



Consultation Paper

Consultation and Draft Direction on extending a Direction of April 2009 requiring Eircom to refrain from launching proposed 1MB and 3MB Family “free calls to meteor” TalkTime bundles

Document No:	09/43
Date:	19 May 2009

All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg 09/43” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before noon, 2 June 2009,
to:

Stephen Brogan
Commission for Communications Regulation
Abbey Court
Lower Abbey Street
Freepost
Dublin 1
Ireland

Ph: +353-1-8049600 Fax: +353-1-804 9680 Email:
Stephen.Brogan@ComReg.ie

Please note ComReg will publish all respondents’ submissions with the Response to this Consultation, subject to the provisions of ComReg’s guidelines on the treatment of confidential information – ComReg 05/24.

Contents

1 Executive Summary 2

2 Introduction and Background 3

3 Legal Basis 5

4 Net revenue test – Analysis carried out by ComReg 7

5 Consultation Issues..... 8

6 Draft Direction 10

7 Submitting Comments..... 12

Appendix A – Consultation Questions 13

1 Executive Summary

On 8 April 2009, the Commission for Communications Regulation (“ComReg”) directed Eircom Limited (“Eircom”) to refrain from launching two proposed TalkTime bundles (1Mb and 3Mb Family “free calls to Meteor”) (the “April 2009 Bundles”). ComReg had carried out an initial compliance assessment and considered that the April 2009 Bundles were not likely to be compliant with Eircom’s regulatory obligations. That direction (the “April 2009 Direction”) was stated to last for a provisional period of three months in order to allow ComReg to confirm or amend, as appropriate, its initial assessment of compliance and, if appropriate, to consult on whether the April 2009 Direction should be extended or made permanent.

The fact of the April 2009 Direction was communicated to industry in Information Notice 09/31 ‘Urgent Direction to Eircom to refrain from launching 1MB and 3MB “free calls to Meteor” “Family” TalkTime bundles pursuant to ComReg Decision D07/61’.

On 28 April 2009, Eircom brought proceedings before the High Court, seeking to have the April 2009 Direction set aside. Legal proceedings are ongoing.

ComReg has confirmed its initial assessment in relation to the April 2009 Bundles, i.e., that in launching the April 2009 Bundles Eircom is not likely to be compliant with its obligation not to unreasonably bundle. ComReg wishes to seek respondents’ views as to whether or not ComReg should extend the April 2009 Direction for a period of 9 months from 8 July 2009 or until such time as ComReg is satisfied that the April 2009 Bundles would not amount to unreasonably bundling, if launched, whichever is the earlier. This is the purpose of the present consultation.

As this is an issue of critical importance to all within the industry and cognisant of the impact that any additional direction might have upon the commercial freedom of Eircom, ComReg requires detailed responses as soon as possible and by no later than noon, 2 June 2009.

2 Introduction and Background

- 2.1 In early March 2009, Eircom presented proposals in relation to a series of retail bundles including line rental, broadband and free calls to Meteor mobile, which it intended to launch commercially in April 2009. The proposal included bundles described as: (a) Talktime Family and 1 MB broadband; and (b) Talktime Family and 3 MB broadband (together referred to as the “April 2009 Bundles”). Eircom stated its intention to offer the April 2009 Bundles to customers for a sign-up period of six months. Customers who signed up during this period would be required to enter into a twelve-month contract (renewable at the option of the customer) and could avail of the April 2009 Bundles as a lifetime offer if they signed up during the relevant period.
- 2.2 The April 2009 Bundles were intended to replace a series of bundles launched by Eircom in October 2008 and offered until 30 March 2009. Two of those bundles, namely: (a) Talktime Family and 1 MB broadband; and (b) Talktime Family and 3 MB broadband (together “the October 2008 Bundles”) are currently the subject of High Court proceedings, namely an enforcement action taken by ComReg against Eircom and an appeal taken by Eircom against ComReg. On 2 April 2009, ComReg informed Eircom of its opinion that Eircom was not in compliance with its regulatory obligation not to unreasonably bundle¹ in respect of the October 2008 Bundles. ComReg also published an Information Notice 09/25 ‘Opinion of Non-compliance by Eircom Limited with its obligations not to unreasonably bundle’. ComReg found that Eircom had failed to comply with its obligation not to unreasonably bundle in respect of the October 2008 Bundles as, from the outset of their launch, they were being sold below cost with a risk of resultant deleterious effect on competition in the line rental markets and the related markets affected by the bundles in question (e.g., fixed line calls, retail broadband services, fixed to mobile calls). In particular, ComReg found that the October 2008 Bundles were likely to impact negatively on the ability of new entrants and Other Authorised Operators (“OAOs”) to compete in the markets for retail line rental, as well as other affected retail markets involved in the bundles in question.
- 2.3 Having received information in relation to the April 2009 Bundles, ComReg was concerned that in offering the April 2009 Bundles, Eircom would again be in breach of its obligation not to unreasonably bundle.
- 2.4 ComReg carried out an initial compliance assessment in relation to Eircom’s April 2009 Bundles and considered that Eircom was not likely to be compliant with its obligation not to unreasonably bundle, if those bundles were launched. This was communicated to Eircom in the Direction of 8 April 2009 (the “April 2009 Direction”) which directed Eircom to refrain from launching the April 2009 Bundles for a provisional period of three months in order to allow ComReg to confirm or amend, as appropriate, its initial assessment of compliance and, if appropriate, to consult on whether the April 2009 Direction should be extended or made permanent.
- 2.5 ComReg’s reasons for considering that Eircom was not likely to be compliant with its obligation not to unreasonably bundle may be summarised as follows:

¹ The legal basis for this obligation is set out at Section 3.

- 2.5.1 The April 2009 Bundles appeared to fail the net revenue test, as referred to in ComReg Document No. 07/26 and ComReg Document No 09/08. The net revenue test is also included in Section 4 of this consultation. In its forecast submission in relation to the April 2009 Bundles, in addition to details on Average Total Cost (“ATC”), Eircom included details on the average avoidable (incremental) costs (“AAC”), which Eircom claimed should be used when the bundle under review is a response to competition. ComReg did not consider the use of AAC to be appropriate, particularly in the context of compliance with *ex ante* regulatory obligations. Rather, ComReg used ATC as the cost measure. ATC requires an operator with Significant Market Power (“SMP”) to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any non-SMP rival when deciding to enter or expand. This is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets.
- 2.5.2 The fact that the April 2009 Bundles would be made available on a promotional basis did not mean that Eircom was not unreasonably bundling. While there might be a limited period within which customers could sign up to the April 2009 Bundles, once signed up, a customer could avail of them for the duration of his/her contract. The potential for competitive harm to the market caused by unreasonable bundling would therefore not cease on expiry of the sign-up period, where the April 2009 Bundles available to those customers who had signed up continued to be provided below cost.
- 2.5.3 ComReg considered that where there was potential for detriment to competition and consumers, any claimed retail efficiencies and increased customer lifetime claims to be considered in applying the net revenue test to the April 2009 Bundles should be supported by clear and robust evidence. Eircom had not provided such robust evidence.
- 2.5.4 ComReg considered whether the existence of similar bundles of services provided by OAOs without SMP should alter its view that Eircom was likely to be non-compliant with its obligation not to unreasonably bundle. ComReg considered that this factor should not alter its view, particularly as it did not consider it likely that OAOs could profitably replicate the April 2009 Bundles.
- 2.5.5 Eircom asserted that the April 2009 Bundles were a response to competition by OAOs. ComReg did not consider that this assertion could or should alter its view that Eircom was likely to be non-compliant with its obligation not to unreasonably bundle.
- 2.6 ComReg considered that there were a number of exceptional circumstances justifying an urgent (i.e., an immediate) need to act, which it did in its April 2009 Direction.
- 2.7 Subsequent to issuing the April 2009 Direction, ComReg has further analysed the information provided by Eircom for the proposed April 2009 Bundles and has confirmed its initial assessment, i.e., that in launching the April 2009 Bundles Eircom is not likely to be compliant with its obligation not to unreasonably bundle. Consequently, ComReg has decided to consult as to whether or not it would be appropriate to extend the April 2009 Direction.

3 Legal Basis

- 3.1 In ComReg Document No. 07/26, dated 4 May 2007, ComReg set out its findings that Eircom has a position of SMP in the markets for higher and lower level retail narrowband access from a fixed location. ComReg Document No. 07/26 also set out in detail the potential for competition problems that might arise in those markets, including the potential competition problems arising from bundles that might be offered by Eircom in the market. ComReg Document No. 07/26 set out a range of proposed SMP obligations intended to address these potential competition problems in advance. These findings and proposed obligations were notified to the European Commission and accepted by it in accordance with all relevant Irish and EU legislative requirements.
- 3.2 Eircom was formally designated by ComReg as having SMP in the markets for higher and lower level narrowband access from a fixed location in ComReg Decision No. D07/61 “Market Analysis: Retail Fixed Narrowband Access Markets” dated 24 August 2007 (the “SMP Decision”). In the SMP Decision, ComReg imposed a number of obligations on Eircom in accordance with and pursuant to Regulations 9, 10, 11, 12, 13 and 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (as amended) and Regulations 14 and 16 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 (as amended) (the “Universal Service Regulations”).
- 3.3 In particular, sections 7.8 and 7.9 of the SMP Decision Instrument, annexed to the SMP Decision, provide as follows:

“Unreasonable bundling

7.8 Pursuant to Regulation 14 (2) (c) of the Universal Service Regulations, eircom shall not unreasonably bundle services.

7.9 Without prejudice to the generality of section 7.8, where eircom offers a number of services within a bundle, it shall ensure that end-users are able to purchase an individual service included in any such bundle without being required by contractual, or non-contractual means to purchase the entire bundle of services and that tariffs for the individual services comprising any such bundle, comply with the principle that end-users should not be required to pay for services, or facilities which are not necessary for the service requested.”

- 3.4 ComReg Document No. 07/26 and the SMP Decision are to be construed together for the purpose of Eircom’s legal obligation not to unreasonably bundle. This is provided for in section 1 of Decision Instrument annexed to the SMP Decision, which provides inter alia as follows:

“1.1 This Decision Instrument relates to the markets for higher and lower level retail narrowband access from a fixed location and is made by the Commission for Communications Regulation (“ComReg”):

...

v. Having had regard to the market definition, market analysis and reasoning set out in Document No. 07/26 and the reasoning and individual decisions set out therein and in the preceding parts of this Decision Notice and Decision Instrument, both of which shall where necessary, be construed with this Decision Instrument;...”

- 3.5 Paragraphs 6.216 – 6.234 of ComReg Document No. 07/26 discuss unreasonable bundling. By way of example, paragraph 6.233 provided two specific instances of what can constitute “unreasonable bundling” for the purposes of Eircom’s legal obligations. In addition to these examples, paragraph 6.234 notes that the SMP operator must ensure that any bundle avoids a margin squeeze and passes a net revenue test. Paragraph 6.219 stated as follows:

“6.219 There is nonetheless a risk that eircom may induce a margin squeeze through bundled pricing. This occurs when equally, or more, efficient operators are unable to profitably replicate eircom’s bundled offering, and are effectively foreclosed from competing with eircom in respect of its bundled products. For example, if eircom were to apply a margin squeeze in respect of the retail narrowband access element of a bundled offering this may undermine the effectiveness of the mandated wholesale inputs since OAOs may not be able to effectively replicate the access element of that bundle (due to an insufficient margin). Should eircom engage in such behaviour it could have the effect of i) reinforcing its dominance in the retail narrowband access markets and/or ii) leveraging that dominance into related markets due to an inability on the part of OAOs to effectively replicate the access part of the bundle.”

- 3.6 The April 2009 Direction was adopted pursuant to Regulation 31 of the Universal Service Regulations, in conjunction with Regulations 19(2) and 20(8) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (as amended) (which allow a derogation from the obligation to consult). Before adopting a measure in accordance with the Universal Service Regulations (other than a provisional measure falling within the meaning of Regulation 20(8) of the Framework Regulations), ComReg is required to publish the draft measure and consult with the industry. Before taking a measure that falls within the scope of Regulation 14 of the Universal Service Regulations, ComReg is required to take account of any comments from the European Commission and other NRAs.

4 Net revenue test – Analysis carried out by ComReg

4.1 ComReg has analysed the April 2009 Bundles in accordance with a net revenue test as set out below.

COMPONENT (all ex VAT)	Factors considered in the Analysis
Revenue:	
Package Price	This is the bundle package price charged to retail customers.
Calls Revenue	This is the total calls revenue earned on average outside the bundle package. This is calculated for each component that is charged separately outside the bundle by: (i) taking the total calls for that component and multiplying that by the call set up fee; and (ii) taking the total minutes for that component and multiplying that by the retail price per minute. This total revenue for the component is then divided by the total number of customers to get an average revenue per customer for that component. The totals of all revenue components sold outside the bundle are included.
Costs:	
Wholesale line rental	This is the Single Billing –Wholesale Line Rental regulated price as per the regulated retail minus price control and as published in Eircom’s Reference Interconnect Offer price list.
Operating costs associated with retail line rental	These are the operating costs as derived from the SB-WLR regulated retail minus price control. <i>Therefore, the full cost of retail line rental, that is the SB-WLR plus the associated retail costs as per the regulated retail minus price control, is taken into account in the analysis.</i>
Mailbox	Where the TalkTime packages include free mailbox, the wholesale price of the mailbox as per the regulated retail minus price control as published in Eircom’s Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer. However, consideration will be taken of the take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control could also be included here.
Costs associated with retail calls	These are the wholesale and retail costs as calculated for each retail cost, e.g. calls to Local, National, UK etc. The retail costs of each are calculated by including the wholesale interconnection prices applicable in the market plus the latest audited average total retail costs (residential average total costs for a residential bundle, business average total cost for a business bundle) provided by Eircom and as reviewed and approved by ComReg. Where applicable, these total retail costs include relevant international calls out payments costs and mobile termination costs applicable (including the costs and mobile termination costs for those mobile calls that are sold for free).
Wholesale broadband	This is the relevant regulated Bitstream price as per the regulated retail minus control and as published in Eircom’s Bitstream price list.
Operating costs associated with retail broadband	These are the operating costs as derived from the Bitstream regulated retail minus price control.
Net Revenue: Total Revenue – Total Costs	<i>If total costs are greater than total revenue, bundle is not profitable</i>

If the above results show the costs are above revenue, ComReg, as a proportionate measure, will consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg will also consider the impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term.

5 Consultation Issues

- 5.1 ComReg is seeking respondents' views in order to determine whether it should extend its April 2009 Direction.
- 5.2 ComReg believes that this is reasonable to extend its April 2009 Direction for the following reasons:
- 5.2.1 Eircom has an obligation not to unreasonably bundle pursuant to ComReg Decision No. D07/61.
 - 5.2.2 The April 2009 Bundles would not in ComReg's view pass a net revenue test if launched – and would accordingly amount to unreasonable bundling.
 - 5.2.3 If the April 2009 Bundles were launched, ComReg believes they would have a detrimental effect on OAOs as OAOs would not be in a position to replicate the bundles profitably.
 - 5.2.4 There is a risk that the April 2009 Bundles, if launched, would have a deterrent effect on market entry and on the ability of existing OAOs to compete. Non-compliance would risk maintaining and even reinforcing Eircom's SMP position in the line rental market and would give scope for leveraging that position of SMP into other retail-level markets (where Eircom is already strong), to the detriment of an effective competitive structure.
 - 5.2.5 To provide the opportunity to Eircom to launch the April 2009 Bundles, where ComReg has taken the strong view that they would not be compliant with Eircom's obligation not to unreasonably bundle, risks serious damage in the marketplace. The alternative course is for ComReg to allow Eircom to allow launch the bundles and subsequently initiate compliance proceedings. This course would allow Eircom to continue to offer the products for a period of time before effective compliance measures could be taken. In these exceptional circumstances, ComReg considers that it is appropriate to extend the April 2009 Direction.
- 5.3 The following are the issues that ComReg is seeking respondents' views in order to determine whether it should extend its April 2009 Direction.

Q. 1. Do you have any comments on the reasoning behind ComReg's initial compliance assessment which informed the April 2009 Direction (as described in Section 2 above)? What other considerations (if any) should be taken into account? Please explain your response.

Q. 2. If launched, what effect, if any, do you consider the proposed bundles would have on consumer interests, on competition in the fixed retail narrowband access market and on other markets? Please explain your response and provide supporting evidence.

Q. 3. If you consider that the proposed bundles would have a potential for competitive harm, do you consider that this would cease on the expiry of the proposed promotional sign up period or would it last for longer? Please explain your response.

Q. 4. Are there any other issues/matters that should be considered by ComReg? Please explain your response.

5.4 Subject to this consultation, ComReg proposes to extend the April 2009 Direction for a period of nine months from 8 July 2009 or until such time as ComReg is satisfied that the April 2009 Bundles would not amount to unreasonable bundling if launched, whichever is the earlier. ComReg's assessment is that the April 2009 Bundles would not pass a net revenue test and, based on the wholesale inputs provided by Eircom, OAOs would therefore not be in a position profitably to replicate the April 2009 Bundles. However, by March 2010 it is anticipated that there will be revised wholesale inputs – for example, reduced Meteor MTRs – and also Eircom may be in a position to provide ComReg with other updated information for consideration in the net revenue test. In light of the above, it is considered inappropriate and disproportionate to render the April 2009 Direction permanent.

Q. 5. Do you consider that it is appropriate to extend the April 2009 Direction, either for a period of nine months or for another period? Please explain your response.

6 Draft Direction

- 6.1 ComReg proposes to extend the April 2009 Direction for a period of nine months by way of the following draft Direction:

Pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations²;

Pursuant to Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations³;

Pursuant to ComReg's functions and objectives as set out in sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended; and

Pursuant to the obligation on Eircom not to unreasonably bundle as set out in ComReg Decision No. D07/61 "Market Analysis: Retail Fixed Narrowband Access Markets" dated 24 August 2007;

Having taken into account the views of interested parties following a public consultation⁴;

Having taken utmost account of the views of the European Commission and other National Regulatory Authorities, where appropriate⁵;

The Commission for Communications Regulation (hereinafter referred to as ComReg) hereby directs Eircom Limited (hereinafter referred to as Eircom) to refrain from launching the bundles, the subject of ComReg's Direction of 8 April 2009 (hereinafter referred to as the April 2009 Bundles),

for a period of nine months from the date hereof; or

until such time as ComReg is satisfied that the April 2009 Bundles would not amount to unreasonable bundling, if launched;

whichever is the earlier.

² 2003 (S.I. No. 308 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) (Amendment) Regulations 2007.

³ 2003 (S.I. No. 308 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) (Amendment) Regulations 2007.

⁴ Regulation 19. of S.I. No. 307/2003 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, as amended by S.I. No. 271/2007 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2007

⁵ Regulation 20 of S.I. No. 307/2003 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, as amended by S.I. No. 271/2007 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2007

Q. 6. Do you consider that ComReg should extend the April 2009 Direction as proposed in the draft Direction? Please explain your response and provide comments on the draft Direction.

7 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 19 May 2009 to noon on 2 June 2009 during which ComReg welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review these and publish a response to consultation and final decision in July 2009 which will, inter alia, summarise the responses to the consultation.

In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Please note

ComReg appreciates that many of the issues raised in this consultation 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 web-site 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 – Consultation Questions

List of Questions

- Q. 1. Do you have any comments on the reasoning behind ComReg’s initial compliance assessment which informed the April 2009 Direction (as described in Section 2 above)? What other considerations (if any) should be taken into account? Please explain your response..... 8
- Q. 2. If launched, what effect, if any, do you consider the proposed bundles would have on consumer interests, on competition in the fixed retail narrowband access market and on other markets? Please explain your response and provide supporting evidence. 8
- Q. 3. If you consider that the proposed bundles would have a potential for competitive harm, do you consider that this would cease on the expiry of the proposed promotional sign up period or would it last for longer? Please explain your response. 9
- Q. 4. Are there any other issues/matters that should be considered by ComReg? Please explain your response. 9
- Q. 5. Do you consider that it is appropriate to extend the April 2009 Direction, either for a period of nine months or for another period? Please explain your response. 9
- Q. 6. Do you consider that ComReg should extend the April 2009 Direction as proposed in the draft Direction? Please explain your response and provide comments on the draft Direction. 11