2 ComReg's position

ComReg welcomes Eircom's recent commitment to introduction of a Bitstream Port Transfer product by 27th January 2004. ComReg's Draft Decisions were designed to introduce an interim solution (Draft Decision 2) in advance of the final solution (Draft Decision 1), but given Eircom's commitment to introduction of the final solution by 27th January 2004, ComReg believes it to be unnecessary to finalise Draft Decision 2 at this stage. However ComReg reserves the right to finalise this Draft Decision in the event of anticipated progress not being achieved..

Whilst ComReg welcomes Eircom's commitment to the introduction of the process by 27th January , ComReg notes the range of objections to Bitstream Port Transfer outlined in Eircom's formal response to the draft Direction, and therefore ComReg has finalised Draft Decision 1. This revision has a revised implementation date of 27th January 2004 as Eircom have confirmed this to be reasonable.

Decision 1

Eircom is directed to implement, publish and offer the bitstream port transfer product and process supporting a customer migration from one operator to another with minimised service outage for the customer. The price chargeable for this product shall be not more than that set out at v1.1 of the ADSL Bitstream Price List and previously approved by ComReg. The Bitstream Port Transfer product should be implemented by 27th January 2004.

ComReg wishes to reiterate that a port transfer product should include *inter alia* the following features:

- Minimal disruption to service
- The recipient operator would enter a contract with the customer which would give authority to the operator to contractually cease the relevant service between the current operator and the customer
- Eircom would supply the recipient operator with a date for cessation of retail billing (where the customer was an i-stream customer) and commencement of wholesale billing. Where the losing operator was not eircom the losing operator will be advised of the date of cessation of wholesale billing.

Although ComReg is confident that with the best efforts of Eircom and OAOs a final solution can be delivered by 27th January 2004, ComReg has requested that Eircom develop a backstop arrangement should the bitstream port transfer process not be implemented within the committed timescales. Eircom has agreed and has stated that they fully intend to proceed as planned but if despite best efforts the transfer process is not operational by 27th January 2004, Eircom will implement Bitstream Port Transfers through the micro management of cease and provide linked orders.

5 Next Steps

Eircom has now committed to ComReg that this product will be in place by 27th January 2004 and as such have asked ComReg to facilitate a series of industry meetings to outline the roadmap to industry to meet this date and ensure the Bitstream Port Transfer product meets their needs. ComReg has convened a meeting for 15th January 2004 between eircom and OAOs.

Appendix A – Legislation

ComReg is issuing this Direction acting pursuant to its statutory objectives contained in section 12 of the Communications Regulations Act, 2002.

The supply of bitstream by Eircom was mandated by Decision Notice D6/00 entitled ‘Report on the ODTR consultation on Local Loop Unbundling’. Pursuant to Regulation 20(8) of the European Communities (Voice Telephony and Universal Service) Regulations, 1999 (SI No 71) (the “Voice Telephony Regulations”), the ODTR, in Direction 5.2 of D6/00, considered that in order to ensure effective competition, Eircom should offer unbundled bitstream access on non-discriminatory, fair and reasonable terms.

Regulation 8(1) of the European Communities (Electronic Communications and Services)(Access) Regulations, 2003 (SI No 305 of 2003) (the “Access Regulations”) provides that operators shall continue to comply with obligations including obligations under the Voice Telephony Regulations until a market review is completed and specific obligations pursuant to Regulation 9 of the Access Regulations are imposed. This market review has not been completed to date and therefore, no obligations have been imposed pursuant to Regulation 9.

Regulation 17 of the Access Regulations permits ComReg, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under the Access Regulations to issue directions. ComReg is issuing this Direction in accordance with Regulation 17 specifying requirements in relation to *inter alia* the obligation of Eircom set out in Direction 5.2 of D6/00 which has been carried over by Regulation 8 of the Access Regulations.